

I.

Discussion of the *Van gend en Loos* and *Costa Enel* cases, the Court of Justice of EU (see separate materials with extracts from these cases)

II.

Interpret the meaning of a «worker» within the Treaty on the Functioning of the European Union (see pages 2-3 for some auxiliary materials)

- 1.1 by applying grammatical approach
- 1.2 by applying contextual (systematic) approach
- 1.3 by applying purposive (teleological) approach

- 1.4 Apply the definitions you constructed to determine whether an unemployed person from an EU State seeking job in another EU State is to be considered a “worker” covered by TFEU provisions.
- 1.5 Compare outcomes you achieve by applying different methods of interpretation. In case of difference between outcomes, which result would in your opinion EU Court adopt? Do you agree or disagree, and why?

III.

Examine the approach to the interpretation of the Convention on the Elimination of All Forms of Discrimination against Women adopted in General Recommendation nr 28 by CEDAW (page 4) What methods of interpretation does CEDAW propose? Do you agree or disagree, and why?

IV.

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 p. 5 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?

Question II.

TFEU Article 45

(ex Article 39 TEC)

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.

In Case 53/81

- 9 Although the rights deriving from the principle of freedom of movement for workers and more particularly the right to enter and stay in the territory of a Member State are thus linked to the status of a worker or of a person pursuing an activity as an employed person or desirous of so doing, the terms "worker" and "activity as an employed person" are not expressly defined in any of the provisions on the subject. It is appropriate, therefore, in order to determine their meaning, to have recourse to the generally recognized principles of interpretation, beginning with the ordinary meaning to be attributed to those terms in their context and in the light of the objectives of the Treaty.

- 10 The Netherlands and Danish Governments have maintained that the provisions of Article 48 may only be relied upon by persons who receive a wage at least commensurate with the means of subsistence considered as necessary by the legislation of the Member State in which they work, or who work at least for the number of hours considered as usual in respect of full-time employment in the sector in question. In the absence of any provisions to that effect in Community legislation, it is suggested that it is necessary to have recourse to national criteria for the purpose of defining both the minimum wage and the minimum number of hours.
- 11 That argument cannot, however, be accepted. As the Court has already stated in its judgment of 19 March 1964 in Case 75/63 *Hoekstra (née Unger)* [1964] ECR 1977 the terms “worker” and “activity as an employed person” may not be defined by reference to the national laws of the Member States but have a Community meaning. If that were not the case, the Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty.

**DIRECTIVE 2004/38/EC OF THE EUROPEAN PARLIAMENT
AND OF THE COUNCIL of 29 April 2004 on the right of citizens of the Union and their
family members to move and reside freely within the territory of the Member States**

4. ... an expulsion measure may in no case be adopted against Union citizens or their family members if:

- (a) the Union citizens are workers or self-employed persons, or
- (b) the Union citizens entered the territory of the host Member State in order to seek employment.

In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

**REGULATION (EU) No 492/2011 OF THE EUROPEAN PARLIAMENT AND OF THE
COUNCIL**

of 5 April 2011 on freedom of movement for workers within the Union

[preamble]

(2) Freedom of movement for workers should be secured within the Union. The attainment of this objective entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment, as well as the right of such workers to move freely within the Union in order to pursue activities as employed persons subject to any limitations justified on grounds of public policy, public security or public health.

Art 1.

1. Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

Question III.

4. The objective of the Convention is the elimination of all forms of discrimination against women on the basis of sex. It guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic or any other field, irrespective of their marital status, and on a basis of equality with men.

5. Although the Convention only refers to sex-based discrimination, interpreting article 1 together with articles 2 (f) and 5 (a) indicates that the Convention covers gender-based discrimination against women. The term “sex” here refers to biological differences between men and women. The term “gender” refers to socially constructed identities, attributes and roles for women and men and society’s social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community. The application of the Convention to gender-based discrimination is made clear by the definition of discrimination contained in article 1. This definition points out that any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms is discrimination, even where discrimination was not intended. This would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there was no recognition of the pre-existing gender-based disadvantage and inequality that women face. The views of the Committee on this matter are evidenced by its consideration of reports, its general recommendations, decisions, suggestions and statements, its consideration of individual communications and its conduct of inquiries under the Optional Protocol.

6. Article 2 is crucial to the full implementation of the Convention, since it identifies the nature of the general legal obligations of States parties. The obligations enshrined in article 2 are inextricably linked with all other substantive provisions of the Convention, as States parties have the obligation to ensure that all the rights enshrined in the Convention are fully respected at the national level.

7. Article 2 of the Convention should be read in conjunction with articles 3, 4, 5 and 24 and in the light of the definition of discrimination contained in article 1. In addition, the scope of the general obligations contained in article 2 should also be construed in the light of the general recommendations, concluding observations, views and other statements issued by the Committee, including the reports on the inquiry procedures and the decisions of individual cases. The spirit of the Convention covers other rights that are not explicitly mentioned in the Convention, but that have an impact on the achievement of equality of women with men, which impact represents a form of discrimination against women.

Question IV .

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.