

## **Assignments on the interpreting of legal texts (Friday 29<sup>th</sup> August)**

Students will work in groups to discuss and solve the assignments in the classroom but it is recommended to read and consider the questions individually before the Friday class. The purpose of the assignments is to improve legal writing skills for students taking various law topics in English.

There are four assignments altogether, dealing with international and EU law issues in different contexts. We will examine interpretation of international, national and EU legal texts and discuss how different approaches to interpretation may influence the solutions.

Please note that extracts from the relevant international and EU texts are found at pp 2-5 below. (We also encourage you to consider how the corresponding questions would be resolved under the domestic law of your home country.)

### **1.**

Interpret the definition of good faith in the performance of contracts in the UNIDROIT principles, Principles of European Contract Law and the common law as reflected in case *Walford v Miles* (see pp 2-3 for respective texts)

1.1 by applying grammatical approach

1.2 by applying contextual (systematic) approach

1.3 by applying purposive (teleological) approach

Compare outcomes you achieve by applying different methods of interpretation. In case of difference between outcomes, which result do you think should prevail?

### **2.**

Human rights law recognizes that states may legitimately limit the freedom of expression. Which criteria do regional and universal instruments set up? (see pp 3-4 for respective texts)

Consider the following when discussing the assignment:

2.1 What sources of law can provide solution of your questions?

2.2 How do you interpret the sources (see 1.1-1.3 above)?

2.3 Have you come to any contradicting interpretation results? What arguments do you consider important/decisive for your answer?

### 3.

In a Member State of the European Union, electric power was for the most part generated in gas-fired and coal-fired power plants. As the market was struggling with over-capacity and low prices, five major producers formed a trade association West-power and reached understanding to phase out of three production plants, the owners of which should be compensated as well as instruct West-Grid (a separate undertaking owned by them and operating national electricity grid) to introduce a particular tariff on imported electricity.

3.1 Is this understanding lawful? What sources of law can provide solution of your question? See relevant texts at pp 4-5 below.

3.2 Explain the meaning of an anticompetitive agreement by applying different methods of interpretation (see 1.1-1.3).

3.3 What method do you find most useful to achieve a correct result, and why?

#### **Assignment 1 : texts**

#### **UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 2010**

##### **ARTICLE 1.7**

*(Good faith and fair dealing)*

- (1) Each party must act in accordance with good faith and fair dealing in international trade.
- (2) The parties may not exclude or limit this duty.

#### **PRINCIPLES OF EUROPEAN CONTRACT LAW**

##### **Article 1:102 - Freedom of contract**

- (1) Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles.
- (2) The parties may exclude the application of any of the Principles or derogate from or vary their effects, except as otherwise provided by these Principles.

##### **Article 1:106 (ex art. 1.104) - Interpretation and Supplementation**

- (1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application.
- (2) Issues within the scope of these Principles but not expressly settled by them are so far as possible to be settled in accordance with the ideas underlying the Principles. Failing this, the legal system applicable by virtue of the rules of private international law is to be applied.

#### **Walford v Miles [1992] 2 AC 128**

The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends

upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. [Counsel for Walford] of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content.

## **Assignment 2: texts**

### **African Charter on Human and Peoples' Rights**

#### *Article 9*

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

### **European Convention on Human Rights**

#### ARTICLE 10

#### **Freedom of expression**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

#### ARTICLE 15

#### **Derogation in time of emergency**

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4

(paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

## **International Covenant on Civil and Political Rights**

### ***Article 19***

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

## **Assignment 3: texts**

### **Article 101 TFEU**

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[(2.), (3.)]

### **Cases T-374/94 etc European Night Services**

136 Before any examination of the parties' arguments as to whether the Commission's analysis as regards restrictions of competition was correct, it must be borne in mind that in assessing an agreement under Article 85(1) of the Treaty, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (judgments in *Delimitis*, cited above, *Gottrup-Klim*, cited above, paragraph 31, Case C-399/93

Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie [1995] ECR I-4515, paragraph 10, and Case T-77/94 VGB and Others v Commission [1997] ECR II-759, paragraph 140), unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets (Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, paragraph 109). In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 85(3) of the Treaty, with a view to granting an exemption from the prohibition in Article 85(1).

#### Case C-309/99 Wouters

97 However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.