Interpretation of Contracts, Reasonableness and Good Faith
Timeline – Renewal of Lease (Interpretation)

Contract between a landlord and a Mining Company – 25 years lease. Fixes amount pr ton of extracted product, index regulated. Renewal clause – same conditions, one year prior to expiry date

Notification of renewal given by the Mining Company in accordance with the renewal clause

Landlord objects – requires the financial conditions to be renegotiated

Constructor finds another party – shorter time + not much higher price than the original price

Is the wording of the contract “at the same conditions” sufficiently clear, or must it be interpreted in the light of other considerations?
Doctor 1 and Doctor 2 decide to exchange cites and transfer to each other the respective practices – enters into a contract to that effect

Doctor 1 decides to go back to her original city – starts new practice in competition with Doctor 2

Doctor 2 wants to prevent Doctor 1 from starting a business in competition with her own – no contractual regulation on the issue

May the “gap” in the contract be filled by inserting a reasonable regulation or a regulation that the parties may prove was meant to apply?
Interpretation – Norwegian law

• Considerable flexibility in the interpretation process, even though the wording will be the starting point
• All circumstances of the case relevant when establishing the (objective) intentions of the parties
• The purpose of the contract and considerations of good faith and fair dealing are of importance
• Gaps can be filled, terms may be implied and in extreme cases the wording may be “corrected”
Interpretation – German law

• The interpreter shall establish the intention of the parties according to good faith and fair dealing

• Objective interpretation – the *bonus pater familias* – but if it is not in accordance with the understanding of both parties a subjective interpretation will be applied

• Can fill gaps and imply terms, but may not make an interpretation which runs against clear terms of the contract
Interpretation – Italian law

• The interpretation must first of all be based on the wording of the contract, tough integrated with the parties’ conduct
• Clear wording will supersede other criteria
• Purpose of the contract, balance of the contract are subordinate criteria
• The contract may be interpreted extensively, but cannot extend the object of the contract
Interpretation – English law

- Establishing the mutual intent of the parties based on the plain and literal meaning of the wording of the contract
- As a general rule the interpreter cannot take external circumstances into consideration (parol evidence rule), but exceptions when it comes to factual background – enhancing predictability
- Little room for gap filling and implying terms, if not necessary to give business efficacy or when it's obvious
Interpretation – CISG

- Regulates interpretation of a party’s statements or conduct, not contracts
- The real intention only relevant where it was known or could not be unknown by the other party
- Otherwise: objective meaning based on a *bonus pater familias* evaluation, taking all circumstances into consideration
- CISG is, in itself, a source for gap filling – the parties may however prevent it
Interpretation – UNIDROIT

• Establishing the common intention of the parties, taking all relevant circumstances into consideration

• Recognizes the validity of merger clauses, but extrinsic evidence may be produced to establish the meaning of the contract

• Gap filling is possible based on the intention of the parties, the nature and purpose of the contract, good faith and fair dealing and reasonableness
Interpretation – PECL

• Very similar to the regulation in UNIDROIT
• The intentions of the parties must be assessed on the basis of preliminary negotiations, circumstances of the conclusion of the contract, the conduct of the parties (also subsequent), nature and purpose of the contract, practices established between the parties, usages, good faith and fair dealing
• Gaps may be filled on the basis of the intention of the parties, the nature and purpose of the contract, good faith and fair dealing
Interpretation – CESL

• Common intention or a party’s intention which was known, or could be expected to be known by the other party, supersedes the meaning of a reasonable person

• Regard may particularly be had to the circumstances when the contract was concluded (incl. negotiations), the parties’ conduct (incl. subsequent), usages, the practices established by the parties, “branch meaning”, nature and purpose of the contract and good faith and fair dealing
Interpretation – CESL

• Terms provided by a professional party – doubt about meaning shall be solved in favor of the consumer
• Contra proferentem rule
Timeline – Renewal of Lease (Interpretation)

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Notification of renewal given by the Mining Company in accordance with the renewal clause.

Landlord objects – requires the financial conditions to be renegotiated.

Constructor finds another party – shorter time + not much higher price than the original price.

Is the wording of the contract “at the same conditions” sufficiently clear, or must it be interpreted in the light of other considerations?
Renewal of Lease

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Transfer of Activity (Interpretation)

Doctor 1 and Doctor 2 decide to exchange cites and transfer to each other the respective practices – enters into a contract to that effect.

Doctor 1 decides to go back to her original city – starts new practice in competition with Doctor 2.

Doctor 2 wants to prevent Doctor 1 from starting a business in competition with her own – no contractual regulation on the issue.

May the “gap” in the contract be filled by inserting a reasonable regulation or a regulation that the parties may prove was meant to apply?
Transfer of Activity

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
A Software Company licenses an accounting program to a Law Firm. The accounting program proves to be inadequate – can only handle a limited number of clients. Contractual regulation on the non satisfactory performance of the program – replacement (after 6 months), other remedies excluded.

The Law Firm seeks to make use of other remedies that would be available under the governing law (for example reimbursement of damages or resolution of the contract).

Is the contractual clause – limiting available remedies – fully enforceable, or can it be modified or declared unenforceable?
A Company borrows a considerable amount from a Bank, to be repaid over 10 years. In the contract there are a lot of covenants on the Company’s hands, hereunder a commitment to submit copies of the quarterly accounts within 7 days after they have been certified.

The Company fails to comply with the obligation concerning the quarterly accounts after a year – according to the contract the Bank is entitled to terminate the contract, even though the Company offers to remedy the breach.

The Bank chooses to terminate the contract in spite of an offer from the Company to remedy the breach.

Is the clause fully enforceable, or can it be modified or declared unenforceable because it is unreasonable, or because its exercise in the particular situation would be unreasonable?
Timeline – Determination of Price (Reasonableness)

Enterprise 1 enters into an agreement with Enterprise 2 concerning supply of energy. Price to be paid on the basis of the square area of each enterprise – most reliable method of calculating the price (principle: no gain or loss).

A meter is installed – Enterprise 2’s consumption is higher than what it is paying for. Enterprise to requires renegotiation of the contract, so the price can be calculated in accordance with the actual consumption – no clause giving the right to require renegotiations.

May the contract clause which determines the price be modified or is it fully enforceable?
Reasonableness – Norwegian law

• The Formation of Contracts Act sec. 36 – an unfair contract term may be modified or set aside – broad and flexible evaluation
  – The remaining content of the contract, the positions of the parties, the circumstances at the time of conclusion, subsequent circumstances – not restricted to these circumstances

• The courts are reluctant facing commercial contracts and “agreed documents”
Reasonableness – German law

- A rather well developed control with “general conditions” – whether they are part of agreement and “direct control” of content
- A party must exercise its rights and perform its obligations according to good faith and fair dealing – not abusing a right
- Correction of a contract is only allowed in exceptional cases
Reasonableness – Italian law

• Less invasive when it comes to general condition than Norwegian and German law – sometimes a prerequisite that the conditions are specifically signed

• Some specific rules which give the courts the power to substitute unreasonable terms – but no general rule

• The criterion of good faith is used more to ensure the proper performance of a contract, rather than correcting the rights and obligations
Reasonableness – English law

• Even less invasive than Italian law
• General conditions have to be brought to the attention of the party to be a part of the contract, but little possibility to control the content
• The parties have excessive freedom
Reasonableness – CISG

• No specific reference to good faith and fair dealing as a corrective to the contract’s content
Reasonableness – UNIDROIT

- General conditions – “unexpected” terms must be expressly accepted
- No express basis for correcting a contract based on reasonableness
Reasonableness – PECL

• Terms not individually negotiated – must be known to the other party or the party having drafted the terms has taken reasonable steps to bring them to the other party’s attention

• A term contained in general conditions may be unenforceable if it, against the principle of good faith and fair dealing, causes a significant imbalance

• Reference to good faith and fair dealing when it comes to interpretation – basis for correction?
Reasonableness – CESL

• Special rules on unfair contract terms not individually negotiated between a business seller and a consumer

• Rule on unfair contract terms in B2B contracts – not individually negotiated + grossly deviates from good commercial practice, contrary to good faith and fair dealing
A Software Company licenses an accounting program to a Law Firm. The accounting program proves to be inadequate – can only handle a limited number of clients. Contractual regulation on the non-satisfactory performance of the program – replacement (after 6 months) , other remedies excluded.

The Law Firm seeks to make use of other remedies that would be available under the governing law (for example reimbursement of damages or resolution of the contract).

Is the contractual clause – limiting available remedies – fully enforceable, or can it be modified or declared unenforceable?
Limitation of Contractual Remedies

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
A Company borrows a considerable amount from a Bank, to be repaid over 10 years. In the contract there are a lot of covenants on the Company’s hands, hereunder a commitment to submit copies of the quarterly accounts within 7 days after they have been certified.

The Company fails to comply with the obligation concerning the quarterly accounts after a year – according to the contract the Bank is entitled to terminate the contract, even though the Company offers to remedy the breach.

The Bank chooses to terminate the contract in spite of an offer from the Company to remedy the breach.

Is the clause fully enforceable, or can it be modified or declared unenforceable because it is unreasonable, or because its exercise in the particular situation would be unreasonable?
Termination for Immaterial Breach

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Determination of Price (Reasonableness)

Enterprise 1 enters into an agreement with Enterprise 2 concerning supply of energy. Price to be paid on the basis of the square area of each enterprise – most reliable method of calculating the price (principle: no gain or loss).

A meter is installed – Enterprise 2’s consumption is higher than what it is paying for. Enterprise to requires renegotiation of the contract, so the price can be calculated in accordance with the actual consumption – no clause giving the right to require renegotiations.

May the contract clause which determines the price be modified or is it fully enforceable?
Determination of Price

- Norwegian law
- German law
- Italian law
- English law
- CISG
- UNIDROIT
- PECL
- CESL
Timeline – Withheld Information (Good Faith)

A Food Producer starts negotiating for the sale of a building where it was, a few years ago, operating a bakery. Food Producer knows that the facilities does not meet the criteria set by new health regulations for the operation of a bakery. The Prospective Buyer intends to initiate a bakery in the facilities, something which the Food Producer knows. The Prospective Buyer does not mention the intention expressly, and the Food Producer does not disclose the information on the health regulations.

The parties enter into a contract for the sale of the building.

Has the Food Producer breach a duty of disclosure towards the (Prospective) Buyer, or does the (Prospective) Buyer has a duty of diligence in enquiring about the contracts’ object?
Timeline – Undue Influence on Calculation of Royalty (Good Faith)

Contract between Lisensor and Licensee which allows the Licensee to produce certain products using Lisensor’s technology. Royalty is to be paid according to a percentage of the price the Licensee charges the company with which it has entered an agreement on distribution of the products.

Licensee establishes a Subsidiary with which it enters an agreement on distribution of the product, at a very low price. The Subsidiary makes a huge profit.

Is the Licensee’s behavior in conflict with the purpose of the contract with the Licensor, or is the Licensee at liberty to arrange the distribution as it deems fit?
Good Faith – Norwegian law

- Good faith as a overarching principle – precontractual phase and beyond
- A duty to take reasonable account of the other party’s interests – may have a duty to disclose information of some importance
Good Faith – German law

• General rule on good faith during the precontractual phase and beyond
• A duty of care – inform the other party of material aspects that are relevant to the proper understanding or performance of the contract
• The contract must be performed in accordance with the principle of good faith and fair dealing
Good Faith – Italian law

• Has a general clause on good faith and a specific clause on good faith applying to phase of negotiation – duties of disclosure, of cooperation and in the phase of performance

• A means of ensuring proper performance of a contract
Good Faith – English law

• Assumes that each party is to take care of its own interests (*caveat emptor*)
• No general duty to disclose information under the phase of negotiations and beyond – some specific exceptions for certain types of contract
Good Faith – CISG

- No general duty of good faith
- A part of legal doctrine is eager to read a guideline of good faith into the convention, even though proposals to insert such a rule into the convention were rejected
Good Faith – UNIDROIT

- Rule on good faith regarding negotiations – unjustified break off and start of negotiations without a real intention to complete them – no express rule on disclosure

- A general rule on good faith – reference to international trade, but hard to establish a uniform notion of “good faith”
Good Faith – PECL

• General duty to act in accordance with good faith and fair dealing and duty to cooperate
• Specific regulation on negotiations with the same focus as UNIDROIT – no specific rule on disclosure
Good Faith – CESL

• General duty of good faith, fair dealing and cooperation
• Special rules on duties to disclose information in the pre-contractual phase – different rules towards consumers and in B2B relationships
Timeline – Withheld Information (Good Faith)

A Food Producer starts negotiating for the sale of a building where it was, a few years ago, operating a bakery. Food Producer knows that the facilities does not meet the criteria set by new health regulations for the operation of a bakery. The Prospective Buyer intends to initiate a bakery in the facilities, something which the Food Producer knows. The Prospective Buyer does not mention the intention expressly, and the Food Producer does not disclose the information on the health regulations.

The parties enter into a contract for the sale of the building.

Has the Food Producer breach a duty of disclosure towards the (Prospective) Buyer, or does the (Prospective) Buyer has a duty of diligence in enquiring about the contracts’ object?
Withheld Information

- Norwegian law
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Undue Influence on Calculation of Royalty

- Norwegian law
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