CHARACTERIST LLC
INCORPORATING LIE KEE PONG PARTNERSHIP

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Payment provisions: Key points to look out for

The following article was written by Bernard Tan. Bernard heads the firm's Corporate and Commercial Practice Group.

In this article, we wish to share some insights about what to look for when you consider payment provisions in any agreement that you or your business vehicle enters into. Payment provisions concern money and the impact of a payment provision that is not properly drafted can have a great impact (financial or otherwise) on a party to a contract.

Completeness and clarity

You will want to make sure that the payment provisions are clear and complete. Any lack of clarity or lack of details in a payment provision can be used to avoid payment or disagree about when, who, or how much is to be paid; such disputes are undesirable and can lead to anxiety, frustration, or cash flow problems, which are better avoided then cured.

A complete payment provisions will have the following matters covered which we summarise as the 5Ws and 2Hs:

Who: the payor and payee need to be stated.

What: the item that the payment is to be made for should be stated so that there is an exchange of promises between the parties without which the agreement may not be binding. Sometimes, the payment could be for a discharge of liability as in a settlement agreement.

Where: this is the place where payment is to be made. Sometimes, a party will want to be paid in a country or certain jurisdiction.

When: this is important. If the time of payment is not stated, it will usually be considered to be a reasonable time. But in loan agreements, failure to state payment can be fatal. There is case law to the effect that if a loan agreement does not state the time for payment of the loan, the time of payment is when the loan is made. This can be severely disadvantageous to the borrower and even the lender if the lender imagines that payment is due only when he demands for it only to find out that he may not be able to claim if the limitation period for contractual claims of six years has expired.

In our experience, we have often seen agreements either not state the time of payment or just state an amount of time without stating when the time starts running. For example, the following provision's time of payment is not stated clearly:

"A shall pay B S$10,000 within five days."

The provision is not clear as to what event or circumstance the five days will be counted from.

Why: this can be the reason for the payment and sometimes ties in with what the payment is being made for. This point however does not always need to be addressed where it is not appropriate.

How: this is the method of payment. A payee sometimes may prefer to be paid in a cashier's order as he knows that a cashier's order cannot bounce.

How much: the amount of the payment needs to be stated.

Below is an example of a simple payment clause that has the 5Ws and 2Hs addressed.

In consideration of B releasing A from all claims under the employment agreement between A and B, A shall pay B S$10,000 in cash within 10 days of the signing of this Agreement.

Grace periods

When you review payment provisions, it is important for you to note that the payee may ask for grace periods if he fails to pay on time. Grace periods are normally asked for to cover accidental failures to pay or unexpected circumstances which may have created a temporary ability to pay.

In considering grace periods, it is important to ask whether they are fair and should be given. The payee may not want to give a long grace period if the time of payment is critical to his operations and cash flow.

Sometimes, you will see an agreement that has a provision which states that "**time of payment is of the essence**". What this means is that any lateness in payment is so serious a breach that the payee may rescind the agreement as if it had not been entered into. This will result the payee being able to demand to be put in the position he would have been in as if the contract had not been entered into.

Remedies for non-payment

This is a key point that every payee must ask for the payment provision to cover. The purpose of providing for remedies is to discourage the payor from making late payments or even evading payment.

Some usual remedies that payees should consider are as follows:

- Where payments are to be made in instalments, the payee could ask for sums to become due. This is normally known as an accelerated payment clause.
- Default interest. The payee could ask that interest be charged on outstanding sums from the day they are due to the day they are paid in full.
- Where the payment is for services to be rendered over a period of time, the payee could ask for the right to suspend the provision of his services.
- Where the payment is for deliverables that the payee needs to deliver, the payee could ask that he be allowed to keep such deliverables and sell them to recover amounts that are due to him.
- Indemnity for costs and expenses suffered or incurred in relation to the late payment.

Conclusion

When you next review payment provisions, it should perhaps not surprise you if you see several paragraphs covering the issue of payment. The information above provides a framework for you to analyse and understand what the payment provisions are trying to achieve and whether they are good for you or have any gaps that you need to point out and cover.

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