Contracts Tea No. 1

US Supreme Court decides that arbitrator determines the validity of the arbitration clause

On June 21, 2010, the Supreme Court ruled 5-4, in *Rent-A-Center, Inc. v. Jackson* that, under the Federal Arbitration Act (FAA), where an agreement includes a delegation of power to the arbitrator to decide any dispute relating to the interpretation, applicability, enforceability or formation of the agreement, the power to decide on a claim of unconscionability rests with the arbitrator and not with the court.

The facts of the case are as follows: Antonio Jackson filed an employment-discrimination suit against his former employer, Rent-A-Center West, Inc., alleging that after having been denied a promotion for a long time and being promoted only after complaining, he had been fired on retaliation. His employment contract contained an arbitration clause requiring arbitration of all disputes and specifically providing that only an arbitrator had the authority to resolve questions concerning the validity of the arbitration agreement: "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." On appeal the Ninth Circuit held that that the trial court was required to determine whether the arbitration agreement was unconscionable, even when the parties to the contract have clearly and unmistakably assigned this issue to the arbitrator for decision. The Supreme Court reversed: Since the plaintiff challenged only the validity of the arbitration agreement as a whole (as substantively unconscionable) and not the delegation provision specifically, the agreement is valid under FAA.

In conclusion, after *Rent-A-Center v. Jackson*, under the FAA, where an agreement to arbitrate includes a clause that the arbitrator will determine the enforceability of the

agreement, if a party challenges specifically the enforceability of that particular agreement, the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, the challenge is for the arbitrator.

The Fourth Circuit decides that when a forum selection clause is coupled with a choice-of-law clause, the forum-selection must be interpreted according to the law that governs the substance

On December 8, 2010 (decision 10-1000), in *Albemarle Corp. v AstraZeneca UK Ltd.*, the Fourth Circuit decided that in an international contract between an American corporation and a UK corporation, the forum-selection clause inserted in the contract ("jurisdiction of the English High Court") must be interpreted according to the law that is chosen to govern substance, in this case, the English law. The result is that the parties can only litigate in England.

The facts are as follows: In 2005 AstraZeneca UK Ltd. ("AstraZeneca") and Albemarle Corp. ("Albemarle") entered into a contract according to which AstraZeneca would purchase 80% of its requirement of di-isopropyl-phenol (DIP) – that AstraZeneca uses in the manufacturing a branded drug (Diprivan) -- from Albemarle International Corporation, a Virginia corporation of the Albemarle group. In the same contract, AstraZeneca agreed to grant Albemarle a right of first refusal to supply propofol (a derivative of DIP) in case AstraZeneca would shift from DIP to propofol in the manufacturing of Diprivan. Alleging a breach of its right of first refusal, Albemarle commenced an action against AstraZeneca in the Court of Common Pleas in Orangeburg, South Carolina. AstraZeneca, invoking diversity jurisdiction, removed the case to federal court. Here AstraZeneca filed a motion to dismiss for improper venue based on the choice of law and forum selection clauses contained in the 2005 contract. The court dismissed the action. The court found that the chosen law (i.e. English law) considers the choice as mandatory and not

permissive.

On Albemarle's appeal, the Fourth Circuit held that in an international contract between a Virginia corporation and an English corporation, the forum selection clause making the contract "subject to the jurisdiction" of the U.K. courts, must be interpreted according to the law that – for express choice of the parties -- governs the contract, i.e. English law. Since English law would interpret a clause of this type as exclusive and not permissive, litigation must be pursued in England and not in the US.

South Carolina Supreme Court holds that trial court cannot alter the territorial restriction of a non-compete agreement

On May 24, 2010, in *Poynter Investments, Inc. v Century Builders of Piedmont, Inc*, the SC reversed a trial court's order granting a preliminary injunction to enforce a non-competition agreement. According to the SC Supreme Court the trial court erred in "blue penciling" the contract by replacing an unreasonable territorial restriction in the agreement with one of its own. The facts are as follows: Rector sold his business to Poynter Investments in 2007. Contemporaneously, the parties entered an "Employment and Non-Competition Agreement," by which Poynter agreed to employ Rector for one year, and Rector agreed to a four-year non-competition clause which included this territorial restriction: "Restricted Territory" means (i) An area encompassing seventy-five (75) miles in any direction from the Premises. (ii) In the event the preceding subparagraph (i) shall be determined by judicial action to be unenforceable, the "Restricted Territory" shall be Greenville County, South Carolina and any county that borders Greenville County, South Carolina. (iii) In the event the preceding subparagraph (ii) shall be determined by judicial action to be unenforceable, the "Restricted Territory" shall be Greenville County, South Carolina. In 2008, Poynter sued Rector and others alleging they had breached the terms of the sales agreement as well

as the non-competition agreement, and sought to enforce that agreement during the pendency of the litigation. The trial court issued an injunction ordering Rectors "to be enjoined and restrained from violating the terms of the non-compete covenant within Greenville County, South Carolina and within an area encompassing fifteen miles in any direction from [the Premises]." This blue-penciling of the agreement was found impermissible by the SC Supreme Court: "the restrictions in a non-compete clause cannot be rewritten by a court … but must stand or fall on their own terms."

Plaintiffs complain about allegedly false profiles in on-line dating service

Dec. 30 in U.S. District Court in Dallas, five men and women filed a lawsuit against the on-line dating company Match.com, seeking unspecified damages and repayment of their subscription fees. The plaintiffs also seek class-action status for their lawsuit. Plaintiffs allege that Match.com uses phony romantic come-ons by false or inactive members to get subscribers to renew. It is also alleged that the company does not vet profiles for legitimacy and does not delete profiles of cancelled customers. According to the plaintiffs the above amounts to a breach of contract, a breach of implied covenant of good faith and fair dealing, and negligent misrepresentation.

When buyer buys three cows but only gets title on two …

March 2011 Robert Wylde, a British collector resident in Monaco, filed suit in federal court in New York City against the Gagosian Gallery, one of the most successful gallery in the world, seeking several million in damages. The contention is that the gallery sold Mark Tansey's 1981 painting, "The Innocent Eye Test", to Mr. Wylde in 2009 for 2.5 million without disclosing to him that the Metropolitan Museum of Art, where the work had once been on display, already owned 31 percent of it and had also been promised by its owners that the Met would eventually obtain an 100%

interest. The plaintiff alleged that a Gagosian Gallery salesman took the plaintiff to see the painting at the apartment of Charles Cowles, art collector and former art dealer. The suit specifically contends that the Gagosian Gallery told the plaintiff that the painting was owned exclusively by Mr. Cowles and had been returned to him by the Met; only in the spring of 2010, the Gagosian Gallery contacted the plaintiff to inform him that the gallery had learned that the Met owned 31% of the painting.

The position of the Gagosian is that "Charles Cowles represented that he had clear title to the painting, which was viewed for sale in his apartment, and the gallery acted in good faith at all times in selling the painting." As for Mr. Cowles, he declared to a newspaper that he considered the whole dispute his mistake because after the Met returned the painting to him "I didn't even think about whether the Met owned part of it or not."