

Contract and agency law essay

Business



Payment, similar to consideration, is one of the four elements of a contract.

Consideration is something of value in a contract or agreement between two parties. Both parties must be providing something of value to the other party. It is an act or promise to do (or not to do) something in return for value and the value given is enforceable. All the law need is 'valuable consideration'. For example, if Jack has offered to pay S\$10 for a hammer worth S\$100, that is considered valuable consideration. There are three types of consideration in law: executory consideration, executed consideration and past consideration.

In this case study, the agreement of payment between Food Enterprises Ltd and Nerd Private Ltd, clause 2. 2 indicates that invoices are to be paid within ten days (10) of receipt of invoices submitted by Nerd Private Ltd. The client (Food Enterprise Ltd) shall pay the consultant (Nerd Private Ltd). Executory consideration is when a promise, yet to be performed, is given in exchange for another's promise. Executed consideration is when an act has been performed in exchange of another's promise. Past consideration refers to an act performed prior to or independent of the promises being exchanged. In this case study, the payment services and expenses in the Service Terms and Conditions are both executory and executed.

The agreement of payment between Food Enterprises Ltd and Nerd Private Ltd, clause 2. 2 indicates that the invoices payable within ten (10) days of receipt of invoices submitted by consultant unless otherwise agreed in the Appendix. This means that the consultant has performed their promise; thus

the consideration is executed, and the client has yet to perform their promise, hence, it is still executory.

In consideration, it must move from the promisee but not necessarily go to the promisor. Consideration also need not be adequate but must be sufficient. Rules of consideration 1. Consideration must be referable to the promise 2. Consideration must move from the promisee 3. Consideration need not be adequate but must be sufficient, or of equal value 4. Consideration must not be illusory 5.

Consideration must be current 6. Performance of an existing obligation under a contract owed to the promisor is not consideration for a promise 7. Part payment of a debt is not consideration for a promise to discharge the whole sum 8. Performance of a public law duty is not consideration for a promise 9.

Performance of a contractual obligation owed to a third party is a good consideration. (b) Proprietary items and confidential information (10 marks)
The word “proprietary” indicates that a party, or proprietor, exercises private ownership, control or use over an item of property, usually to the exclusion of other parties. In this case study proprietary items refer to the Consultant Knowledge Capital. As stated in Clause 4.

1(d) in the Service Terms and Conditions, the term Consultant Knowledge Capital refers to the Materials existing prior to commencement of the Services, or developed outside the scope of the Services, that are together with any enhancements and/or modifications thereto, whether or not such enhancements and/or modifications are developed as part of the Services. In Clause 5, the client shall have or obtain no rights in any Consultant

Knowledge Capital other than the four stated exceptions. This may cause the restriction, restraint of trade. It is a common law doctrine relating to the enforceability of contractual restrictions on freedom to conduct business. In a business, the buyer refrains from seeing its assets being diminished by the seller's post-completion activities. If the seller was able to lure all his previous clients away from the buyer then the buyer is left with a worthless asset. A buyer will hence consider the insertion of restraint clauses which consolidate the business's commercial assets. Confidential information is information that is not publicly available, that the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential (or secret).

Confidential information is not property, but you can control access to it, and license its use or transfer it to another person. In Singapore, most employees will need to acknowledge the staff or employees handbook or code of conduct upon joining the company. Some companies require its employees to acknowledge it on an annual or bi-yearly basis. In one of these clauses, indicates that information of the company is to be treated with utmost confidentiality. However, as much as either party tries to keep all information confidential, there tend to be obligations of confidence.

This exists when this is an express obligation due to the relationship they share. Thus, the law implies that one party must know of the confidentiality of the information. Obligations of confidence are present in the following relationships: fiduciary relationships, company officers and employees, and employment.

In clause 6. of the Services Terms and Condition, any confidential information is available for use only in connection with the agreement. It may also be reproduced or reasonably copied for the performance of obligations by the receiver. In the case of Vandashima (Singapore) Pte Ltd and Another vs Tiong Sing Lean and Another (2006) SGHC 132, the first defendant, Tiong, employed by the first plaintiff, Vandashima (Singapore) Pte Ltd, was holding a high post in the company. He misused his authority and power to trade information with the second plaintiff PT Vandashima Indonesia.

When found that Tiong had breached the contract of leaking confidential information of the first plaintiff, Tiong's employment was terminated and he had to serve the non competition clause. Tiong is unable to engage with a competitive company of the first plaintiff, upon termination of his employment for a period of two years. (c) Warranties (8 marks) In commercial and consumer transactions, a warranty is an obligation that an article or service sold is factually stated or legally implied by the seller, and that often provides for a specific remedy such as repair or replacement in the event the article or service fails to meet the warranty. It is a statement of fact, forming part of the contract, which the party giving the warranty (warrantor) asserts to be true. There are three types of warranties in law . 1. warranty as a less important term, contrasts a warranty, with a condition, which is an essential or fundamental term.

2. warranty as a guarantee is when a supplier provides warranty for the products or services it produces or serves. 3. warranty in insurance law explains the law in insurance where a warranty is treated as a condition.

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Warranties, similar to guarantees, provide a legally-binding, under the Sale and Supply of Goods Act, assurance that any problems caused by manufacturing defects during a set period will be remedied.

In this case study, we will look at a warranty as a guarantee of a manufacturer's responsibility. Warranties are used to gain the confidence of consumers of their products that their products or services work as designed and corrections will be done should problems arise. It is a contract or agreement to provide some benefit for a set period of time in the event of the goods or services being defective. An example is a computer manufacturer will usually offer guarantee of their products with free repairs within a period of one year. With that, it is the manufacturer's responsibility to carry out the agreement should consumers come back with defects. In the contract between Food Enterprises Ltd and Nerd Private Ltd, clause 7.

1 states that the consultant guarantees the services in a good manner. Any defects, brought to the attention of Nerd Private Ltd will be rectified. If there is a breach of warranty brought to the attention within thirty days after the performance of the Services, they will rectify it with reasonable efforts and at its cost. It also clearly stated that after five days of delivery, the deliverables are deemed accepted, if Food Enterprises Ltd does not write in to indicate of any basis for its non-acceptance. (d) Entire agreement (8 marks) The "entire agreement" clause is to ensure clarifications to all the parties to a contract that the complete set of terms of the contract is to be found in the agreement. Any pre-contractual written representations and oral statements are set aside. Thus, the parties are bound only by the written agreement.

With this entire agreement clause, all parties want to ensure that neither party can raise any argument based on misrepresentation to cancel the contract off. It makes it easier for the contract to be understood as the written agreement contains all the terms which make up the whole contract. In this case study, the “entire agreement” clause can be found in clause 15.1 of the Service Terms and Conditions. The “parol evidence rule” enacts a principle of the common law of contracts that presumes that a written contract embodies the complete agreement between the parties involved; the document is the sole repository of the terms of the contract (Jacobs v. Batavia & General Plantations Trust Ltd [1924] 1 Ch 287).

The rule therefore generally forbids the admittance of extrinsic evidence (i. e. , evidence of communications between the parties which is not contained in the language of the contract itself) which would add or change terms of a later written contract. The introduction of extrinsic evidence is always allowed. Parol evidence rule is any evidence other than contract documents, even if it is outside of a written contract.

In parol evidence rule, it is not admissible to alter or explain a written contract’s terms. Since parol evidence is not considered as part of a contract, explanation to the meaning of any terms in the contract is not admissible. To commence the effectiveness of the rule, it must be fully written in the judgment of the court, and is the final agreement between the parties.

A merger clause is one way to make sure that the contract be fully integrated. It confirms that the contract is an agreement done between the

parties An integrated agreement is either a partial or complete integration. If it contains some, but not all, of the terms as to which the parties have agreed then it is a partial integration. This means that the writing was a final agreement between the parties (and not mere preliminary negotiations) as to some terms, but not as to others. On the other hand, if the writing were to contain all of the terms as to which the parties agreed, then it would be a complete integration.

The importance of this distinction is relevant to what evidence is excluded under the parol evidence rule. For both complete and partial integrations, any evidence contradicting the writing is excluded under the parol evidence rule. However, for a partial integration, terms that do not contradict the writing but merely add to it are not excluded. Most contracts contain an “entire agreement” clause which is also known as an integration or merger clause. An entire agreement clause indicates that the contract represents the final and complete agreement, hence, protecting the contracting parties.

It also means the contract overrides any other agreements the contracting parties have made with regards to the contracted subject. (e) Force majeure (6 marks) Force majeure is a clause commonly used in contracts which essentially frees both parties from liability or obligation when the occurrences of events such as war or natural disasters prevent one or both parties from fulfilling their obligations under the contract. Such extraordinary circumstances or events are beyond the control of either party. However, force majeure cannot be used as an excuse when frustration is caused but can be predicted, by the natural and external forces. An example is when a predicted rain stops an activity done outdoor. Other sensitive and time-

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critical contracts may be drafted where one party may not take reasonable precautions to limit or prevents the effects of interferences coming from the outside.

A force majeure may excuse some obligations of either or both parties. An example is when timely delivery of goods is prevented by a strike. However, the payment of the delivered portion has no excuse to be late. A force majeure may also be the overpowering force itself, which prevents the fulfillment of a contract. In that instance, it is actually the impossibility defense. The clause may be an exemption clause. It must then comply of the Unfair Contract Terms Act.

In a contract, there are possibilities of frustrations to happen. In frustrated contracts, the circumstances which give rise to possible cases of frustration are relatively few in real life. These circumstances include occasions such as war, natural disasters and death. The application of frustration is limited by three factors: foreseeability, force majeure clauses and self-inducement.

In this case study, clause 14 mentioned that the agreement may be terminated by either party upon written notice, thirty days after the start of delays due to force majeure. With the termination of contract, neither party are liable for the losses, delays nor failures in performance as stated in clause 14. 2 (f) Limitation of liability (8 marks) Limited liability is a concept whereby a person's financial liability is limited to a fixed sum, most commonly the value of a person's investment in a company or partnership with limited liability.

A limitation of liability clause is a contractual provision that restricts the amount of damages a client can recover from its consultant. It can provide protection against breach or negligence of contracts and is a tool for allocating project risk. However, it does not protect the consultant's against liability for intentional misconduct. Third-parties who have not signed the contract are not bound by the limitation provision. .

In the case study, clause 11. 3 states that any action by either party must be brought within six (6) years after the cause of action arose. This shows that the law gives room for parties to seek remedies in court. Q2. The three legal concepts and its legal impact (15 marks) In law, three parties will be involved in every agency. There are three legal concepts on this contract, mainly distributors (or agents), employees (or servants) and independent contractor.

A distributor is one who enters into one transaction and buys goods from an overseas manufacturer, who then enters into another transaction to re-sell the goods to consumers. The role of the agent can also be: to prepare a contract that binds the consultant and client. For example, an insurance agent who sells insurance policies to the public on behalf of his insurance company. Employees instructed by the employer to create legal relationships with third parties on behalf of the employer, thus, the employer is agent for the employer. An employee is someone working for an employer and receives compensation based on either on hourly, daily or monthly income basis. An example is a clerk working in an office doing paper work.

She is paid by her employer on a monthly basis. He or she is usually overseen by the employer with a high degree of supervision and control. Independent contractor is engaged under a contract for services.

A contractor is usually free to choose how he wishes to perform his work. An independent contractor is engaged to provide a specific outcome and is not generally authorised to act on behalf of the main contractor in respect of third parties. For example a taxi driver who works for his employer. His main role is to drive the passengers to the places instructed by them. The taxi driver's employer does not have specific routes which he has to follow, thus, he does his own planning to reach the destinations. In this case study, the Service Terms and Conditions in clause 9. indicated that neither party are allowed to contract with a partner, employee or independent contractor, whether directly or indirectly during their participation in the Services or during the twelve months thereafter. In clause 10.

1 however, each party is considered an independent contractor. Hence, does not have the authority to commit or bind the other. In this case study, Nerd Private Ltd should engage them the expert consultants as agents instead of independent contractors or employees. This will avoid them from any breach of any part of the agreement as the consultants will offer services to Nerd Private Ltd on behalf of the company. Q3 (g) The governing law clause (5 marks) In law, there are a couple of types of express jurisdiction clauses; an exclusive and non-exclusive jurisdiction clause. An exclusive jurisdiction clause is when the parties agree not to bring the dispute before the courts of another jurisdiction. A non-exclusive jurisdiction clause, on the other hand, allows the parties to submit to the jurisdiction of the courts of the specified

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jurisdiction without excluding the possibility of the dispute being heard elsewhere. An exclusive jurisdiction clause is preferable for certainty purposes.

The choice will be for a jurisdiction where the cost, speed and integrity of the judicial process are acceptable to the parties. It does not guarantee proper law of the contract of jurisdiction. A choice of law clause or proper clause in a contract is one in which the parties specify which law (i. e. the law of which state or nation if it only has a single legal system) will be applied to resolve any disputes arising under the contract. In Singapore, parties are allowed to choose the laws of jurisdiction they wish.

As we follow the English principle, parties can choose the law with which the transaction has connection to. The governing law clause, in fact, makes matters less complicated as a law has been chosen by the parties before bringing the dispute to court. Without a chosen law by the parties, the court will have to consider several factors between the parties such as where was the agreement made, languages of parties and the content of the agreement. In this case study, clause 16.

1 states that should there be any dispute arises between both parties during the service, they shall resolve in accordance to the Singapore law. (h) The dispute resolution clause (5 marks) The inclusion a Dispute Resolution clause in a contract is to have control and certain assurance that all parties are aware of what will happen in the event of breach of the agreement or any of its terms. The six alternatives in methods of dispute resolutions are: concede, negotiate, mediate, conciliate, arbitrate and litigate. When a

dispute is initiated by one party, the other party will go into defence mode. Although the parties may be able to resolve the matter mutually, the dispute may quickly escalate to higher levels of management.

If direct negotiations proved to be unsuccessful, then the parties are required to engage in arbitration. In this case study, a Dispute Resolution clause in clause 17 indicates that either party will work together internally in the event of a dispute and to escalate the matter to the higher levels of management. When no mutual agreement is set within thirty days after the dispute is escalated, either Food Enterprises Ltd or Nerd Private Ltd may request for arbitration by providing written notification to the other party. Litigation is always seemed as a last resort in a dispute. However, the delay, uncertainty and cost in favour of an earlier and genuine attempt at settlement as a contractual obligation. The commonly used process for resolving disputes is mediation. It provides confidentiality and speed for the resolution of a dispute through a third party.

Mediation settlements are seldom breached as they are binding on all parties. Due to the no decision imposed, any or settlement reached will be by mutual agreement of all the parties involved in the disputes. In Singapore, the Singapore International Arbitration Centre (SIAC) was established to provide qualified arbitrators for both international and domestic arbitrations.

However, in this case study, the Dispute Resolution does not apply to any claim arising from any patent or registered trademark. Such a case shall be subjected to judicial resolution instead of arbitration.