Caroline Bradley FALL SEMESTER 2016

CONTRACTS: NOTES ON FALL 2016 EXAM, SECTION A

The Section A question and the second question B question refer to arbitration. On the morning of December 7th (the day of the exam) the New York Times published a long article on Wells Fargo's use of arbitration agreements (Michael Corkery & Stacy Cowley, Wells Fargo Killing Sham Account Suits by Using Arbitration, NY Times, Dec. 7, 2016).

Before beginning to grade the exam I wrote up an analysis of the Section A issues:

Section A, Questions 1 and 2 Before Reading the Answers

The way the questions are set up involves some choices about organization of the answers as there are issues relating to the application process which relate to both Cora and Dash. It would be inefficient to address the issues twice, so would make sense to address them once, either in an introductory section and then deal separately with the issues relating specifically to Cora and to Dash, or to refer in the Dash answer back to the treatment of the common issues in the Cora answer. Of course addressing them twice would be fine, although it would take longer. I decided that if a exam answer decided to separate out the issues in the way I set out below I would figure out how to allocate points between the parts of the questions (10 points for the common questions, 15 points for the separate questions).

Common issues relating to Cora and Dash

The AGF program looks like a unilateral contract. The facts described are like a reward contract: people who apply for the funding and meet the criteria may get an award. In the first two years of the program every applicant who met the criteria received an award. In 2016 the number of applicants who meet the criteria is greater than the number of awards (an inherent and entirely predictable problem with the criteria as the potential applicants are the winners of 8 specified prizes). The criteria seem to be objective rather than, for example, suggesting any subjective judgment about how interesting the different projects are. The program terms and conditions do not specify how the selection is to be made, which raises an issue of gap filling. At the same time, the terms and conditions state that AGF decisions are "final and may not be challenged." Does this really mean that however arbitrarily the AGF decisionmakers behave there is no possibility of challenge?

There's an arbitration agreement as a component of the terms and conditions, but the facts of the question tell us nothing about the arbitration terms, and don't suggest any basis for thinking that the agreement ,may not be valid and binding (e.g. no facts like those in Meyer v Kalanick). And we know that AT&T v Concepcion limits the extent to which state contract law applies to arbitration agreements.

The terms and conditions include a non-compete agreement which restricts any applicants (whether successful or not) from competing with Atlas or any of the

businesses he owns, or any of the businesses established by any of the AGFs for a period of 10 years. The rules relating to non-compete agreements vary, and we don't know what the rules in Arcadia are. In the employment context the interests of the employer in protecting its business are weighted against the interests of the employee in exploiting the value of their own skills. But this is not a non-compete in the context of employment. The applicants are prohibited from competing with Atlas and the businesses he owns although there is no indication they will acquire any information about these businesses through the application process. Whereas a successful applicant who becomes an AGF fellow might be in a similar relation to Atlas as an employee, there's an argument that any such restriction on an unsuccessful applicant would be unreasonable as there is no need for the protection. The agreement is very broad, and the length of the restriction is very long. Fullerton Lumber suggests that a 10 year restriction may be seen as unreasonable, and the Florida statute has a range of presumptions with respect to time. The most generous levels of protection under the Florida statute allows a period of 5-10 years with respect to trade secrets. A broad 10 year restriction of the type described in the facts ought not to be enforceable.

On submission of the application it looks as though there could be a bilateral contract. The applicants apply by clicking a button on the website which states "I hereby apply to the AGF program and agree to the AGF terms and conditions." There's a contrast here with Meyer v Kalanick: there is no indication that the terms are not clear and there is unambiguous assent to the terms. There is no scope for the applicants to negotiate, the terms are take it or leave it terms. Judge Easterbrook in ProCD and Hill v Gateway seem to be comfortable with ths sort of arrangement (although note those cases relate to after-communicated terms which is different from what is happening here).

Is there consideration for the promises by the applicants (arbitration, non-compete)? Atlas' willingness to consider the application is the consideration. But thinking about what is going on we could ask whether the AGF program or Atlas is actually making any sort of real promise at all to the applicants (rather than just offering a hope they might be successful). The arrangement seems to be rather one-sided with a set of promises/obligations imposed on the applicants (e.g. the non-compete) and not much promised by Atlas (not even any sort of procedure for making the determination). Is the deal "you apply and I will do whatever I want"? Perhaps it would be appropriate to argue that Atlas/AGF's promises here are illusory— not promises at all— and that we should therefore not think of any of this as a binding contract. Both Cora and Dash might want to argue that there is no binding contract created by the application as this would mean that the provisions of the terms and conditions that restrict their rights should not apply.

If there is a binding contract there are issues of whether Atlas had complied with its implied duty of good faith with respect to both Cora and Dash.

Question 1. Cora: Discuss the issues of contracts law raised by the facts set out above relating to Cora. (25 points)

Cora's situation is different from Dash's because of her dealings with Bilbo, dealings that occurred before she submitted her application. In some ways this situation resembles Hoffman v Red Owl. It isn't quite the same, because in the case there was a much longer period in which Lukowitz induced Hoffmann to change his position on the basis that he would appear to be a more credible franchisee than we have here. And here there is the fact that Cora seems to have agreed to a set of terms and conditions that purport to limit her rights. On the other hand, there are Bilbo's representations. He tells her how to "make the best application possible" and "she spent a lot of money on materials, equipment and rent for premises for her venture based on Bilbo's encouragement." If the application agreement is not a valid contract Cora may be able to argue that she should obtain a remedy on a promissory estoppel theory: Atlas (via Bilbo) made promises to her on which it was reasonable for her to rely and she did rely to her detriment. There are some issues here: what Bilbo said does not seem to have been as concrete as Lukowitz's representations. There may not be enough for a promissory estoppel claim. We do not know whether her spending decisions were reasonable. We don't know either whether Cora has applied for any other funding sources (i.e. was she really relying on the idea of getting the money from the AGF program). The availability (or otherwise) of other funding sources could be relevant to the issue of what, if any, remedy would be appropriate (relevant to ideas of reliance, causation, mitigation).

The facts state that Cora recognizes that the "successful applicants' business ideas were generally much closer to Atlas' own business activities than her own idea is. She is unhappy that the program criteria did not indicate any preference for particular types of ideas and she thinks that if the program criteria had been clearer she would not have wasted so much time and money on her application." Is there a basis her for any sort of argument that the program criteria were really misleading in any sort of meaning ful way, or that Bibo was acting in a misleading way? The case we read that might be relevant here would be Vokes v Arthur Murray. But that case was a stretch and these facts don't suggests the sort of taking advantage of a vulnerable widow we saw in that case.

Is there any basis for arguing that the gap in the contract (no specification as to how the decision would be made) should be able to be filled using the implied duty of good faith (cf. Market Street Associates)? Cora's idea that the successful applications are made by people whose ideas relate to Atlas' business interests, perhaps combined with the non-compete, implies perhaps that Atlas is using the AGF program to benefit himself.

With respect to Victor's widgets. This is a Colonial Dodge issue - perfect tender rule - here rejection 2 months after delivery - suggests no issue re acceptance, so revocation - substantial impairment of value to her - Victor- "says that the widgets only differ from the specifications in ways that do not affect their functionality"

Question 2. Dash: Discuss the issues of contracts law raised by the facts set out above relating to Dash. (25 points)

The Dash situation raises the question of whether Dash's application complies with the application criteria. The issue is whether Eddie's promise of money is"Verified financial resources (cash owned by the applicant or by a family member of the applicant or a loan provided by a financial institution not connected to the applicant or his or her family) of a level consistent with the business plan (if the application were to be successful and the applicant were to receive the $250,000 grant). Verification is by means of a certification by a financial institution." The facts don't say there is no verification by a financial institution here so the issue seems to be about whether Atlas can validly refuse to accept Eddie as a family member. The question says that "the AGF terms and conditions did not define family in any way that would exclude Eddie." We are not told whether under Arcadian law there is any general definition of what a family means. If there were, this would be relevant to the issue. If there is not any general definition there is a question whether a court would want to get involved with this issue (although note that the arbitration provision of the agreement could prevent a court deciding this question). Here I think it makes sense to discuss the cases we looked at where courts have addressed issues of social policy and whether they want to get involved (Marvin, Hewitt, Blumenthal v Brewer). The situation here is different and there might be felt to be less need to intervene, for example than in Marvin. Arguably the lack of definition of family is a gap in the terms and conditions. How should a court/arbitral tribunal go about filling this gap?

Second, it seems that Atlas may have been stealing Dash's idea. If the idea of defining family to exclude Eddie's money is part of this scheme, that is a problem for Atlas. And, in addition to the general issue of (non)enforceability of the non-compete, trying to use a non-compete to stop Dash exploiting his own business idea which Atlas has appropriated from him is unacceptable. We don't know all of the facts here. But if this is all a scheme to steal Dash's idea than the contract could be invalidated on that basis and Dash should have a restitutionary remedy with respect to Atlas' unjust enrichment.

Section A, Questions 1 and 2 After Reading the Answers

In fact answers tended to focus on the issues in a rather different way, focusing on Bilbo and Victor in the Cora answer and on Eddie and the non-compete in the Dash answer. Some of the other issues I identified in my common issues comments above did surface from time to time. One or two of the answers did include a brief common section at the beginning of the exam and some answers dealt with the issues I identified as common in the context of the individual answers dealing with Cora and Dash.

The most common weakness I saw in the answers was a tendency to see the facts given in the hypo as being "similar" to facts in cases we had read without

really stopping to think whether the doctrinal issues raised by the facts were the same. Sometimes the cases were just asserted to be similar with no explanation of the reasons for the assertion. The use of this similar case approach was most commonly the case with respect to Hoffman v Red Owl. Many people jumped right in and discussed promissory estoppel without thinking about how the circumstances are very different here: here there is a contract between C and AEI/AGF whereas in Red Owl there was no contract. During the semester we discussed how a contract between Hoffmann and Red Owl at the beginning of the application could have limited Red Owl's risk of liability. But the contract here could work in a similar way unless there is a way of displacing it. Some answers did note the issue of the contract but most didn't link it to the promissory estoppel issue. Although a complaint might argue based on both promissory estoppel and contract theories the theories are not consistent — promissory estoppel does not apply where there is a contract, the contract does.

But the same sort of issue arose with respect to the definition of family. Marvin and Hewitt are not directly relevant to this issue which is an issue of interpretation of the contract. The question is whether there is any basis for defining family for the purposes of the contract here in a way different from how Atlas/AEI/AGF do. We don't know if Arcadia has defined the term family. Arcadia's approach to issues such as those raised in Marvin and Hewitt could shed some light on this issue. But the cases deal with contracts between two parties and whether the courts will enforce them and the question raises an issue of how a third (non) party might be affected by a contract between two parties. A number of answers here focused on the issue of Eddie's promise as a weakness in Dash's position. But the question does not say there is any issue with respect to verification, and the terms of the competition allow "cash owned by the applicant or by a family member of the applicant" to count, so if Eddie is a family member of Dash the lack or not of a promise makes no difference. If he is not a family member the money could only count if it was a loan by an unconnected financial institution and there's no hint Eddie is a financial institution.

Some other general issues:
If the question gives you the language of provisions of the UCC it is a good idea to use that language. During the semester we focused on the substantial impairment of value language at issue in Colonial Dodge, and the question is designed to invite a discussion of whether that applies here. I.e. does the subjective nature of substantial impairment of value acknowledged in Colonial Dodge also apply in a case like this where Cora merely seems to be claiming substantial impairment for opportunistic reasons where there are facts suggesting only a minor variance between specifications and the actual widgets? In Colonial Dodge there is a hint of opportunism, but here there seems to be more than a hint. Not using the specific UCC language when it is given in the exam is sloppy. Not knowing the provisions well enough before the exam so you cite language that isn't really relevant to the issues is sloppy in a different way (although it could also be the product of exam stress).
A number of people threw around words like unconscionability (even with respect to arbitration where AT&T v Concepcion tells us it doesn't work), unreasonableness, and

unfairness as though they were general bases for finding that contracts should be enforceable. The book we used does raise questions about fairness in contract law, but I don't think it provides any basis for thinking that these ideas work as a sort of general cure for any issues of unfairness.

Question 3. How would you advise Atlas and AEI to amend the AGF criteria and/or terms and conditions to avoid problems for the future? (10 points)

Answers to this question mostly raised the issues dealt with in the answers to the first two questions and suggested they be fixed. So: specify criteria for choosing among applicants who meet the application specifications; think about the financial contributions provision (for example define family); adjust the non-compete to make it more reasonable (reduce time, address geographic scope, only apply the non-compete to successful applicants).

Some answers addressed the contract formation issues raised in e.g. Meyer v Kalanick. Strictly the question does not ask you to deal with this sort of issue because it asks about amendment of the AGF criteria and the terms and conditions rather than about how the criteria and terms and conditions are communicated to applicants.
An alternative to establishing selection criteria might be to specify how the process would work (e.g. identify the people responsible for making the decision), or to emphasize the subjective nature of the decision to bolster the language about the decisions being final and not subject to challenge.

Some people seemed to be entirely comfortable with quite a harsh contracting regime (e.g. applicants would give up their rights to exploit their own ideas on the basis that people are not required to apply. I think that it's worth bearing in mind that the greater the benefits AEI/AGF get from the arrangement in comparison to what the applicants get (a chance to be considered) the less likely the arrangement is to be seen as a contract at all (i.e. if AEI/AGF seems to be making illusory promises in return for economically valuable real promises).