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| <u>FACULTY</u> | : | LAW |
| <u>DEPARTMENT</u> | : | PRIVATE LAW |
| <u>CAMPUS</u> | : | APK |
| <u>MODULE</u> | : | LAL9X0C LAW AND LANGUAGES |
| <u>SEMESTER</u> | : | SECOND |
| <u>TEST</u> | : | NOVEMBER EXAM (SUPPLEMENTARY) |

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|----------------------------|---|-----------------------|----------------------------|---|--------|
| <u>DATE</u> | : | 30 November 2021 | <u>SESSION</u> | : | Online |
| <u>ASSESSOR(S)</u> | : | Dr. M van Eck | | | |
| <u>MODERATOR</u> | : | Prof. B. Kuschke (UP) | | | |
| <u>DURATION</u> | : | 5 hours | <u>MARKS</u> | : | 100 |
| <u>OPENING TIME</u> | : | 08h30 | <u>CLOSING TIME</u> | : | 13h30 |

NUMBER OF PAGES: 15 PAGES (INCLUDING THIS PAGE)

INSTRUCTIONS:

1. The question paper and the answer sheet will be loaded onto Blackboard under "*Supplementary Exam*" in the section called "*Tests, Exams and Assessment*".
2. To complete the assessment, you should use the answer sheet that has been loaded onto Blackboard to answer the questions. All answer sheets should be saved (named) with your surname and initials with the words "*Supplementary Exam*" in the file name. For example, "*Your Surname Initials Supplementary Exam*".
3. All answers sheets must include:
 - Your surname and initials; and
 - Your student number.
4. If the answer sheet does not contain your details to sufficiently identify you, then it cannot be marked.

5. All answers must be submitted **BEFORE** the closing time by emailing the answers to the following email address: mmvaneck@uj.ac.za as a MS Word Document.
6. Take note of the following:
- You should only send through one answer sheet. If more than one answer sheet is received, then the first answer sheet that was received will be viewed as the submission and all other answers and answer sheets will be disregarded.
 - Late submissions will not be marked, and no extensions or late submissions will be permitted. Therefore, it is your responsibility to ensure that your answers are emailed and received on time.
7. By participating in this test, you are deemed to have accepted the below rules of conduct and declaration:

EXPECTED CONDUCT AND DECLARATION FOR PARTICIPATING IN THIS TEST

You are reminded that this test is subject to the rules and policies of the University and the Faculty, and that the normal academic integrity rules apply. Your answers must be a true and honest reflection of your knowledge and understanding of the work. This means that:

- You must act honestly and with integrity when answering this test. Your answers must reflect your own knowledge and understanding of the work. You should use key terms specific to the Law of Contract module to answer the questions, but answers must be explained in your own words.
- You may **not** ask for assistance from another student, the tutor, non-student or any person whatsoever to answer this test or to help you complete your answers in any way.
- You may **not** use or consult any information, tips or guidance that another student, non-student or any person whatsoever provides to answer this test or to help you complete your answers in any way.
- You may **not** provide assistance to another student to answer this test in any way whatsoever.
- You may **not** look at, view or participate in any way in WhatsApp Groups, emails, other online communication devices (or in person) with other students while completing this test.
- You may **not** copy material from the textbook, lecture slides, case law, journals or the internet in whole or in part to answer the questions to this test

By submitting your answers you are deemed to have confirmed your understanding of the above expected conduct and also the below declaration for participating in this test.

DECLARATION

I hereby confirm that the answers I have submitted are my own work (which reflects my own knowledge and understanding). I have not received assistance from another student (or anyone else) in answering this test and I have not provided any other student with assistance in answering this test.

8. Good luck with the test.

INSTRUCTIONS

- 1 Answer all of the questions in the answer sheet.
- 2 All answers must use appropriate plain language principles (e.g. grammar, spelling, paragraphs, headings etc.) and be presented in a logical structure.
- 3 All answers should provide a detailed explanation of the applicable law, rules and authority.
- 4 Read Annexure A that is attached to this test paper before answering the questions.

QUESTION 1

Critically discuss the following statement: “*There is a special relationship between the law and language*”.

(5)

[5]

QUESTION 2

In Jerrier v Outsurance Insurance Company Limited [2015] 3 All SA 701 (KZP) the insurance policy stated:

“... *There is no fine print in our documents. Our documents are easy to read and user friendly so there are no hidden surprises*”.

Briefly discuss the court’s view of this statement, as well as the requirements that exist in the use of plain language in the South African legislative framework with reference to consumer contracts.

(15)

[15]

QUESTION 3

Compare the judgements of *Durban's Water Wonderland (Pty) Ltd v Botha* [1999] 1 All SA 411 (A) and *Drifters Adventure Tours CC v Hircock* 2007 2 SA 83 (SCA) 989. Discuss the legal principles established and explain how the use of language impacted the enforceability of the contentious contractual provisions in each case.

(10)

[10]

QUESTION 4

- 4.1 Identify and discuss the various contractual provisions found in the contract in Annexure A hereto, that may be used to terminate the contract. (5)
- 4.2 Your client (the Finance Company) is not sure what clause 14.2 of the contract in Annexure A attached hereto means. Briefly explain the purpose of the clause to your client and redraft the clause by using plain language principles. Include reference to sound theory and practical considerations to explain the reasons for making such changes to clause 14.2. (15)
- 4.3 Assume for the purposes of this question that your client is concerned about sending and receiving notices under the contract as in Annexure A. How would you advise your client? Your answer must include the following:
 - (i) The purpose of a *domicilium* clause (reason for including such a clause in a contract) and its general principles.

(ii) A discussion of the principles laid down in relevant case law in relation to *domicilium* clauses.

(iii) A draft a double *domicilium* clause that can be included in the contract in Annexure A, which allows notice to be received via hand, post and email. (25)

4.4 What professional duties does a contract drafter have when preparing a written contract on behalf of their client? Your answer should include the following:

(i) The sources of the drafter's ethical and professional duties.

(ii) The way language in legal instruments may impose duties on drafters, as well as the possible consequences if such duties are not fulfilled.

(iii) The principles that could be applicable to contracts to ensure that a drafter's professional duties are met in the drafting of contracts, use of standard forms and technology to draft contracts.

(iv) Any practical considerations or strategies that can be adapted to ensure that a drafter meets their professional duties. (25)

[70]

| | |
|---------------|--------------|
| TOTAL: | [100] |
|---------------|--------------|

ANNEXURE A

MEMORANDUM OF AGREEMENT

Entered into between

REVOLUTIONARY 4IR DEVELOPERS (PTY) LTD

(hereinafter called “the Service Provider”)

and

THE FINANCE COMPANY (PTY) LTD

(hereinafter called “the Customer”).

1. RECITALS

- 1.1 The Service Provider has developed certain software applications and platforms which it makes available to subscribers via the Internet on a subscription basis.
- 1.2 The Customer wishes to use the Service Provider's service in its business operations.
- 1.3 The Service Provider has agreed to provide and the Customer has agreed to take and pay for the Service Provider's service subject to the terms and conditions of this agreement.

WHEREBY IT IS AGREED AS FOLLOWS:

2. INTERPRETATION

The headings of the clauses in this Agreement are for purposes of convenience and reference only and shall not be used in the interpretation, nor modify or amplify the terms of this Agreement nor any clause hereof. Unless a contrary intention appears—

2.1 Words importing—

- 2.1.1 any one gender includes the other gender;
 - 2.1.2 the singular includes the plural and *vice versa*; and
 - 2.1.3 a natural person includes juristic persons (corporate or unincorporated) and *vice versa*.
- 2.2 A reference to a statute or statutory provision is a reference to it as it is in force for the time being, taking account of any amendment, extension, or re-enactment and includes any subordinate legislation for the time being in force made under it.
 - 2.3 References to clauses, and annexures are to the clauses and annexures of this Agreement; references to paragraphs are to paragraphs of the relevant annexures to this Agreement.
 - 2.4 If any provision in a definition is a substantive provision conferring rights or imposing obligations on any Party, notwithstanding that it is only in the definition clause, effect shall be given to it as if it were a substantive provision in the body of the Agreement.
 - 2.5 When any number of days is prescribed in this Agreement, same shall be reckoned exclusively of the first and inclusively of the last day unless the last day is not a business day, in which case the last day shall be the next succeeding business day.
 - 2.6 The expiration or termination of this Agreement shall not affect such of the provisions of this Agreement as expressly provide that they will operate after any such expiration or termination or which of necessity must continue to have effect after such expiration or termination, notwithstanding that the clauses themselves do not expressly provide for this.

3. DEFINITIONS

3.1 The definitions and rules of interpretation in this clause apply in this agreement.

- 3.1.1 “**Agreement**” means this software subscription agreement and any schedules and annexures thereto;
- 3.1.2 “**Authorised Users**” means those individuals who are authorised by the Customer to use the Services and the Documentation;
- 3.1.3 “**Confidential Information**” means information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information by a Party, or information which the receiving Party knows or reasonably should have known is of a proprietary or confidential nature;
- 3.1.4 “**Customer Data**” means the data inputted by the Customer, Authorised Users, or the Service Provider on the Customer’s behalf for the purpose of using the Services or facilitating the Customer’s use of the Services, and includes (without limitation) Personal Information;
- 3.1.5 “**Documentation**” means the document made available to the Customer by the Service Provider online via its web address or such other web address notified by the Service Provider to the Customer from time to time which sets out a description of the Services and the user instructions for the Services;
- 3.1.6 “**Effective Date**” means the date on which this Agreement will come into force and effect;
- 3.1.7 “**Initial Subscription Term**” means 12 (twelve) months from the date of signature;
- 3.1.8 “**Intellectual Property Rights**” means all the rights in and to Intellectual Property including (without limitation) the rights in and to trademarks, service marks, trade names, domain names, logos, get-up, patents, provisional patents, inventions (whether patentable or not), know-how (including confidential industrial and commercial information and techniques in any form), utility models, registered and unregistered design rights, copyright, semi-conductor topography rights, database rights, rights in respect of any new or existing compilation of any data or information not covered under any existing copyright, any structured analysis, reports, application and any resulting know-how, use or any other results originating or following from or as a consequence of data being made available in respect of any of the aforementioned or part thereof, and all similar proprietary rights which may subsist in any part of the world including, where such rights are obtained or enhanced by registration, any registration of such rights and applications and rights to apply for such registrations, as well as any Confidential Information or processes relating to that subject matter;

- 3.1.9 “**Party**” means either the Service Provider or the Customer, and “**Parties**” means both the Internet Service Provider and the Customer;
- 3.1.10 “**Personal Information**” has the meaning ascribed to it in the Protection of Personal Information Act 4 of 2013 (“**POPI**”), and any applicable law in South Africa and/or in any other jurisdiction where the Services are provided and/or used;
- 3.1.11 “**Renewal Period**” means the period described in clause 14.1;
- 3.1.12 “**Services**” means the subscription services provided by the Service Provider to the Customer under this Agreement via the Service Provider’s web address or any other website notified to the Customer by the Service Provider from time to time, as more particularly described in the Documentation;
- 3.1.13 “**Software**” means the online software applications provided by the Service Provider as part of the Services;
- 3.1.14 “**Subscription Fees**” means the subscription fees payable by the Customer to the Service Provider for the User Subscriptions;
- 3.1.15 “**Subscription Term**” means the Initial Subscription Term together with any subsequent Renewal Periods;
- 3.1.16 “**User Subscriptions**” means the user subscriptions purchased by the Customer pursuant, which entitle Authorised Users to access and use the Services and the Documentation in accordance with this Agreement; and
- 3.1.17 “**Virus**” means a device or thing (including any software, code, file or programme) which may prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, Trojan horses, viruses and other similar things or devices.

4. USER SUBSCRIPTIONS

- 4.1 Subject to the Customer purchasing the User Subscriptions in accordance with the terms and conditions of this Agreement, the Service Provider hereby grants to the Customer a non-exclusive, non-transferable right to permit the Authorised Users to use the Services and the Documentation during the Subscription Term solely for the Customer’s internal business operations.
- 4.2 In relation to the Authorised Users, the Customer undertakes that:

- 4.2.1 the maximum number of Authorised Users that it authorises to access and use the Services and the Documentation shall not exceed the number of User Subscriptions it has purchased from time to time;
- 4.2.2 it will not allow or suffer any User Subscription to be used by more than one individual Authorised User;
- 4.2.3 each Authorised User shall keep a secure password for his use of the Services and Documentation;
- 4.2.4 it shall maintain a written, up to date list of current Authorised Users.
- 4.3 The Customer shall not access, store, distribute or transmit any Viruses, or any material during the course of its use of the Services that is unlawful, harmful, threatening, defamatory, obscene, infringing, harassing or racially or ethnically offensive, and the Service Provider reserves the right to disable the Customer's access to any material that breaches the provisions of this clause.
- 4.4 The Customer shall not:
 - 4.4.1 except as may be allowed by any applicable law which is incapable of exclusion by agreement between the Parties:
 - 4.4.1.1 and except to the extent expressly permitted under this Agreement, attempt to copy, modify, duplicate, create derivative works from, frame, mirror, re-publish, download, display, transmit, or distribute all or any portion of the Software and/or Documentation (as applicable) in any form or media or by any means; or
 - 4.4.1.2 attempt to reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software.
- 4.5 The Customer shall prevent any unauthorised access to, or use of, the Services and/or the Documentation and, in the event of any such unauthorised access or use, shall promptly notify the Service Provider.

5. SERVICES

- 5.1 The Service Provider shall, during the Subscription Term, provide the Services and make available the Documentation to the Customer on and subject to the terms of this Agreement.
- 5.2 The Service Provider shall use commercially reasonable endeavours to make the Services available **7 days a week**, except for:
 - 5.2.1 planned maintenance carried out during the maintenance window of December annually; and
 - 5.2.2 unscheduled maintenance performed as may reasonably notified to the Customer.

- 5.3 The Service Provider will, as part of the Services provide the Customer with the Service Provider's standard customer support services during business hours in accordance with the Service Provider's Support Services Policy.

6. THIRD PARTY PROVIDERS

- 6.1 The Customer acknowledges that the Services may enable or assist it to access the website content of, correspond with, and purchase products and services from, third parties via third-party websites and that it does so solely at its own risk.
- 6.2 The Service Provider shall have no liability or obligation whatsoever in relation to the content or use of, or correspondence with, any such third-party website, or any transactions completed, and any contract entered into by the Customer, with any such third party.
- 6.3 The Service Provider does not endorse or approve any third-party website nor the content of any third-party website made available via the Services.

7. SERVICE PROVIDER'S OBLIGATIONS

- 7.1 The Service Provider undertakes that the Services will be performed substantially in accordance with the Documentation and with reasonable skill and care.
- 7.2 The undertaking at clause 7.1 shall not apply to the extent of any non-conformance which is caused by use of the Services contrary to the Service Provider's instructions, or modification or alteration of the Services by any party other than the Service Provider or the Service Provider's duly authorised contractors or agents.
- 7.3 If the Services do not conform with the undertaking in clause 7.1, the Service Provider will use all reasonable commercial endeavours to correct any such non-conformance promptly, or provide the Customer with an alternative means of accomplishing the desired performance.
- 7.4 Notwithstanding the foregoing, the Service Provider:
- 7.4.1 does not warrant that the Customer's use of the Services will be uninterrupted or error-free; and
- 7.4.2 is not responsible for any delays, delivery failures, or any other loss or damage resulting from the transfer of data over communications networks and facilities.
- 7.5 The Service Provider warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this Agreement.

8. CUSTOMER'S OBLIGATIONS

The Customer shall:

- 8.1 provide the Service Provider with:

- 8.1.1 all necessary co-operation in relation to this Agreement; and
- 8.1.2 all necessary access to such information as may be required by the Service Provider;
- 8.2 comply with all applicable laws and regulations with respect to its activities under this Agreement;
- 8.3 ensure that the Authorised Users use the Services and the Documentation in accordance with the terms and conditions of this Agreement; and
- 8.4 be solely responsible for procuring and maintaining its network connections and telecommunications links from its systems to the Service Provider's data centres.

9. CHARGES AND PAYMENT

- 9.1 The Customer shall pay the Subscription Fees to the Service Provider for the User Subscriptions as follows:
 - 9.1.1 The Subscription Fees shall amount to a total of R10 000, based on 10 User Subscriptions at R1 000 per User Subscription.
- 9.2 The Supplier shall invoice the Customer for the Subscription Fees 30 days.
- 9.3 The Customer shall make payment to the Supplier of any amount due under this Agreement within 30 days of receipt of an invoice from the Supplier.
- 9.4 All amounts and fees stated or referred to in this Agreement are exclusive of value added tax (VAT).

10. INTELLECTUAL PROPERTY

- 10.1 The Customer acknowledges and agrees that the Service Provider and/or its licensors own all Intellectual Property Rights in and to the Services and the Documentation. Except as expressly stated herein, this Agreement does not grant the Customer any rights to, or in, patents, copyrights, database rights, trade secrets, trade names, trademarks (whether registered or unregistered), or any other Intellectual Property Rights, or licences in respect of the Services or the Documentation.

11. DATA PRIVACY AND PROTECTION

- 11.1 The Customer shall own all rights, title and interest in and to all of the Customer Data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of the Customer Data.
- 11.2 In the event of any loss or damage to Customer Data, the Customer's sole and exclusive remedy shall be for the Supplier to use reasonable commercial endeavours to restore the lost or damaged Customer Data from the latest back-up of such Customer Data maintained by the Supplier.

12. CONFIDENTIALITY

- 12.1 Each Party may be given access to Confidential Information from the other Party in order to perform its obligations under this Agreement. A Party's Confidential Information shall not be deemed to include information that:
- 12.1.1 is or becomes publicly known other than through any act or omission of the receiving Party;
 - 12.1.2 was in the other Party's lawful possession before the disclosure;
 - 12.1.3 is lawfully disclosed to the receiving Party by a third party without restriction on disclosure;
 - 12.1.4 is independently developed by the receiving Party, which independent development can be shown by written evidence; or
 - 12.1.5 is required to be disclosed by law, by any court of competent jurisdiction or by any regulatory or administrative body.
- 12.2 Each Party shall hold the other's Confidential Information in confidence and, unless required by law, not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.
- 12.3 Each Party shall take all reasonable steps to ensure that the other Party's Confidential Information to which it has access, is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.

13. LIMITATION OF LIABILITY

- 13.1 The Parties agree that, in the event of a breach of any of the provisions of this Agreement, the defaulting Party shall be liable to the other Party for all losses which constitute direct and/or general damages.
- 13.2 The Service Provider shall not be liable for any losses which constitute indirect, special or consequential damages and liability shall at all times be limited to R100,000 (one hundred thousand Rand).

14. TERM AND TERMINATION

- 14.1 This Agreement shall, unless otherwise terminated as provided in this clause 14, commence on the Effective Date and shall continue for the Initial Subscription Term and thereafter this Agreement shall be automatically renewed for successive periods of 12 months (each a "**Renewal Period**"), unless:
- 14.1.1 either Party notifies the other Party of termination, in writing, at least 60 days before the end of the Initial Subscription Term or any Renewal Period, as the case may be; or
 - 14.1.2 otherwise terminated in accordance with the provisions of this Agreement.
- 14.2 Should either Party ("the defaulting party") commit a breach of any of the provisions hereof, then the other Party ("the aggrieved party") shall, if it wishes to enforce its rights hereunder, be obliged to give the defaulting party 14 days written notice to remedy the breach. If the defaulting party fails to comply with such

notice, the aggrieved party shall be entitled to cancel this agreement against the defaulting party or to claim immediate payment and/or performance by the defaulting party of all of the defaulting party's obligations whether or not the due date for payment and/or performance shall have arrived, in either event without prejudice to the aggrieved party's rights to claim damages. The foregoing is without prejudice to such other rights as the aggrieved party may have at law.

- 14.3 On termination of this Agreement for any reason all licences granted under this Agreement shall immediately terminate.

15. FORCE MAJEURE

- 15.1 The Service Provider shall have no liability to the Customer under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes (whether involving the workforce of the Service Provider or any other party), failure of a utility service or transport or telecommunications network, acts of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of Service Providers or sub-contractors, provided that the Customer is notified of such an event and its expected duration.

16. WAIVER

- 16.1 No indulgence which any of the Parties ("the grantor") may grant to any other or others of them ("the grantee(s)") shall constitute a waiver of any of the rights of the grantor, who shall not thereby be precluded from exercising any rights against the grantee(s) which might have arisen in the past or which might arise in the future.
- 16.2 If the Customer is a juristic person, then the representative signing on behalf of the Customer hereby agreed to be personally liable jointly and severally for all obligations that the Customer may have under this Agreement towards the Service Provider.

17. SEVERANCE

- 17.1 If any provision (or part of a provision) of this Agreement is found by any court or administrative body of competent jurisdiction to be invalid, unenforceable or illegal, the other provisions shall remain in force.
- 17.2 If any invalid, unenforceable or illegal provision would be valid, enforceable or legal if some part of it were deleted, the provision shall apply with whatever modification is necessary to give effect to the commercial intention of the Parties.

18. ENTIRE AGREEMENT

- 18.1 This Agreement, and any documents referred to in it, constitute the whole agreement between the Parties and supersede any previous arrangement, understanding or agreement between them relating to the subject matter they cover.

- 18.2 Each of the Parties acknowledges and agrees that in entering into this Agreement it does not rely on any undertaking, promise, assurance, statement, representation, warranty or understanding (whether in writing or not) of any person (whether party to this Agreement or not) relating to the subject matter of this Agreement, other than as expressly set out in this Agreement.

19. ASSIGNMENT

- 19.1 The Customer shall not, without the prior written consent of the Service Provider, assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.
- 19.2 The Service Provider may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

20. GOVERNING LAW AND JURISDICTION

- 20.1 This Agreement and any disputes or claims arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) are governed by and construed in accordance with the laws of South Africa.
- 20.2 The Parties irrevocably agree that the High Court of South Africa has exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

21. EXECUTION IN COUNTERPARTS

- 21.1 This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same agreement as at the date of signature of the Party that signs its counterpart last in time.

SIGNED at **JOHANNESBURG** on this the 1ST day of **FEBRUARY** 2019 in the presence of the undersigned witnesses.

AS WITNESS:

T. Malulele

For and on behalf of

CUSTOMER

G. Moseke

Name: Gugulethu Moseke

Capacity: Director

Who warrants his/her authority hereto

SIGNED at **PRETORIA** on this the 15TH day of **JANUARY** 2019 in the presence of the undersigned witnesses.

AS WITNESS:

T. Brown

For and on behalf of

SERVICE PROVIDER

J Zulu

Name: J. Zulu

Capacity: Director

Who warrants his/her authority hereto.