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Disciplina – Contract Law

Nº Exame- 393820

Exam

Part 1

1 – b

2- b

3- b

4- d

5- d

6- d

7- d

8- b

9- d

10-c

Part 2

12.

In the present exercise, it's important to start by remembering the definition of consideration and all the importance of consideration in English Law. The English perspective of contract law sees consideration as one of the conditions for a contract to be formed. Those conditions are: existence of an agreement (an agreement is made of an offer and correspondent acceptance, resorting to an objective test to objectively determine if there is an agreement); intention to create legal relations; consideration. In English law, agreements need to be supported by consideration. Consideration is necessary for a promise to become binding. Now we need to understand the definition of consideration. Professor Pollock defined consideration as "an act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable". Consideration can be an act, but it can also be a forbearance. It can also be a promise to act or to forbear. In the case law *Currie v. Misa* (1874), the House of Lords defined consideration as "some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other". The promisee must give consideration in exchange of the promisor's promise, is 'something' which is of

value in return for a promise. Consideration must have monetary value. For a promise to become binding, consideration is necessary. In English Law, consideration does not have to be adequate, but it must be sufficient, of value in the eyes of the law.

It is now relevant to go deeper and see past consideration. Past consideration is consideration which is given before the promise is made. As we said in class, it is generally not considered as sufficient consideration to support a contract, as the consideration and the promise must be part of the same transaction, otherwise it is unenforceable. The case law that exemplifies what was previously said and the general rule is *Roscorla v. Thomas*, 1842. In this case a man sold a horse for a fixed price. After the contract was finalized, the man told the buyer the horse was free from vice. Later, the buyer became aware that the horse was unwell, and he sued the seller for breach of contract, since the horse wasn't free from vice. The High Court ruled that the promise that the horse was free from vice was not part of the bargain, so no consideration had been given in exchange for the promise. Quoting Lord Denman: "it may be taken as a general rule that the promise must be coextensive with the consideration, and that a consideration past and executed will support no other promise than such as would be implied by law". Consequently, past conduct is not sufficient consideration to support a contract.

However, there are exceptions to this rule. Certain circumstances of past consideration can give rise to an implication to pay some money or confer a benefit on the promisee. To exemplify, we should see the case of *In Pao-On v. Lau-Yiu-Long*, 1980. Here a man owned the shares of a company that owned a building that another company wanted to buy. He sold the company and the building in exchange for shares of the company that bought the building. Fearing a drop in stock value, another arrangement was negotiated forcing the man to hold on to his recently-acquired shares. This made the man to propose a new arrangement, where he would be paid back in case the stock value did plummet. The company agreed to this offer, yet when its value dropped, it refused to pay the man back. The Supreme Court of Hong Kong ruled that an act done before a promise was made was good consideration for that promise if it was done at the promisor's request and the parties understood the act was to be paid for at a later date, and the payment or benefit would have been enforceable had it been promised in advance.

As we can see, past consideration constitutes consideration when the promisor requested the promisee to carry out the act, when both parties understood that the promisor intended to pay the promisee for his services (and was not requesting the services as a favour), and when the promise would have been legally enforceable if consideration had been given in advance.

In the present exercise, André is Alexandra's employee, he cleans the restaurant owned by Alexandra and through her request, he starts doing extra hours until a new employee is hired. Afterward's, Alexandra was pleased and promised André he would be paid a bonus at the end of the month but that did not happen. In class, we talked about a similar case, *Re Casey's Patents*, 1892. In this case, two men hired a patent

manager to handle their patents, and after doing so, the men promised the manager a small share of the patents' profits. However, they backed down on this promise, and the manager was left unpaid for his work. The Court of Appeal ruled that the manager had an expectation for payment, since he didn't work out of goodwill. Quoting presiding Judge Charles Bowen: "a past service raises an implication that at the time it was entered it was to be paid for".

Looking back at our exercise, André did the extra hours before Alexandra's promise, it is past consideration. The general rule in English Law says that it's not sufficient to be binding but there are exceptions we believe to fit this case because of the following circumstances: here we are faced with a working/ labour contract, André does not work for free or out of goodwill, he works and is paid per hour. Also, resorting to the objective test, any reasonable person would look at this situation and see it as a working situation in which one works and the other pays for work done, including extra hours which correspond to extra pay. In conclusion, taking into consideration all the rules of Contract Law under the English perspective, I believe that André needs to be paid for the work he did, the exceptions of past consideration are here present: Alexandra requested André to carry out those actions, it was understood that one intended to pay the other for his services and if consideration had been given in advance, the promise would have been legally enforceable.

14.

I will start by giving some context of English law regarding the intention to create legal relations. This is the second condition for a contract to have been formed, as previously said, it is necessary an agreement (offer and acceptance), an intention to create legal relations and consideration. In English Law, the formation of a valid contract requires that both parties agree on the same thing, a "meeting of the minds". To decide if there is an intention to create legal relations, courts must use the objective test (reasonable man). Quoting Lord Denning: "(The Court) looks at the situation in which (the parties) were placed and asks if reasonable people would regard the agreements as intended to be binding?" As explained during classes, the English case law developed two rebuttable presumptions to determine whether an intention to create legal relations exists and would make an agreement enforceable. One of the presumptions is that commercial or business arrangements are presumed to be made with an intention to create legal relations. However, this presumption can be rebutted with the use of specific words such as "in honour only" or "gentleman's arrangement".

The second presumptions is the fact that social or family arrangements are considered to be not binding because they are based on mutual ties of trust and affection, for example, a father and a son, as in our exercise. This general rule is contemplated in the following case law: Jones v. Padavatton, 1968. In this case, a woman convinced her daughter, who lived in Washington, to move to London and study there. The woman provided her with a house and an allowance. However, after a few

years, both women started fighting and the mother filed an action to take over the house. The daughter contested the action, claiming that the agreement between herself and her mother was legally binding. The Court of Appeal said that there was no binding contract, since there is a presumption that domestic agreements are based on mutual trust, ties and affection, and there was insufficient evidence to rebut this presumption, since the women were very close to each other until the fighting started.

Nevertheless, English Courts have recognized some exceptions to this rule, and there are situations in which the presumption that parties on a social or family arrangement did not intend to create legal relations can be rebutted. An example of that is the case law, *Merritt v. Merritt*, 1970. In this case, a man left his wife and moved in with another woman. He and his wife agreed on the payment of a monthly allowance and that the house they both owned would become the wife's property once she paid the mortgage. After she paid it off, the husband refused to turn over the house, in breach of their agreement. The Court ruled that, since the couple was not on amicable terms and separated, there was an intention to create legal relations. Quoting Lord Denning: "(in cases where) the parties were living together in amity their domestic arrangements are ordinarily not intended to create legal relations. It is altogether different when the parties are not living in amity but are separated, or about to separate. They then bargain keenly. They do not rely on honorable understandings. They want everything cut and dried. It may safely be presumed that they intend to create legal relations." What we can understand from this is that if the parties are not on good terms, not just a little fight but actually not speaking or separated, a permanent situation, the promise made is intended to be legally binding.

However, this is not the case of our exercise. In our exam scenario, the father and son are in a good relationship. Thierry made a promise to his son to give him an allowance while he was studying, however, after years, the father stopped giving Hugo money because he was taking so long graduating. It was a father and son promise, they were in a good relationship until the father stopped sending his son money. I believe that at the time when Thierry made his promise he did not intend it to be legally binding and the son did not intend to sue the father if he did not receive the money. In conclusion, Thierry's promise to his son Hugo is not binding because as previously said and discussed in class, it's based on mutual ties of affection and trust, not on a legal relationship.

15.

The traditional requirements of the formation of a contract regarding "offer and acceptance" remain in the new means of communication. English courts have however refused to extend the postal rule (acceptance effective when posted) to these means.

Email is an instantaneous way of communication, some think otherwise because it needs to surpass various servers before it arrives at the wanted destination and because of that we will call it, “virtually instantaneous”. It’s important to also understand what is an electronic contract. It’s a contract made through the internet. When is acceptance effective? There are three options: when the email is read by the offeror (this has evidentiary problems, how can we know when it’s read?) and it can also lead to abuse (for example, I decide not to read the email that I have received and delay the acceptance). Another option is when it has passed reasonable time since sending the email so that it would call the offeror’s attention (was used in some cases, for example with telex – The Pamela 1995- but it creates uncertainty and the truth is that business hours don’t have that much importance nowadays, everyone sees the email they receive even if it is no longer business hour). The last option is when the email arrives at the server which manages the offeror’s email, this is the approach taken by English Law. It provides more certainty, clarity, is easier to prove and it’s also approached by CISG (article 24) and the UN Model Law on Electronic Commerce (article 15). There are two contracts formed through websites: digital content - “digital vending machine”, the website is an offer and acceptance is the payment, performance of the contract is immediate, for example, music); physical content – “digital shop window” (the act of payment is an offer and acceptance is the confirmation email, not performed immediately).

In our exam scenario, I believe the contract is of physical content. Under English law, in these contracts, scholars argue that the display of goods or services on a website would constitute an invitation to treat, it benefits the business, they can sell to whoever they desire to, CISG article 11. The online seller can become bound when he takes the customer’s payment, when the website displays a message after the payment saying the order is being processed, or when the customer receives the automated email saying that the order has been received. In the Chwee King Keong decision the confirmation email had all the characteristics of an unequivocal acceptance. However the online retailer can take control of the situation by making it clear to the customers that the website is an invitation to treat and give details of the status of any email sent to the customer as a receipt. In the terms and conditions of Amazon it says that “acceptance will be complete at the time we send the dispatch confirmation email to you”.

In our case, Céline placed her order of a printer through the website, the payment was processed right away, and the website displayed a message saying that her order had been processed. A few minutes after, she received an email confirming receipt of her order. Sumsang replied explaining that the standard terms of sale published on their website say that they have the right to change the content of the website at any time including prices and that the display of price-marked goods is not an offer to sell goods but, merely an invitation to treat and that no contract was formed since they had not yet dispatched the goods. I don’t agree with what Sumsang says, the

goods haven't yet been dispatched but the confirmation emails have been received. Under English law the contract was formed when Céline received the confirmation email with the receipt, which recognized her order, it is acceptance. The contract has been formed and as Chwee Kink Keong decision said, the customers are entitled to some protection. The argument that Sumsang uses saying they can change the content of the contract's it's not true after the contract is already formed.

Under French Law, an electronic contract must respect article 1128 of the French Civil Code which refers to consent of the parties, parties' capacity to contract and certain and determined object as the conditions for a contract to be formed. French law is very protective of their consumers and advertisements of goods/services online are seen as offers. Acceptance takes place when the online offeree clicks on the button for validation of the offer ("double click"- 1 click to verify their order, 2 click to confirm their order). The offeror must then send an electronic acknowledgment of receipt. Then the online offeree has the right to revoke his acceptance for 14 days, without any justification. This leads to the same conclusion, the contract between Céline and Sumsang has been formed, the only thing that differs is the moment the contract was formed, here was with the double click.

The Portuguese Law is also protective of their consumers and the DL 24/2004 demands detailed precontractual information to be included in the contract, the terms must be accessible and easily readable/understandable. Here, advertisements of goods and services are also offers made to the public. Article 32 of the DL 7/2004 says that a contract is formed when the acceptance is sent by the offeree, the acknowledgement of receipt of an order has no significance in determining when the contract was concluded but it is mandatory, some say it's a post contractual obligation. We can arrive to the same conclusion here, the contract was formed between Céline and Sumsang. Consequently, Sumsang has no reason saying no contract has been formed.