Course Description

This short course explores two types of issues that commonly arise in sophisticated transactions. First, although transactions vary in their details, every transaction involves problems of information and incentives that can discourage parties from entering into what otherwise would be value-maximizing arrangements. For example, the seller of an asset almost always has better information about it than the buyer does. This reality — combined with the fact that the seller is willing to sell — can cause buyers to be skeptical about the asset’s quality, and might even persuade them not to purchase it. A central responsibility of transactional lawyers, then, is to help overcome these information and incentive problems. They do so with a range of contractual and organizational responses, such as due diligence, contingent purchase price, staged financing, vouching by third parties, etc.

Second, legal and regulatory regimes sometimes are imperfectly drafted and conceptualized, so that economically similar arrangements are treated differently. These differences create possibilities for legal arbitrage, so that a change in the way the transaction is structured can yield dramatically better (or worse) treatment for the parties. More generally, sophisticated transactional lawyers must help their clients navigate regulatory hurdles, and the nature of the relevant regulations -- and the parties’ responses to them -- can determine whether a potentially promising business succeeds or fails.

This course develop these two themes (information and incentive problems and regulatory arbitrage) in various settings, including acquisitions, venture capital, derivative securities, and energy. For example, we will consider various mechanisms to bridge information problems in acquisitions, and will use venture capital funds and their market practices as examples of contractual and organizational mechanisms that deal with incentive issues. As examples of regulatory arbitrage, we will explore selected examples involving U.S. tax rules and energy policy. These various examples will expose students to a survey of selected cutting edge issues in a sophisticated transactional practice. Students will be invited to reflect on the extent to which lawyers are adding value (or not) for their clients and for society.