Cross-Border Commercial Contracts and Consideration

Kevin J. Fandl, J.D., Ph.D. *

ABSTRACT

Private contracts for the exchange of goods and services are increasingly made across national borders. Firms continue to look for the best suppliers for their inputs or the best markets for their outputs, and as the costs of transport come down, global market access goes up. Yet the most fundamental tool of international business—the contract—may be much less "global" than the business itself. The understanding that a firm has of how a contract is formed and enforced in their home jurisdiction may conflict with that of their partners or customers in foreign jurisdictions, leading to unnecessary litigation. This Article will examine the common law contract requirement of consideration, an element that can make or break a contract. It will compare the requirements for forming a contract in civil and common law jurisdictions and explain how consideration can be overlooked or underemphasized, and what effect this has on the enforcement of commercial contracts. Finally, it will offer practical suggestions for parties to avoid a consideration challenge following execution of their agreement.

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* Kevin J. Fandl, Ph.D. (George Mason University), J.D./ M.A. (American University), B.A. (Lock Haven University), is an Assistant Professor of Legal Studies and Strategic Global Management at Temple University. He lectures on comparative contract law around the world, highlighting important distinctions such as the one discussed in this Article.

INTRODUCTION

> Without the fear of punishment for breaking contracts, men will break them whenever it is immediately advantageous for them to do so.
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> Thomas Hobbes, 1588-1679

> [A contract is] an agreement, upon sufficient consideration, to do or not to do a particular thing.
>
> Sir William Blackstone

Doing business across borders has become easier and more accessible for firms than ever before. A firm can source its supplies, manufacturing, or any host of services to a party across the globe with relative ease and at significant cost savings. And when it does so, it will enter into contracts with other parties at home and abroad.[1] When doing so, a firm may be under the impression that the contracts it forms will be interpreted and enforced in the same manner regardless of where the parties are located. However, this is not the case.[2]

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1. E. Allan Farnsworth, *The Past of Promise: An Historical Introduction to Contract*, 69 COLUM. L. REV. 576, 580–83 (1969) (tracing the historical development of trade and describing the need to bargain as a central concept in the development of modern society).

2. *See* Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine*

The validity and enforceability of a commercial contract depends on a number of factors found in both civil and common law jurisdictions, including intent, offer and acceptance. Yet, in common law jurisdictions alone, the act of bargaining is also a requirement. Parties from civil law jurisdictions, which have no bargaining requirement, are often unaware of this requirement and fail to account for it in their contracts.

The concept of consideration has long been a staple of common law contract theory.[3] The basic tenet is that a contract will be found unenforceable for lack of consideration if the parties have failed to risk anything in their bargain.[4] Risk of loss is what differentiates gratuitous motivation from mutual commitment.[5] Accordingly, agreements to give something of value with no expectation of a return promise or performance will generally fail for lack of consideration in common law jurisdictions.[6] In order to be valid, a contract requires that the parties bargained for the value being exchanged—the promisee, in other words, must make his promise to the promisor principally because of the promise made to him by the promisor.[7]

In the commercial context, common law parties generally provide for consideration explicitly within the terms of the contract. Parties in these jurisdictions are acutely aware that their contracts may be unenforceable if they do not explicitly spell out the nature of the consideration and show that it was properly bargained for.[8] This is often done through a combination of recitals and a consideration clause in the body of the contract, discussed below.

In law schools in the United States, a common law jurisdiction, consideration is taught as the "exchange element" in a contract—that is, the

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of Consideration, 48 U. MIAMI L. REV. 45, 48–49 (1993) (examining assertions that consideration is of little value in modern contracts and finding that it remains an essential element of any enforceable contract today).

3. *See, e.g.*, Ernest G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919) (tracing the history of the consideration requirement to the development of British common law); Val D. Ricks, *The Sophisticated Doctrine of Consideration*, 9 GEO. MASON L. REV. 99, 102 (2000).

4. *See, e.g.*, SAMUEL COMYN, A TREATISE OF THE LAW RELATIVE TO CONTRACTS AND AGREEMENTS 15 (1809) (describing a contract lacking consideration as a naked promise and unenforceable).

5. *But see* James D. Gordon III, *Consideration and the Commercial-Gift Dichotomy*, 44 VAND. L. REV. 283, 286–87 (1991) (arguing that "commercial promises" should be enforceable regardless of consideration because they "facilitate economic exchange and therefore should be enforceable.")

6. *See* Richard A. Posner, *Gratuitous Promises in Law and Economics*, 6 J. LEGAL STUD. 411–12 (1977).

7. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71(1) (AM. LAW INST. 1981) ("To constitute consideration, a performance or a return promise must be bargained for.").

8. However, note that reliance is a frequent substitute for consideration and may be used to convert an unenforceable contract into an enforceable quasi-contract. *See, e.g.*, Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443 (1987).

benefit received by one party in exchange for the detriment undertaken by the other.[9] A concise example of consideration is the payment of a fee in order to receive a right to use a piece of property to operate a business. The lessor is suffering a detriment by giving up his right to lease his property to someone else or hold it for himself, in exchange for the lessee's detriment of paying his money to the lessor. Each party benefits from the receipt of the value given by the other and each assumes a risk of loss. Assuming proper offer and acceptance took place, the consideration requirement is satisfied and the contract between these two parties is valid and enforceable.

Contracts that lack valid consideration are usually based on either past consideration or illusory consideration. Past consideration refers to a commitment made in exchange for an act or promise previously agreed to. Illusory consideration refers to a promise by a party who never actually commits to any risk of loss in making their promise, making their commitment *illusory*. Neither of these promises would form a valid contract in a common law jurisdiction.

Common law courts are frequently called upon to decide whether a contract should fail for want of consideration.[10] For instance, a promisor may promise a certain good or service to another party in exchange for payment and then, prior to acceptance by the promisee, the promisor may rescind his offer.[11] The promisee will not be able to claim the existence of a contract because no consideration was provided to the promisor that would obligate him to perform his promise. That would not be the case in most civil law jurisdictions, where intent to make an offer accompanied by a legal cause may be enough to create an irrevocable offer and, ultimately, a contract.[12]

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9. *See, e.g.*,. *Elements of a Contract*, U. NEW MEX. JUD. EDUC. CTR., http://jec.unm.edu/education/online-training/contract-law-tutorial/contract-fundamentals-part-2 (last visited Apr. 6, 2016) ("Something of value was promised in exchange for the specified action or nonaction.").

10. *See* Sharington v. Stratton, Plow. 308 ("because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation . . . So that there is great deliberation used in the making of deeds, for which reason they arc received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made."); see also Armstrong v. Toler, 24 U.S. 258, 260–61 (1826) (invalidating a contract based upon illegal consideration); Aller v. Aller, 40 N.J.L. 446 (Sup. Ct. 1878) (challenging a contract under seal as a foolproof substitute for consideration and finding that even sealed agreements can be challenged on the basis of fraud); Greenleaf v. Barker (1590) 78 Eng. Rep. 449 (K.B.) (invalidating a contract based upon the preexisting duty rule); Hunt v. Bate (1568) 73 Eng. Rep. 605 (K.B.) (invalidating a contract based upon past consideration).

11. Note that there are exceptions to this rule, such as offers to sell goods made by merchants in writing. See U.C.C. § 2-205 (AM. LAW INST. 2002).

12. Consider for example the law of Colombia, which requires for validity that a contract be entered into freely by at least two parties with capacity and consent. *See* CODIGO CIVIL [C.C.] [CIVIL CODE] art. 1495 (Colom.).

Consideration in the common law context is meant to confirm the intent of the parties to bind themselves to an agreement. The assumption is that if there is no consideration, and no substitute for the missing consideration, there are only empty promises with no affirmation of commitment to be bound by the terms of those promises. Stated another way, consideration serves as a practical confirmation of party's intent.[13]

In civil law jurisdictions, which constitute the vast majority of countries, the concept of consideration does not exist. A contract that fails to demonstrate a bargained-for-exchange, often the heart of consideration in a common law jurisdiction, can still be valid in these jurisdictions as long as the intent of the parties is clear and the cause of the contract is legal.[14] This suggests that far more agreements are valid and enforceable in civil law jurisdictions than would be in common law jurisdictions.

On the contrary, common law jurisdictions usually demand evidence of a bargain or some other inducement to enter the contract to make it enforceable. For example, consider a health food advocate who tells a skeptic that she will give her $500 if the skeptic eats only fresh fruits and vegetables for a month. The skeptic agrees and abides by the promise for several weeks. Just before the end of the month, the advocate dies of a heart attack. Assuming that the advocate intended to give the skeptic the money for eating fresh fruits and vegetables, a court should theoretically enforce this promise, and likely would in a civil law court. In the common law, however, a court may find no contract due to a lack of consideration since the skeptic didn't actually give up anything of value and did not complete the promise.[15]

Yet common law is not as formalistic in the formation of a contract as civil law is.[16] A common law court will recognize the formation of a contract when the parties have completed their bargaining, regardless of the conclusion of any formalities or manifestation of intent.[17] Stated simply, a contract can be formed without explicit intent in common law jurisdictions, whereas intent alone can make or break a contract in civil law jurisdictions.[18] In most civil law

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13. *See* Val Ricks, *Assent is Not an Element of Contract Formation*, 61 KAN. L.R. 591 (2013) (arguing that assent to the contract is not a separate and distinct element from consideration).

14. U.C.C. § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (listing the elements of a valid contract, which do not include consideration).

15. Note that there may be a claim for reliance here. Reliance, though not actually a legal claim in contract law, may allow a party who reasonably relied on the promise of another to its detriment and where the promisor could have foreseen such reliance, may have a claim for damages accrued from that reliance.

16. *See, e.g.*, Gregory Klass, *Intent to Contract*, 95 VA. L. REV. 1437 (2009) (providing a comprehensive examination of the intent requirement in contracts and distinguishing British from American interpretations of that requirement).

17. *See* RESTATEMENT (SECOND) OF CONTRACTS § 21 (AM. LAW INST. 1981) ("Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract.").

18. *See, e.g.*, The Commission of European Contract Law, Principles of European Contract

jurisdictions, formalities are required for the formation of certain contracts, such as marriage contracts, mortgages, and gifts.[19] These formalities may include signatures made in front of notary publics, for instance. Without notarization or other written affirmation, many contracts would be invalid in civil law jurisdictions.

Differences in the interpretation of contracts between common law and civil law jurisdictions can be disastrous for firms. A common law-based firm that does business with firms in civil law jurisdictions may be surprised to learn that their promise constitutes an enforceable contract when they assumed it was only gratuitous. Likewise, a firm in a civil law jurisdiction doing business with a common law firm may discover that their draft contract might be enforced by a common law court despite the lack of clearly expressed consent between the parties. In order to avoid these potentially costly surprises, this Article recommends that an aspiring transnational entrepreneur "familiarize herself with the CISG and with the contract law of the foreign country in which she plans on doing business."[20]

This Article examines the role of consideration in commercial contracts and assess whether international contracting parties need to worry about this requirement when working across civil and common law jurisdictions. The Article begins by presenting a brief historical overview of the development of contract rules in Roman law and how enforcement was uniquely interpreted between England and continental Europe, leading to the current split in contract interpretation that we have today. This Article then discusses the importance of consideration in commercial contracts today and how some firms contort their contracts to ensure compliance with this doctrine. Finally, this Article explains how disputes in interpretation can arise in the context of multinational firm contracts between civil and common law jurisdictions and how to avoid those disputes.

It is important to note at the outset of this Article that the concerns it raises herein apply most directly to the following contract areas:

- Service contracts (employment, construction, consulting, etc.) between parties in both common law and civil law systems;
- Goods contracts between parties in both common law and civil systems where the Convention on the International Sale of Goods (CISG) does not apply; and,
- Goods contracts between parties applying the CISG but enforcing the contract in a common law jurisdiction

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Law art. 2:101 cmt. B (Ole Lando & Hugh Beale eds., 2000).

19. These are generally known as solemn contracts.

20. Larry A. DiMatteo, *An International Contract Law Formula: The Informality of International Business Transactions Plus the Internationalization of Contract Law Equals Unexpected Contract Liability*, 23 SYRACUSE J. INT'L L. & COM. 67–68 (1997).

Purely domestic contracts in common or civil law jurisdictions would be validated and enforced in accordance with understood domestic principles of contract law, be they common or civil law concepts. As the Article discusses later, the CISG follows local law to assess valid formation, so consideration rules would apply to a CISG contract if it were to be interpreted by a common law court.[21]

The next Section addresses the origins of contract law in the civil and common law contexts. This will help the reader to better understand why different countries use different standards to decide if a contract has been properly formed and why these concerns remain today despite the globalization of business.

I.
HISTORICAL DEVELOPMENT OF THE CONCEPT OF CONSIDERATION

A. Causa and Consideration[22]

Common law contracts developed from merchant rules in the eleventh century, when the Count of Flanders decentralized the court system to allow local tribunals to handle legal matters, including commercial contracts. However, in the earliest common law cases, no action existed to allow for recovery on a breach of contract claim.[23] From this point and through the abandonment of local courts in the late fifteenth century, two principal categories of actions were brought to common law courts to resolve "contract" disputes—debt and covenant.[24] Debt contracts were explicit or implicit agreements to pay a fixed sum to another party. Covenant actions were for breaches of existing promises made under seal. Executory contracts—contracts that have been agreed upon but not yet fully performed—were not enforceable in court at this time. Thus, it was impossible to legally force someone to comply with their contractual obligations not made under seal in this era, even if one party had already performed and the other had not.

In these medieval courts, then, the only way to enforce an executed contract was to prove that a promise was explicitly made to pay a debt to the promisee and to bring a writ of debt to the court.[25] The defendant promisor could then

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21. The CISG automatically governs contracts between diverse parties with their principal place of business in CISG member states when the contract involves the sale of goods.

22. Note that excerpts from this Section have been reprinted in the author's book, KEVIN J. FANDL, INSIDE THE AMERICAN LEGAL MIND (Routledge, 2015).

23. *See* George F. Deiser, *The Origin of Assumpsit*, 25 HARV. L. REV. 428, 438 (1912).

24. *See* Arthur T. Von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Contract Formation and Form*, 15 LA. L. REV. 687, 699–701 (1955).

25. A writ is a "form of action" that was used to initiate a case in medieval England. A writ was initiated with a letter from the King to local authorities addressing a narrow set of circumstances. And although writs were meant to be flexible and applicable to any type of action, in

request a "wager of law," which allowed him to testify to the court that he did not owe any such debt to the plaintiff. If the defendant produced eleven individuals to swear that they believed him, the case was dismissed.[26] It should be noted that the wager of law defense was never permitted in U.S. courts.[27]

Before establishing the writ of *assumpsit*, discussed below, common law courts took a formulaic approach to resolving cases.[28] A pleading had to meet the specific requirements set forth in the writ to proceed. For this reason, writs were created for hundreds of specific actions, such as separate writs for trespass to cattle and trespass to pigs.[29] Accordingly, since no cause of action existed for breach of covenant yet, parties relied on other writs to plead their cases. The most successful form of action was for trespass.[30]

Trespass arose as a writ out of the Statute of Westminster II in 1285, which allowed the courts to create forms of action and remedies as necessary in each individual instance.[31] Between 1285 and 1348, a number of actions were brought for trespass on the case alleging what might today be considered an action for breach of contract.[32]

At this time in history, parties had great difficulty enforcing informal and executory contracts due to the inability to prove the existence of a contract not made under seal.[33] These agreements were known as *nudum pactum* or naked promises because they lacked any *quid pro quo*, or exchange.[34] In the middle of the fifteenth century, lawyers began utilizing a new cause of action—*assumpsit*.[35] This was a claim made to enforce a contract, written or verbal, not

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practice they were highly limited and formulaic. *See generally* Michael J. Sechler, *Supply Versus Demand for Efficient Legal Rules: Evidence from Early English "Contract" Law and the Rise of Assumpsit*, 73 U. PITT. L. REV. 161 (2011).

26. BOUVIER'S LAW DICTIONARY (1856).

27. Childress v. Emory, 21 U.S. 642 (1823) ("The wager of law, if it ever had a legal existence in the United States, is now completely abolished.").

28. *See* Deiser, *supra* note 23, at 433 ("[I]n its early history classes of actions were of less importance than rigorous adherence to the formula of the class or form of action chosen.").

29. *See id*.

30. *See id*.

31. *See id*. at 428 (allowing for a flexible and adaptable approach to development of the common law).

32. *See id*. at 431–32 (describing briefly the sixteen "actions on the case" that might serve as precursors to the creation of the writ of *assumpsit*).

33. For instance, in two fourteenth century cases, plaintiffs brought actions under the writ of trespass where today the action would lie clearly within contract law. Both cases involved a seller engaging in a fraudulent sale. However, as these were likely unsealed agreements, trespass was the only available action. Plaintiffs lost in both cases. *See* Sechler, *supra* note 25.

34. *See* COMYN, *supra* note 5, at 1–2.

35. *See* William M. McGovern Jr., *The Enforcement of Informal Contracts in the Later Middle Ages*, 59 CALIF. L.R. 1145, 1151–52 (1971) (discussing a case from 1369 in which the new writ of *assumpsit* first arose in the case of a patient contracting with a doctor for medical services, where those services were incompetently performed. The author notes that while this was the first known use of the writ, it was not regularly used to enforce contracts until at least the following

under seal or recorded (as a debt contract might be). It served as an independent cause of action and could be brought, unlike a writ of debt, in front of a jury where wagers of law were not permitted.

The writ of *assumpsit* was not immediately recognized as a valid contract enforcement action by the medieval courts in England.[36] However, this changed with *Slade's Case* in 1602. In that case, John Slade brought an action in *assumpsit* against Humphrey Morley, claiming that Slade promised to sell and Morley promised to buy a crop of wheat and rye for £16.[37] Morley reneged on the agreement and Slade sued for what we would consider today a breach of contract.[38] The case dragged on for six years until Chief Judge Lord Popham issued a written opinion formally recognizing the *assumpsit* cause of action:

> [E]very contract executory importeth in it self an Assumpsit, for when one agreeth to pay money, or to deliver anything, thereby he promiseth to pay, or deliver it; and therefore when one selleth any goods to another, and agreeth to deliver them at a day to come, and the other **in consideration thereof** promiseth to pay so much money to the other (emphasis added).[39]

The first recorded case in which *assumpsit*—meaning to undertake—was pleaded in a trespass action was the famous Humbler Ferry case.[40] In that case, a ferryman promised to transport a mare across a river.[41] The ferryman overloaded the boat and it sank, causing the mare to drown.[42] The plaintiff, John Bukton, sought to recover for the loss of the mare by bringing an action in covenant.[43] But because a covenant required an agreement made under seal, which Bukton did not have, he resorted to the claim of trespass on the case.[44]

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century).

36. In the earliest cases referencing *assumpsi*t, parties continued to rely on the writ of trespass to bring their claim. *See, e.g.*, Prince v. Huish (1391), *in* SELECT CASES OF TRESPASS IN THE KING'S COURTS VOL. II, 1307–99, in 103 SELDEN SOC'Y 430–31 (Morris S. Arnold ed., 1987) (using the writ of trespass to enforce an agreement with a cloth dyer who promised to competently dye cloth for the buyer and who did so incompetently); Rogerstun v. Northcotes (1366), in Select Cases of Trespass in the King's Courts Vol. II, 1307–99, in 103 SELDEN SOC'Y 423–24 (Morris S. Arnold ed., 1987) (applying the writ of trespass against a party who undertook to transport wheat by boat but carelessly drove the boat such that the wheat was lost); Bukton v. Tounesende (1348) Y.B. 22 Ass. 94, pl. 41 (KB) ["Humber Ferry Case"] (allowing for the first time in recorded history the use of the writ of trespass in a breach of covenant case. Defendant promised to transport a horse across a river but overloaded the boat such that the horse was killed. The court applied the law of trespass to badly-performed agreement). *See generally* Sechler, *supra* note 26.

37. Slade v. Morley (1602) 4 Co. Rep. 92b.

38. *Id*.

39. Slade v. Morley (1602) 4 Co. Rep. 92b.

40. Bukton v. Tounesende (1348) Y.B. 22 Ass. 94, pl. 41 (KB).

41. *Id*.

42. Note that this was an action to recover damages in tort for injury to person and property.

43. *Id*.

44. *See* J.B. Ames, The History of Assumpsit, 2 Harv. L. Rev. 1–2 (1888).

The legal claim of *assumpsit* quickly overtook the writs of debt and trespass as the primary action brought for breach of contract.[45] This is the standard contract enforcement action that the common law courts still follow today (though it is no longer called *assumpsit*). It was this writ of *assumpsit* that led to the need for the concept of consideration.

> [I]n all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal. This thing, which is the price or motive of the contract, we call the consideration: and it must be a lawful thing in itself, or else the contract is void.[46]

Assumpsit was largely an action to enforce commercial contracts, which were often informal (*parol*) and executory (not immediately performed).[47] The common law courts were heavily influenced by merchants who had been seeking recourse for breaches of informal executory contracts (contracts not under seal where parties have not yet completed their performance) since the eleventh century, and *assumpsit* provided such recourse.[48] Facilitation of economic arrangements became the motivating factor in enforcing medieval contracts.

Though the sixteenth century English courts were willing to enforce these informal and executory contracts, they and the merchants invoking these actions were aware of the risk of making every agreement between parties a binding contract. Given the fact that the merchants who engaged in these transactions had little opportunity to formalize the agreements in front of a notary, as was required under most civil law systems then under development, the courts chose instead to create a requirement that the parties bargained for their transaction in lieu of the formalities otherwise required.[49] Hence, the creation of consideration came about.

By the middle of the nineteenth century, courts recognized two forms of *assumpsit*—express and implied, as defined below in 1856:

> An express assumpsit is where one undertakes verbally or in writing, not under seal, or by matter of record, to perform an act, or to pay a sum of money to another.
> An implied assumpsit is where one has not made any formal promise to do an act or to pay a sum of money to another, but who is presumed from his conduct to have assumed to do what is in point of law just and right. . .it is a rule that he who

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45. *See, e.g.*, Ricks, *supra* note 4, at 104–06 ("In an assumpsit case where both promise and consideration must be alleged, the combination of promise and the requirement of causa reciproca means that the promise is given for the consideration, and vice versa."). *See also* W.T. Barbour, *The History of Contract in Early English Equity*, 3 L.Q. REV. 173 (discussing the slow development of *assumpsit* as a contract claim rather than a tort claim).

46. COMYN, *supra* note 5, at 8.

47. *See, e.g.*, Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration,* 101 COLUM. L. REV. 1876, 1887 (explaining that in the absence of separate contract law, the writ of *assumpsit* was used to enforce a debt by implying a promise to pay).

48. *See, e.g.*, *id*. at 2.

49. *See* Von Mehren, *supra* note 25, at 700–02.

> desires the antecedent, must abide by the consequent; as, if I receive a loaf of bread or a newspaper daily sent to my house without orders, and I use it without objection, I am presumed to have accepted the terms upon which the person sending it had in contemplation, that I should pay a fair price for it.[50]

Though civil law jurisdictions never adopted consideration, similarities can be drawn between their doctrine of *causa* and the emerging common law doctrine of consideration at the time.[51] Before explaining the similarities and differences between the two substantive legal concepts, it is important to understand the foundational differences between them. Consideration is a judicially created, common law doctrine, and by its nature, "springs from statutes, regulations, and constitutional provisions" unlike in the civil law.[52] In the civil law, what is "law" and what is a "contract" is determined by an exclusive list of legislative materials (e.g., statutes, regulations), and the function of courts and judges is to apply that "law" in a prescribed and technical manner.[53] As stated by authors John Henry Merryman and Rogelio Perez-Perdomo in their book *The Civil Law Tradition*, "[t]o the average judge, lawyer, or law student in [civil law countries], the traditional theory of sources of law represent the basic truth."[54] Hence, *causa* as a requirement partly applies because it is statutorily required as a complete codification of the "law."[55]

The loose definition of *causa* in civil law jurisdictions would be party consent and lawful purpose. As an example of the civil law's statutory requirements, France's civil code requires "*une cause licite dans l'obligation*."[56] The provision translates to "a lawful purpose obliged" or the civil law

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50. BOUVIER'S LAW DICTIONARY (1856).

51. *See e.g.,* James Gordley, *Louisiana and the Common Law: Le Jour de Gloire, Est-Il Passe?*, 24 TUL. EUR. & CIV. L.F. 191 (2009); Lorenzen, *supra* note 4; Caslav Pejovic, *Civil Law and Common Law: Two Different Paths Leading to the Same Goal*, 32 VICTORIA U. WELLINGTON L. REV. 817 (2001).

52. Charles R. Calleros, *Introducing Civil Law Students to Common Law Legal Method Through Contract Law*, 60 J. LEGAL EDUC. 641, 650 (2010-2011).

53. *See* JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 24 (3d ed. 2007).

54. JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 25 (3d ed. 2007).

55. Calleros, *supra* note 49, n. 13.

> The German scholar Savigny doubted that a code could comprehensively anticipate "every case that may arise," because "there are positively no limits to the varieties of actual combinations of circumstances." Frederick Charles von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence 38 (Abraham Hayward transl., The Legal Classics Library 1986). Nonetheless, Savigny cleverly used an example from geometry to describe the technique that judges might use to apply code provision and underlying principle to resolve any dispute; "In every triangle. . .there are certain data, from the relations of which all the rest are necessarily deductible: thus, given two sides and the included angle the while triangle is given. In like manner, every part of our law has points by which the rest may be given: these may be termed the leading axioms." *Id*. at 38–39.

56. *Id*. at 651 (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1108 (Fr.)).

requirement of *causa*.[57] While the requirement of consideration is often found in common law legislative materials, its definition and application to particular cases is often bound to prior case law. The differences in both the source of law and interpretation of the law are important to keep in mind when analyzing the doctrine of consideration and *causa*.

Some commentators suggest that the basis of a cause requirement in civil law is morality.[58] To prevent parties from being taken advantage of by, for example, agreeing to a usurious contract, the *causa* doctrine steps in to block enforcement of a contract with an illegal purpose.[59] A prime example of this concept is in the adequacy of the value exchanged between the parties. In most civil law jurisdictions, a price that is much more than the value of the object (usually real property) bargained for will be unenforceable. Consider the French Civil Code, which states, "[i]f the price of an immovable object is inadequate by more than seven-twelfths, the seller has the right to demand rescission of the sale."[60] This concept of "just sale" creates an adequacy requirement that does not exist in the common law. A common law court leaves the price and value decision up to the parties.[61]

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57. To illustrate a barrier in comparing the two legal systems, the French law is to be interpreted in the strictest sense, whereas the common law incorporates the doctrines of stare decisis and precedent to determine the law's meaning. *Id*. at 642. Meanwhile in the French system the *Cour de Cassation* (the highest court also called the court of last resort of civil obligations) can ignore prior rulings and a lower court can ignore a higher court's decision. Id. Another example can be seen in the Italian Civil Code of 1942 which provides that:

> In interpreting the statute, no other meaning can be attributed to it than that made clear by the actual significance of the words according to the connection between them, and by the intention of the legislature.
>
> If a controversy cannot be decided by a precise provision, consideration is given to provisions that regulate similar cases or analogous matters; if the case still remains in doubt, it is decided according to general principles of the legal order of the State.

MERRYMAN, *supra* note 50, at 44. The Code itself provides the interpretive framework, and, similar to many civil law countries, relies heavily on the provision's language itself and legislative intent. *Id*. If something remains unclear, as a last resort, the court is to refer to the "legal order of the State," which echoes to the notions of natural law that today's common law system has drifted far away from. *Id*. at 45. While in practice civil law countries have turned away from natural law and do get influenced by prior judicial decisions, the Code and the dominant judicial theories echo to notions the common law is essentially distinct from. *Id*. at 45–47. The interpretive differences also raise another key difference by inferring that the civil law, being legislation bound, may be slower to change than the common law.

58. *See* CHANTAL MAC, FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW 32 (2008); Lorenzen, *supra* note 4, at 633.

59. *See* Boris Kozolchyk, *Comparative Commercial Law and the NLCIFT Methodology for Economic Development*, 30 ARIZ. J. INT'L & COMP. L. 65–66 (2013).

60. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 109 (Fr.); HENRY P. DEVRIES, NINA M. GASTON, & REGINA B. LOENING, FRENCH LAW 5–18 (1985).

61. *See* SAMUEL COMYN, THE LAW OF CONTRACTS AND PROMISES UPON VARIOUS SUBJECTS AND WITH PARTICULAR PERSONS AS SETTLED IN THE ACTION OF ASSUMPSIT 16 (1835) ("But if there be any benefit, labour, or prejudice, however trifling, it is deemed a sufficient consideration."); DiMatteo, *supra* note 21, at 75.

The doctrine of consideration and the legal requirement for *causa* both deal with the formation of lawful contracts. Civil law countries, at least theoretically, view their codifications of law as complete.[62] It follows that the determination as to whether a contract has formed will depend on whether it meets the statutory requirements. As an example of the requirements to form a valid civil law contract, Article 1108 of the French *Code Civil* requires the following:

> *Quatre conditions sont essentialles pour la validite d'une convention*:
> (Four conditions are essential for the validity of an agreement)
>
> 1. Le consentement de la partie qui s'oblige;
> (The consent of the obligated party)
> 2. Sa capacite de contracter;
> ([The obligated party's] capacity to contract)
> 3. Un object certain qui forma la matiere de l'engagement;
> (A certain object which formed the subject of the agreement)
> 4. Une cause licite dans l'obligation.
> (A lawful purpose.)[63]

Contrast these contractual validity requirements with the requirements in a common law jurisdiction, which include mutual assent, offer, acceptance and consideration. While the civil law requirements focus on the consent of the parties and the object of the contract, the common law requirements focus on the bargain between the parties, regardless of the object. Consideration is described as the bargained-for-exchange between the parties and is often explained in terms of mutuality. It pits one party to the contract against the other and requires a bargaining or negotiation process between them. *Causa* is a principle as much as it is a legal requirement for a contract. Its origins stem from the legal theory that a contract required both consent and some cause "that the law would respect."[64] Historically, the theory behind *causa* can be divided into two legal actions—one for gratuitous contracts and one for onerous contracts.[65] In the gratuitous contract there must be the *causa* of exercising liberality and conferring some benefit on another, and in the onerous contract there must be the *causa* of receiving the equivalent of what one gave up.[66] The Louisiana Civil Code defines *causa* as "the reason whereby a party obligates himself," hence it is often described as the contractual motive or purpose.[67]

Common law consideration and civil law *causa* do have important differences with respect to the problems these doctrines were created to solve. The common law focus on unenforceable promises is not as important in civil

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62. MERRYMAN, *supra* note 50, at 33.

63. Calleros, *supra* note 49, at 651 (citing CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1108 (Fr.)) (translation done by Google); *see also,* RAYMOND YOUNGS, ENGLISH, FRENCH & GERMAN COMPARATIVE LAW 545 (2014).

64. Gordley, *supra* note 48, at 192.

65. *See id*.

66. *See id*.

67. *See* Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34 H.K. L.J. 339, 354 (2004).

law.[68] Instead, consent takes on an important role in determining whether a contract exists in civil law jurisdictions, as illustrated by its position as the first requirement in the French *Code Civil* cited above.[69]

However, civil law contracts based upon French law do create more uncertainty about what would be considered a lawful contract through their doctrine of *causa*.[70] As part of the contract formation process, the civil code requires that the contract maintain a lawful object and purpose, though this lawful purpose is not clearly defined by statute, making conclusive determinations challenging.[71]

The doctrine of consideration, though mentioned as early as 1602 in *Slade's Case,* was used interchangeably with the civil law doctrine of *causa* in prior English court decisions. In fact, Lord Mansfield attempted to eliminate the distinct use of consideration as a requirement for a valid contract in an opinion issued in 1765. He wrote, "I take it, that the ancient notion about the want of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration."[72] He went on to conclude, "[i]n commercial cases amongst merchants, the want of consideration is not an objection."[73]

However, Lord Mansfield's dismissal of consideration was short-lived. The need for consideration in contracts was reaffirmed ten years later in the case of *Rann v. Hughes*.[74] In that case, the court held that "every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of [England] supplies no means, nor affords any remedy, to compel the performance of an agreement made without sufficient consideration."[75]

The doctrine of consideration was clarified in subsequent cases in England and the British colonies, including the United States. Today, we can identify the following characteristics of consideration:

1. A document not under seal requires consideration.
2. Consideration requires a benefit to the promisor or a detriment to the promisee.
3. Moral consideration is insufficient.

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68. *See id.* at 349.

69. *See id.*

70. *See, e.g.*, J. FLOUR & J.L. AUBERT, LES OBLIGATIONS: L'ACTE JURIDIQUE (5th ed. 1991) (finding *causa* to be "one of the most uncertain ideas of civil law.").

71. *See* YOUNGS, *supra* note 59, at 546; *see also* CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1131 (Fr.).

72. Pillans v. Van Mierop (1765) 3 Burr. 1663, 97 Eng. Rep. 1035, 1038 (KB) (quoting from Lord Mansfield).

73. *Id. Contra* COMYN, *supra* note 5, at 13. (suggesting that Lord Mansfield's comment in the *Pillans* case referred only to cases of bills in the hands of the endorsee and not to general informal contracts).

74. Rann v. Hughes (1778) 7 T.R. 350n, 101 Eng. Rep. 1014.

75. *Id.*

4. The consideration must be induced by the promise.
5. The adequacy (amount) of the consideration is irrelevant, unless fraudulent or sham consideration.[76]

Courts have, in some limited instances, recognized moral obligations as valid consideration. In the 1782 case of *Hawkes v. Saunders*, Lord Mansfield found moral consideration to be sufficient to enforce a variety of promises, including the promise to pay a debt discharged by bankruptcy or barred by the statute of limitations, for instance.[77] However, this approach was rejected by British courts in later cases, such as *Eastwood v. Kenyon*, where a promise to pay a debt absent consideration was found to be unenforceable.[78]

Today, moral obligations are not valid consideration in most cases within common law courts. In the United States courts have carved out a small cadre of exceptions, including an adult's promise to pay the debt of a minor,[79] the promise to pay a debt that has been discharged due to bankruptcy or barred by the statute of limitations,[80] and a promise in which the promisor receives a material benefit and promises to pay out of moral obligation.[81] In most other cases, moral obligations are unenforceable in common law courts.

Despite the argument that *causa* cannot be compared to consideration due to structural and doctrinal differences between the two systems,[82] scholars continue to analogize the two.[83] Arguably, the reasoning for the analogy stems from the fact that the requirement of consideration in common law jurisdictions prevents the enforcement of gratuitous promises or contracts with third-party beneficiaries, whereas a civil law jurisdiction will allow a legal *causa* to support such gratuitous promises and agreements with third-party beneficiaries.[84] With this in mind, both doctrines can be seen as an attempt to draw a line between enforceable and unenforceable contracts, with *causa* drawing more of a theoretical rule as opposed to a hard, practical rule like bargained-for-exchange.[85]

One scholar's explanation for this distinction refers back to the underlying premise of consent in civil law contracts and "the moral principle that contracts

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76. *See* Lorenzen, *supra* note 4, at 622–23 (note that the benefit/detriment theory of consideration listed here has largely been replaced with the bargain theory, which requires that the parties have entered the agreement on the inducement of the other's promise).

77. Hawkes v. Saunders (1782) 1 Cowp. 289 (KB).

78. Eastwood v. Kenyon (1782) 11 Ad. & E. 438, 452–53 (QB).

79. Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825).

80. Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957).

81. Webb v. McGowin, 27 Ala. App. 82, 86 (1935).

82. Charles Calleros, *Cause, Consideration, Promissory Estoppel, and Promises under Deed: What our Students Should Know about Enforcement of Promises in a Historical and International Context*, 13 CHI.-KENT J. INT'L & COMP. L. 83, 90–92 (2013).

83. *See, e.g.*, Gordley, *supra* note 48, at 193; Pejovic, *supra* note 48, at 821–22.

84. *See* Pejovic, *supra* note 48, at 822.

85. *See* Calleros, *supra* note 49, at 651.

should be observed," contrasted with a "medieval system of common law writs that began with a decidedly restrictive view of enforceable obligations."[86] Julian Hermida argues that this underlying distinction would make the two concepts incomparable and that each doctrine is trying to solve its own problem.[87] And though both doctrines set boundaries on the types of contracts that will be enforced, Hermida argues that *causa* "aims at reflecting Aristotle's distinction between liberality and commutative justice," while consideration is "merely concerned about limiting in practice the promises that could be enforced."[88]

Whether the doctrines are comparable or too distinct, the underlying analogy behind the comparison is that both doctrines attempt to provide the "reason that justifies the assumed obligation."[89] Going further, one might argue that the "reason" is not necessarily *causa* or the contract's motive but consent in civil law and getting the benefit of the bargain in common law. The earliest of comparative scholars noted that the idea of *causa* was hard to describe as one particular thing as it applied in many different contexts. Perhaps due to its theoretical nature, early U.S. scholars deemed *causa* as "serv[ing] no proper object" because of its lack of a definite and precise meaning.[90]

Unlike the common law, the civil law places special emphasis on the categorization and classification of contracts.[91] The civil law code that dictates which contracts will be enforced is often divided into the "general law of contracts" (*lex generalis*) and the special law of individual contract (*lex specialis*).[92] Consider, for example, contract law in Colombia, a civil law jurisdiction. They divide contracts into three categories: 1) consensual contracts, which require only consent and legal purpose to be valid; 2) solemn contracts, which require notarization to be valid, and; 3) real contracts, which require the delivery of the object to be valid. For a contract to be valid, it must fall within one of these three categories.[93]

Further, civil law legal scholars (who are seen as "dominant actors of the civil law")[94] have divided contracts into more refined categories such as "nominated and innominate, consensual and real, bilateral and unilateral, and

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86. *Id*. at 653 (describing the concept as cause/causa as "expansive" and reflecting the "Napoleonic Code Civil's respect for the autonomy of the partiesFalse").

87. *See* Hermida, *supra* note 63, at 354–55.

88. *Id*. at 355.

89. *Id*. at 354.

90. Lorenzen, *supra* note 4, at 646 ("There is in reality no definable 'doctrine' of causa. The term 'causa' includes a variety of notions which may equally well be derived from the nature of a juristic act and from considerations of equity.") (notably framed in terms of "law" and "equity").

91. Hermida, *supra* note ,63, at 345.

92. *Id*.

93. *See, e.g.,* http://www.abogadosbogota.info/requisitos-de-validez-de-los-contratos (describing the legal requirements to form a valid contract in Colombia).

94. MERRYMAN, *supra* note 50, at 60.

commutative and aleatory, among others."[95] Each type is said to have its own "legal nature."[96] Some of the categories are familiar in common law systems, but their definitions are different. In contrast, the common law has established formation principles that apply to all contracts with equitable exceptions.

Additionally, formalities, such as a writing or certification by a notary (equivalent to a lawyer in most civil law countries) remain part of the civil code requirements in many parts of Latin America, including in the Chilean civil code.[97] Writing requirements are also found for certain types of contracts in the French and German civil codes,[98] which would also be unenforceable under the parol evidence rule in common law which requires certain oral contracts to be evidenced by a writing to be enforceable. The rationale for requiring a writing in civil law systems is to uncover the true intent of the parties outside of the contract terms alone and "to stamp out the courts' reliance on fraudulent testimonies purchased by the parties or their attorneys from 'witnesses' who offered their 'testimony' to the highest bidder literally steps away from the courtroom where judges and their clerks adjudicated contractual intent."[99]

The common law appears more concerned with distinction as opposed to classification, as seen in the courts of law versus equity and the contract versus the quasi-contract (e.g., promissory estoppel/reliance).[100] There are challenges in trying to compare one system to the other. Saying that consideration is not required in civil law countries is true but misleading. The relevant code will dictate what is required for contract validity in the civil law country. Determining whether a contract has a *causa* might force the lawyer to classify the contract at hand.[101] If the contract is bilateral or onerous then *causa* takes the form of "receiving the equivalent of what one gave up," which, semantics aside, is very similar to the bargained-for-exchange definition of consideration.[102] The similarities and distinctions of the two systems may go on *ad infinitum* as the two continue to change over time. Understanding which contracts are valid and legally enforceable requires a lawyer to understand the most important similarities and differences not just between contract laws, but also the legal systems as a whole.

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95. Hermida, *supra* note 63, at 346. *See also* Farnsworth, *supra* note 2, at 589–90 (explaining the shortcomings of contracts that require execution to prove their existence).

96. *Id*.

97. Kozolchyk, *supra* note 55, at 68.

98. These include non-commercial financial obligations exceeding a minimum amount, mortgages, and marriage contracts, among other things. *See* Arthur T. Von Mehren, *Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1019–20.

99. Kozolchyk, *supra* note 55, at 69.

100. This is opinion only.

101. *Causa* will likely be presumed and it is up to the party disputing the contract to prove its non-existence. *See* Hermida, *supra* note 63, at 355.

102. *See, e.g., id*.; *see also* Gordley, *supra* note 48, at 192, 205.

Is the common law approach workable for commercial contracts? Though the civil law approach codified in the nineteenth century is clear and enforces a broader array of contracts than the common law, the civil system is rigid and difficult to change in light of the creation of new forms of contracts (e.g., online contracts, franchise agreements, shrink wrap agreements). The common law, on the other hand, is flexible and constantly evolving to meet the changing nature of contracting between parties.

In the common law, "[e]very new case is an experiment. . .The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be reexamined."[103] And "consideration [is] the way to isolate. . .promises worthy of enforcement."[104] The next Section examines the application of consideration in common law jurisdictions.

II.
THE PRACTICAL EFFECTS OF THE CONSIDERATION DOCTRINE

As we can now see clearly, the element of consideration is essential in common law contracts, but not necessarily in civil law contracts. In fact, since the mid-1970s, missing consideration in a common law contract has led to enforcement challenges in over 300 cases.[105] What does this mean for parties engaged in business transactions that cross common and civil law jurisdictions? To better understand the relevance of this concern, it may be helpful to examine some seminal common law cases that hinged on the consideration element of the contract. Though these were purely domestic in nature, they highlight the use of consideration as a validating principle in common law jurisdictions.

In 1869, William Story offered his fifteen-year-old nephew $5,000 if he would refrain from drinking, using tobacco, swearing or gambling until he turned twenty-one years old.[106] His nephew agreed and complied with his promise by refraining from those activities for six years.[107] On his twenty-first birthday, the nephew informed his uncle of his compliance with the agreement and requested payment.[108] Story responded that his promise was good and that he would pay his nephew when he believed his nephew was ready to have that much money.[109] Before the money was delivered to his nephew, Story died.[110] Story's nephew had already committed the $5,000 to his wife and subsequently

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103. MUNROE SMITH, JURISPRUDENCE 21 (1909).
104. Kreitner, *supra* note 44, at 1897.
105. Wessman, *supra* note 3, at 48.
106. Hamer v. Sidway, 124 N.Y. 538, 544–545 (1891).
107. *Id*. at 549.
108. *Id*.
109. *Id*. The value of $5,000 in 1875 would be approximately $125,000 in 2012.
110. *Id*.

to Louisa Hamer, who brought this action against the executor of Story's estate, Mr. Sidway.[111]

The *Hamer v. Sidway* case dealt squarely with the concept of consideration in validating an agreement. If, in this case, Story wished to give a gift to his nephew, he could do so by promising to give the gift, delivering the gift, and having the nephew accept the gift. No consideration would be required—that is, the nephew would not have to do anything other than accept the gift. In a civil law jurisdiction, regardless of the lack of consideration, a gift like this would generally form an enforceable contract.

However, in common law jurisdictions, a promise to give a gift is not a contract. Thus, if the promisor fails to deliver the gift before his death, the promise expires and is treated as an unenforceable (undelivered) gift. In this case, Sidway argued just that—that the promise to pay $5,000 was merely a gift and, since the money was never delivered to the nephew, the promise was invalidated upon Story's death.[112]

Hamer, on the other hand, argued that the nephew's abandonment of his rights to drink, use tobacco, swear and gamble, provided sufficient consideration to turn this promise from a gift into an enforceable contract.[113]The court agreed. In a widely cited opinion, Judge Alton Parker of the New York Court of Appeals, citing an 1880 treatise, held that:

> Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisor or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him."[114]

This *benefit-detriment* approach to consideration governed until the early twentieth century, when courts began to apply the "bargain" theory to their analysis of consideration.[115] Rather than evaluating only whether the parties received a benefit and suffered a detriment, the bargain theory allows courts to consider whether the parties made their promises because they were induced by the promise made by the other. At the end of the nineteenth century, Justice Holmes said, "[i]t is hard to see the propriety of erecting any detriment which an instrument may disclose or provide for, into a consideration, unless the parties have dealt with it on that footing."[116] Clarifying, Just Holmes said, "[i]t is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting."[117] In other words, one-sided consideration

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111. *Id*.

112. *Id*. at 547-548.

113. *Id*. at 546.

114. WILLIAM REYNELL ANSON, PRINCIPLES OF THE LAW OF CONTRACT 63 (1880).

115. *See* Kevin M. Teeven, *The Advent of Recovery of Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 292–93 (2002).

116. OLIVER WENDELL HOLMES, THE COMMON LAW 292 (1881).

117. Wisconsin and Michigan Railway Co. v. Powers, 191 U.S. 379, 386 (1903).

is insufficient to form a valid contract—rather, mutually bargained-for consideration is essential to make a contract enforceable.[118]

The bargain theory helps courts overcome concern over the use of "peppercorn" contracts, that is, contracts that would be gifts but for the exchange of nominal consideration meant to establish a valid and enforceable contract.[119] Thus, if Sam offers to give his car to Rebecca for $1, the benefit-detriment theory would find the exchange to be a valid and enforceable contract and the $1 would be treated as sufficient consideration.[120] But the bargain theory would require the court to look further and determine if the $1 were actually bargained for between the parties—that is, whether the reason Sam is giving the car to Rebecca is *because* she is giving him $1 and not because Sam simply wants to donate the car to her. These types of contracts are not enforceable today.[121]

III.
THE "EXPECTATIONS PROBLEM" OF INTERNATIONAL CONTRACTS ACROSS LEGAL SYSTEMS

Generally speaking, a contract that is found to have sufficient consideration in a common law jurisdiction will also be found to have sufficient *causa* in a civil law jurisdiction, so long as it is licit. The existence of a bargained-for-exchange is also proof of party intent. Enforceability of such a contract should not pose a problem for the parties in either jurisdiction. The more problematic contracts are those that appear to be enforceable in civil law jurisdictions but that lack sufficient consideration to enforce in common law jurisdictions.

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118. *See* Teeven, *supra* note 108, at 294–95.

119. Note that the first Restatement of Contracts permitted such nominal contracts to be enforced:

> A wishes to make a binding promise to his son B to convey to B Blackacre, which is worth $5000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for $1. B accepts. B's promise to pay $1 is sufficient consideration. Restatement of Contracts § 84, illustration 1 (1932).

However, the second Restatement of Contracts rejected this position:

> A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B for $1000 a book worth less than $1. B accepts the offer knowing that the purchase of the book is a mere pretense. There is no consideration for A's promise to pay $1000. Restatement (Second) of Contracts § 75, illustration 5 (1965).

120. *See generally* Edmund Polubinski Jr., *The Peppercorn Theory and the Restatement of Contracts*, 10 WM. & MARY L. REV. 201, 202 (1968); No Author, *Restatement of Contracts (Second)—A Rejection of Nominal Consideration?*, 1 VAL. U. L. REV. 102 (1966) (discussing the evolution of the consideration doctrine in the common law and finding that the reason a party enters a contract is critical in determining whether consideration exists).

121. *See* RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. LAW INST. 1979); *see also* Joseph Siprut, *Comments: The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is not Binding, but Should be*, 97 N.W. U. L. REV. 1809, 1823–24 (2003).

Below are three types of contracts that, while likely enforceable in a civil law jurisdiction, would generally fail in a common law jurisdiction for lack of valid consideration:

Option contracts. In the common law, an option to enter a contract at a future date that is not accompanied by consideration fails unless the option is exercised before revocation of that offer.[122] This is not the case in most civil law jurisdictions, where an offer to hold a contract open for a period of time is generally irrevocable.[123] This is the case in the CISG, which follows many civil law principles as well as under the French civil code, which would find the agreement between the parties to be sufficient to form a binding contract.[124]

Unilateral contracts. Similar to option contracts, a unilateral offer under common law does not become a binding contract until the performance requested by the offeror has been fully performed.[125] Under the French civil code, agreement to perform by the offeree is sufficient to form a binding contract; however, the offeree must complete the performance within a reasonable period of time or no enforceable contract forms.[126] The only exception to this rule in the United States would be in the event that the offeree substantially performed the unilateral offer, which would make the offer irrevocable for a reasonable period of time.

Gift contracts. A gratuitous offer to a donee where no consideration is given to the donor will not form an enforceable contract under the common law.[127] Though such agreements were previously held valid if made under seal, the formality is no longer used and only valid consideration will make the gift binding. In some jurisdictions, nominal consideration (e.g., a peppercorn) will turn a gratuitous offer into a binding contract; however, many jurisdictions consider this sham consideration and will not enforce such agreements. The French civil code allows such promises to be enforceable if made in the presence of a notary.[128]

Contracts premised on past performance as consideration. Likewise, a gift cannot be turned into a valid contract by a subsequent promise from the donee. This leads to the problem of past consideration, which is insufficient to support a

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122. *See* Arthur Corbin, *Option Contracts*, 23 YALE L.J. 641, 643–44 (1914).

123. *See* Chastan v. Isler, C. Civ. Dec. 17 1958 (Fr.) (finding an offer to sell a chalet in which the offeree expressly committed to inspect the chalet on a future date irrevocable prior to the passing of that date, thereby creating an implied option contract).

124. Von Mehren, *supra* note 25, at 690–91.

125. *See* I. Maurice Wormser, *The True Conception of Unilateral Contracts*, 26 YALE L.J. 136, 136–37 (1916) (creating the hypothetical "Brooklyn Bridge" case in which A promises to pay B $100 if B walks across the Brooklyn Bridge. A revokes when B is halfway across, exercising his right under a unilateral contract to cancel prior to complete performance).

126. *Id*. at 692.

127. *See* George S. Geis, *Gift Promises and the Edge of Contract Law*, 2014 U. ILL. L. REV. 663, 665 (2014).

128. *Id*. at 697–98.

valid contract. For example, if Peter promises (verbally or in writing) to give Paul a sum of money to compensate him for a completed act, that agreement would not be enforceable in common law courts, but it would be enforceable in most civil law courts. Likewise, if a firm were to hire an unpaid intern, who provided invaluable service to the firm that the managers later felt merited compensation, the firm's subsequent promise to compensate that intern for those services would be unenforceable for want of consideration.

The French Civil Code recognizes the creation of a contract when the parties reach agreement on the terms. Lack of consideration is not a barrier to the formation of most contracts, though some formalities may be required for certain types of contracts (e.g., real property transfers).[129]

In addition to the risk that a contract will fail for lack of consideration in common law jurisdictions, a second (and perhaps more dangerous) concern is the ability in common law jurisdictions to form a contract without express assent. Express assent is one of the requirements to form a civil law contract; however, common law courts have been willing to find assent even in the absence of any clear evidence or formalities evidencing such assent. The next series of Sub-Sections address this and similar problems of contract formation in the common law due to the requirement of consideration.

A. Creation of a Contract without Express Assent

In common law jurisdictions, courts have found a valid contract even where one of the parties did not believe they had explicitly assented to the formation of such a contract. In civil law jurisdictions, parties must agree on the terms before a contract can be formed. Accordingly, a party accustomed to civil law rules entering a contract that would be enforceable under common law rules may find that they are bound prior to their explicit agreement.

In the case of *Caley v. Gulfstream Aerospace Corp.*,[130] Gulfstream developed a dispute resolution policy that would apply to their employees. They mailed the policy to their employees with a notice that if the employees continued working for Gulfstream, they would become bound by the new policy, regardless of explicit assent.[131] The employees sued their employer and argued that they should not be contractually bound to a policy they never expressly agreed to. In other words, they had given no valid consideration in exchange for their agreement to the new policy. The common law court hearing the case concluded that the policy was an offer that would be accepted upon completion of the performance specified in the terms, namely, continuing to work for the employer.[132] The consideration consisted of the bargain concluded

129. Von Mehren, *supra* note 25, at 688–89.

130. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359 (11th Cir. 2005).

131. *Id.* at 1366.

132. *Id.* at 1374.

by the parties that allowed the employees continued employment in exchange for the acceptance of the new terms. Thus, the contract was deemed valid.

In the widely cited *Pennzoil v. Texaco* case, Pennzoil sued Texaco for tortious interference with a contract, a claim requiring proof of the existence of a contract.[133] Texaco argued that Pennzoil and the third party had neither definitively agreed on terms, nor completed the formalities of forming a binding contract. The question was put to the jury—had the parties expressed, in words or deeds, the intent to be bound by the terms of the memorandum of agreement? The jury found that the circumstances surrounding the negotiations of the parties and their subsequent public statements about a deal were sufficient to prove that they had reached an agreement. The jury ultimately awarded Pennzoil $10.53 billion, which included a large punitive damage award only available in a contract dispute where a tort is also alleged.[134]

Finally, as a corollary to the illusory promises I discuss below, the absence of consideration can empower a party to change the terms of what the other party may have believed to be an agreement. Consider the case of *Garber v. Harris Trust & Savings Bank*, in which a bank attempted to unilaterally change the terms of credit for its credit card holders.[135] The bank argued that since the card holders took on no obligation in receiving the card (prior to usage of the card), the bank was merely making an offer and was free to change the terms of that offer at any time prior to acceptance.[136] The court agreed and found no consideration in the initial approval of the cardholder's application or distribution of the card.[137]

These cases reflect the willingness of a common law court to find a contract so long as the basic elements of formation have been met—intent, offer, acceptance and consideration. Formalities, such as signatures, notarization, and express manifestations of assent are unnecessary in the presence of evidence of a bargain. The next Section will discuss the importance of not only including consideration in the contract, but in proving that it was bargained for.

B. Contracts with Intent but no Bargained-for-Exchange

In the *Locator of Missing Heirs* case, the K-Mart Corporation entered into a contract with a company claiming that it would locate information about a potential class action lawsuit that might benefit K-Mart.[138] K-Mart would give Locator a 20% finder's fee if they provided information to K-Mart about the

133. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).

134. Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768 (Tex. App. 1987).

135. Garber v. Harris Trust & Savings Bank, 432 N.E.2d 1309 (Ill. App. Ct. 1982).

136. *Id.* at 1311.

137. *Id.* at 1315-1316.

138. Locator of Missing Heirs, Inc. v. Kmart Corporation, 33 F. Supp. 2d 229 (W.D.N.Y. 1999).

suit.[139] The parties clearly intended to go forward with the contract at the moment of agreement. However, unbeknownst to the K-Mart representative signing the contract with Locator, other K-Mart representatives had already received information about this suit and filed their own claim without any knowledge of the agreement with Locator.[140] The question in the case was whether a promise of information in exchange for a finder's fee constituted a bargained-for-exchange sufficient under the common law to form a valid contract.[141] The court found here that it did not.[142] Locator refused to nullify the agreement because the official date of the filing was after the signing of the agreement.[143]

The Court found there was no consideration to make the contract binding and valid.[144] The Court first explained that information may serve as valid consideration, but not when the information provided was known prior to bargain. The Court explained that "information may be a valid consideration for a promise. . . [h]owever, to constitute a valid consideration, the information must be new or novel and valuable, or thought to be so."[145]

The Court determined that knowledge of the claim prior to the signing of the contract was valid as a defense, not necessarily the date of filing.[146] In addition, the information provided no role in the filing of the claim as other attorneys were working prior to the agreement in anticipation of a claim in the antitrust suit, without any knowledge of Locator's services[147] In sum, the Court found that the information provided was not new or novel and the agreement to pay a finder's fee was void for lack of consideration.[148]

C. Adequacy of the Consideration – How Much is Enough?

Common law courts, unlike many civil law courts, rarely evaluate the adequacy or amount of the consideration exchanged between the parties.[149] In other words, the value given-up in exchange for the value received do not have

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139. *Id*. at 230.

140. *Id*.

141. *Id*. at 232.

142. *Id*. at 234.

143. *Id*. at 230–31.

144. *Id*. at 233 ("[I]t is well settled that information may be a valid consideration for a promise to pay for it, and may be the subject of bargain and sale, or of contract . . . . However, to constitute a valid consideration, the information must be new or novel and valuable, or thought to be so.") (citing Singer v. Karron, 162 Misc. 809 (N.Y. Mun. Ct. 1937)).

145. *Locator of Missing Heirs, Inc*., 33 F. Supp. 2d. at 233 (citing *Singer v. Karron*, 162 Misc. at 809, 811 (1937)).

146. *Locator of Missing Heirs, Inc*., 33 F. Supp. 2d. at 234.

147. *Id*.

148. *Id*.

149. *See, e.g*., Wood v. Lucy, Lady Duff Gordon, 118 N.E. 214 (N.Y. 1917).

to be equal in common law contracts, and rarely are. If a party chooses to make a bad deal, that is their choice and a common law court will not consider the difference in value between the amounts of consideration given by each party as a factor in finding an enforceable contract.[150] As long as there is some bargained-for consideration, a common law court will generally be satisfied that the parties intended their promises to be binding.

Consider the seventeenth century case of *Sir Anthony Sturlyn v. Albany,* in which the defendant leased property from the plaintiff landlord and was two years in arrears on the rent. [151]When the plaintiff demanded payment, the defendant informed him that if he could prove that the defendant was in fact two years in arrears and a deed showing the rent was due, he would pay the amount in full.[152] The plaintiff produced the deed and the defendant still refused to pay.[153]When the plaintiff sued, the defendant alleged that producing the deed was not adequate consideration to form a binding contract. [154]The court disagreed and found that "when a thing is to be done by a party to whom the promise is made, be it ever so small, this is a sufficient consideration to support an action."[155]

D. Contracts with Illusory Promises

Adequacy of consideration is a prominent issue in cases of illusory promises. These are promises that fail to place the promisor at any serious risk and fail to create a true commitment. The canonical case illustrating this principle is *Wood v. Lucy, Lady Duff-Gordon*, decided in 1917 by Justice Cardozo, who was then serving on the New York Court of Appeals.[156] This case involved fashion designer and Titanic disaster survivor Lucy, Lady Duff Gordon, who agreed to give exclusive license to an advertising agent, Otis Wood, to market and sell her designs for a period of one year.[157]Half of all revenues received by Wood from these sales were to go to Lady Duff-Gordon.[158] The contract did not specify any minimum level of effort that Wood had to expend, but it did prevent Lady Duff-Gordon from selling her goods through any other means.[159]

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150. *See, e.g.*, CORBIN ON CONTRACTS § 28.39 (2015) (explaining that in order for a unilateral mistake to allow rescission of a contract, the party against whom enforcement is sought must suffer an unconscionable hardship and avoidance must not pose a substantial hardship on the other party).

151. Cro. Eliz. 67, 78 Eng. Rep. 327 (1587).

152. *Id*.

153. *Id*.

154. *Id*.

155. Anthony Sturlyn v. Albany (1587) 78 Eng. Rep. 327, 328; 29 and 30 Cro. Eliz. 67, 68.

156. *Wood*, 118 N.E. at 214.

157. *Id*. at 90.

158. *Id*.

159. *Id*.

Shortly after entering into this agreement, Lady Duff-Gordon developed a new product line that she chose to market through Sears Roebuck, thereby violating her agreement with Wood.[160] Wood sued Lady Duff-Gordon for breach of contract, and Lady Duff-Gordon contended that there was no contract because Wood's promise was illusory.[161]

Justice Cardozo disagreed with Lady Duff-Gordon's argument.[162] The court found that Wood had implicitly agreed to use reasonable efforts to market Lady Duff-Gordon's clothing in exchange for the exclusive right to do so.[163] Lady Duff-Gordon had also covenanted to account monthly for all sales and to take out all necessary patents on the clothing he contracted to sell.[164] Despite the fact that no sales had been made, Wood promised Lady Duff-Gordon half of the sales profits from his reasonable efforts in exchange for this license.[165] This was sufficient consideration for Justice Cardozo to find a bargained-for-exchange.[166] However, one might have argued that the value of withholding a right to sell your goods in exchange for an implied promise to use best efforts is quite unequal.

An illusory promise exists where the promisor has shrouded his or her commitment in language that provides a release from liability should the promisor choose to use it.[167] In other words, it binds only one of the parties to the agreement. An illusory promise lacks consideration and will generally be found not to form a valid and enforceable contract, leaving the promisee in most cases without a remedy.[168]

Consider the oft-cited case of *Universal Computer Systems, Inc., v. Medical Services Association of Pennsylvania*.[169] In that case, Universal was attempting to submit a bid on a contract with Blue Shield but could not get it to Blue Shield by mail on time.[170] A representative from Universal phoned a Blue Shield

160. *Id*.

161. *Id*.

162. *Id*. at 215.

163. *Id*. at 214–15.

164. *Id*. at 215 ("[Wood's] promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly, was a promise to use reasonable efforts to bring profits and revenues into existence.").

165. *Id*.

166. *Id*. at 92.

167. *See* CORBIN ON CONTRACTS § 5.28 (2015) (describing an illusory promise as one that does not put any limitation on the freedom of the alleged promisor).

168. *But see* Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 SW. L. J. 841, 842–43 (1990) (arguing that while promissory estoppel will not generally remedy an illusory promise, courts often find creative remedies to protect an injured promisee who committed to an illusory promise).

169. Universal Comput. Sys., Inc., v. Med. Serv. Ass'n of Pa., 474 F. Supp. 472 (M.D. Pa. 1979).

170. *Id*. at 475.

employee and asked the employee if he would agree to meet a plane carrying the bid at the airport, which Universal would arrange.[171] The employee agreed and Universal sent the bid via an express air carrier.[172] However, the employee chose not to pick up the bid and Universal, which had the lowest bid, was not awarded the contract.[173] The court here concluded that the employee had given no consideration in exchange for his promise to pick up the bid and thus made only an illusory promise.[174]

In *Mattei v. Hopper*, the plaintiff offered to purchase a lot from the defendant and made a $1,000 deposit in support of this promise.[175] The parties signed a contract that contained a "satisfaction" clause, which excused the plaintiff from performance if he did not find leases satisfactory to him for the property within 120 days, which was to be developed into a shopping center.[176] Prior to the end of the satisfaction period, the defendant chose to cancel the sale.[177] When the plaintiff sued for breach, the defendant claimed that Mattei's promise was illusory due to the satisfaction clause.[178]

The court in *Mattei* explained that a satisfaction clause is not necessarily illusory so long as there is a reasonable mechanism to assess whether the party has in fact been satisfied.[179] In commercial contracts where satisfaction is based upon identifiable standards used in commercial practice, a satisfaction clause is not illusory because parties relinquish some discretionary power.[180] Likewise, when satisfaction is dependent upon the tastes or judgment of the party, so long as the party subject to the clause has acted in good faith in making that determination, the clause does not render the contract invalid due to illusory consideration.[181]

Conditions can be used to design a valid exit strategy for careful parties under certain circumstances; however, if they are drafted so as to avoid creating any legal obligation, a court will deny enforcement of the contract. These classic common law cases highlight the importance of including sufficient and

171. *Id*.

172. *Id*.

173. *Id*.

174. *Id*. at 477.

175. Mattei v. Hopper, 330 P.2d 625, 625–26 (Cal. 1958).

176. *Id*. at 626 ("Subject to Coldwell Banker & Company obtaining leases satisfactory to the purchaser.").

177. *Id*.

178. *Id*.

179. *Id*. at 628–29 (finding that language referring to "reasonable judgment" would create an implied requirement of good faith).

180. *Id*. at 628.

181. Matttei v. Hopper, 51 Cal.2d 119, 124 (1958) (citing Tiffany v. Pac. Sewer Pipe Co., 180 Cal. 700, 702–705, 182 P. 428). But see J. C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D. Cal. 1954) (allowing withdrawal based upon unrestricted interpretations of pleasure as illusory).

identifiable consideration in contracts to ensure that common law courts will enforce them.

In the *NCSPlus, Inc*. case from 2012, a landlord attempting to collect nearly $150,000 in delinquent payments entered into a contract with a collection agency to assist with his efforts.[182] The terms of the contract allowed the collection agency to receive a withdrawal fee from the landlord if the landlord removed any accounts from the collection process, amounting to the full collection fee had the debt been collected (liquidated damages).[183] The agency collected only $750 over two years and made little effort to collect on the remaining debts, so the landlord withdrew all of the accounts.[184] The agency tried to recover the withdrawal fees for the removed accounts.[185]

The landlord in this case argued that the collection agency never obligated itself to do anything.[186] Here, since the agency was receiving withdrawal fees in exchange for no commitment to act on their part, the court concluded that they had made an illusory promise.[187] The contract failed for lack of valid consideration.[188]

In a similar case, *Fakhoury Enterprises, Inc. v. J.T. Distributors*, a firm entered a contract with an air freshener manufacturer to operate a distribution franchise in a given territory.[189] The contract explained most of the terms of the distribution arrangement; however, it failed to specify a quantity of air fresheners that would be sold, leaving that element to be decided later by the parties.[190] "Later" never came. The firm never ordered any air fresheners from the distributor.[191] When the distributor sought other firms to work within the same territory, the original firm sued, claiming breach of their contract. At trial, the distributor argued that there was no consideration—the promise made by the firm was illusory.[192] The court agreed, stating that under the Uniform Commercial Code (UCC) this exchange might have been sufficient to form a valid contract under principles of good faith.[193] However, as the UCC is not

182. NCSPlus Inc. v. WBR Mgmt. Corp., 949 N.Y.S. 2d 317, 319–20 (Sup. Ct. 2012).

183. *Id*. at 319–20.

184. *Id*. at 320.

185. *Id*.

186. *Id*.

187. *Id*. at 325. *But see* Wood v. Lucy, Lady-Duff Gordon, 188 N.E. 214, 215 (N.Y. 1917) (finding that Wood was required to make reasonable efforts to sell Lucy's line of clothing).

188. *NCSPlus Inc*., N.Y.S. 2d 317 at 325.

189. Fakhoury Enters., Inc. v. J.T. Distribs., No. 94 CIV. 2729 (PKL), 1995 WL 424990, at *1 (S.D.N.Y. July 19, 1995).

190. Fakhoury Enters. v. J.T. Distribs., 1997 U.S. Dist. LEXIS 7667 at 3.

191. *Id*. at 5-6.

192. *Id*. at 8-9.

193. *Id*. at 10.

applicable to most service agreements like this, strict adherence to common law rules is required and strict consideration rules are followed[194]

Distinguish these cases from the approach in civil law. In the case of *Blanche Raymond v. Varlet*, an actress signed a contract with Gaiete Rochechouart Concerts to give performances over three seasons between 1894 and 1897.[195] The director reserved the exclusive right to terminate the contract at the end of each month without the performer having any right to indemnity.[196] Blanche refused to perform and the company brought suit to claim a penalty for non-performance. [197]The Paris Court of Appeals held that the ability to terminate a contract with impunity creates no true obligation and thus no valid cause for the contract, finding this result consistent with Article 1174 of the civil code.[198] However, the French Court de Cassation reversed the Paris court, finding that a one-sided transaction can still be binding even if that party's obligation can be terminated at will.[199]

E. Back to the Future - Past Consideration

A promise that is made in exchange for a thing already done will not form an enforceable contract.[200] This is the problem of past consideration. For the consideration to be valid, it must be made in the present at the same time the contract is formed.[201] The concept is based on the idea that a gift given without expectation of payment cannot later be used as a justification for a demand. "For it is not reasonable that one man should do another a kindness, and then charge him with a recompense: this would be obliging him whether he would or not, and bringing him under an obligation without his concurrence."[202] For example, in the case of a party that promises to pay the previously acquired debts of another, a court concluded that no valid contract was formed due to lack of consideration.[203] Again, a court found a contract invalid where a father promised

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194. *Id*.

195. Blanche Raymond v. Varlet, cour d'appel [CA] [regional court of appeal] Paris, 5e ch., April 26, 1898., D. 1898. Il. 526.

196. *Id*.

197. *Id*.

198. *See* BERNARD SCHWARTZ, THE CODE NAPOLEON AND THE COMMON LAW WORLD 131 n.7 (1954); Arthur T. Von Mehren, *supra* note 95, at 1025.

199. *See* Varlet v. Blanche Marie, Cour de Cassation [Cass.] [supreme court for judicial matters] ch. civ., March 1, 1899 (Fr.).

200. Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825).

201. *See, e.g.*, Webb v. McGowin, 168 So. 196 (Ala. Ct. App. 1935) (finding a promise made subsequent to an act being committed to lack valid consideration).

202. COMYN, *supra* note 5, at 19.

203. Rohrscheib v. Helena Hosp. Ass'n, 670 S.W.2d 812 (Ark. Ct. App. 1984) (reversing a lower court decision that had found an enforceable contract where a third-party signed a hospital release for his sister under the heading "responsible party," leading the hospital to bill that third-party $4,000 for services rendered to the patient).

a Good Samaritan to pay the costs to care for his dying son after the care had already been rendered, maintaining a clear distinction between gratuitous acts and acts induced by promise.[204]

In the commercial context, if a seller concludes a contract with a buyer whereby the seller agrees to sell his yacht for the sum of $1 million, and then later the seller warrants that the yacht is free from any defects, the warranty is unenforceable for lack of valid consideration.[205] In a case such as this, the buyer would be wise to include such warranty in the original sales contract or to offer some additional consideration in exchange for the subsequent warranty. "A promise given in consideration of past services voluntarily rendered without the promisor's privity or request is purely gratuitous and creates no legal liability."[206]

There are some exceptions to this rule worth noting. The first is the *material benefit* exception. If a party performs a service, pays a sum of money, or procures a good on behalf of another without the other's knowledge, and the beneficiary subsequently agrees to receive that service, money, or good, the law considers this a previous request and shrouds it in implied consideration.[207]

This theory has been applied in cases of moral consideration. Courts have been consistent in their denial of moral bases to support valid consideration.[208] For instance, in *Webb v. McGowin*,[209] Webb, a lumberyard worker, saved the life of McGowin by jumping onto and diverting a falling block of pine that would have crushed McGowin had it continued its trajectory to the ground. After doing so, McGowin promised to pay Webb, who was severely crippled from the fall, $15 every two weeks for the rest of his life. Upon McGowin's death, his estate refused to continue making payments. The court found that McGowin had received a material benefit that he would reasonably be expected

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204. *Mills*, 20 Mass. (3 Pick.) at 207.

205. *See, e.g.*, SAMUEL COMYN, THE LAW OF CONTRACTS AND PROMISES UPON VARIOUS SUBJECTS AND WITH PARTICULAR PERSONS AS SETTLED IN THE ACTION OF ASSUMPSIT 21 (1835) (discussing a similar exchange involving a horse).

206. WILLIAM FREDERICK ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS 360 (1913).

207. *See, e.g.,* Ferguson v. Harris, 39 S.C. 323, 333 (1893) (finding a contract made by a married woman, which at the time would be unenforceable, to purchase lumber enforceable when the woman received and used the lumber); Lycoming Cty. V. Union Cty., 15. Pa. 166, 171 (1850) (receipt of a moral benefit through legislation); *see also* COMYN, *supra* note 5, at 23.

208. *See, e.g.*, Kevin M. Teeven, *A Legal History of Binding Gratuitous Promises at Common Law: Justifiable Reliance and Moral Obligation*, 43 DUQ. L. REV. 11, 64-66 (2004); *see also* Muir v. Kane, 55 Wash. 131, 135 (1909) ("It is clear that if a contract between two parties be void, and not merely voidable, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract."). *But see*, Webb v. McGowin, 27 Ala. App. 82, 85 (1935) ("It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.").

209. Webb v. McGowin, 27 Ala. App. at 85.

to pay for; thus, having accepted to make such payments, this became a *previous request*.[210]

Similarly, in *Boothe v. Fitzpatrick*, a bull escaped from its owner's keep and was subsequently caught and cared for by a third-party. The court found that the subsequent promise to pay by the owner constituted a *previous request* and thus valid consideration.[211] The basic tenet is that for past consideration to be validated by the court, there must be a material benefit given by the promisor to the promisee that a reasonable promisee would be expected to accept, and in fact accepted. The court will then bring that past promise forward to make it present consideration.

Civil law courts have been more willing to accept gratuitous or moral promises as binding than common law courts. Consider *Guidez v. Thuet*, in which a husband promised a woman 2,000 francs in exchange for her previous care of the husband's dying wife.[212] The husband refused to pay, claiming it was an unenforceable donation. The court found for the woman, holding that the agreement was to fulfill a natural obligation, which was in itself obligatory.[213] Similar results can be found in cases involving debts to a hospital for caring for a sick patient,[214] promises to pay an additional sum after a contract for the sale of land had already been concluded,[215] and promises to reimburse for losses suffered due to bad investment advice.[216]

It should be noted that the French courts differentiate between moral duties and natural obligations. Though no clear distinction exists in the civil code, courts have drawn a line between the two, only finding natural obligations enforceable, similar to a nominal claim in the common law.[217] As an example, consider *Darier v. Dubois*, in which a man promised to pay his mistress an annuity for support of her and her child while she was away from her husband.[218] He supported her for nearly fifteen years with large sums, but when

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210. For an interesting commentary on this case, see Stephen J. Leacock, *Echoes of the Impact of Webb v. McGowin on the Doctrine of Consideration under Contract Law: Some Reflections on the Decision on the Approach of Its 75th Anniversary*, 1 FAULKNER L. REV. 1 (2010).

211. Boothe v. Fitzpatrick, 36 Vt. 681, 683–84 (1864).

212. Guidez v. Thuet, cour d'appel [CA] [regional court of appeal] Douai, 2e ch., July 2, 1847 (Fr.).

213. *See also* Von Mehren, supra note 95, at 1039.

214. Pages v. Freres Saint Jean-de-Dieu, Cass. req. [ordinary court of original jurisdiction] Lyon, May 5, 1868 (Fr.).

215. Jouanne v. Berruyer, Cass. req. [ordinary court of original jurisdiction] Nov. 21, 1831 (Fr.).

216. Carpentier v. Enchery, Tribunal Civil de la Seine, June 27, 1911, *reprinted in* ARTHUR VON MEHREN, THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW (1957).

217. *See, e.g.*, David V. Snyder, *The Case of Natural Obligations*, 56 LA. L. REV. 423, 424 (1996).

218. Darier v. Dubois, cour d'appel [CA] [regional court of appeal] Paris, 8e ch., Nov. 5, 1925 (Fr.).

she married a wealthy man, he sent a wedding gift and then ceased the annuities. She sued, and the court held that this was "only a simple moral duty. . .and not a natural obligation."[219]

F. Contracts Based Upon Existing Duties

A contract cannot be formed on the basis of a promise previously made or an action already performed.[220] This is the basis of the preexisting duty problem. The issue first came up, as might be expected, in a debt case. In *Pinnel's Case*, Pinnel sued Cole over a debt agreement in which Cole owed eight pounds and ten shillings.[221] Cole alleged to the court that he paid five pounds and two shillings prior to the due date for the debt as full payment. Pinnel contended that this was mere partial payment. The court concluded that payment of part of a debt, without some additional consideration, could not modify the terms of the original contract.[222]

The original purpose for the preexisting duty rule was to prevent parties from attempting to modify existing contracts without a new bargain.[223] As seen in *Pinnel's Case* above, and many cases since,[224] this rule requires new consideration to make any new promise, whether a new contract or the modification of an existing contract. And though the rule has not received high favor among scholars,[225] it remains an important tool to verify the intent of the parties.

Renowned contracts scholar Arthur Corbin argued in a 1918 law review article that "[t]he law does not define consideration as the sole inducing cause of a contractor's action, and if it were so defined a valid contract would seldom be made."[226] Yet while it may be true that consideration does not stand alone in proving the existence of a valid contract (intent is also a crucial element),

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219. *Id*.

220. *See, e.g*., Kevin M. Teeven, *The Advent of Recovery of Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 347-53 (2002).

221. Pinnel's Case (1602) 5 Co. Rep. 117a (Eng.).

222. Pinnel's Case (1602) 5 Co. Rep. 117a (Eng.).

223. Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 731 (1996) (describing the "policing" function of the rule in post-formation contracts).

224. *Id*. at 732 (citing Arden Equip. Co. v. Rhodes, 285 S.E. 2d 874 (N.C. Ct. App. 1982)) (finding a debtor's promise to return leased equipment to the owner voluntarily after default did not constitute an enforceable promise since they were already obligated to return the equipment); Foakes v. Beer (1884) 9 App. Cas. 605 (HL) (refusing to enforce a creditor's promise to waive interest on an outstanding debt so long as it was paid back).

225. *See, e.g*., Kevin M. Teeven, Consensual Path to Abolition of Preexisting Duty Rule, 34 VAL. U. L. REV. 43 (2000); Wessman, supra note 193, at 729–32.

226. Arthur Corbin, *Does a Preexisting Duty Defeat Consideration?* 366 (YALE FAC. SCHOLARSHIP SERIES, Paper 2870, 1918), http://digitalcommons.law.yale.edu/fss_papers/2870.

without it, common law courts are unlikely to enforce the promises made by the parties.

Pinnel's case is an important one for illustrating the distinction between pure common law contracts and commercial sales contracts. In the former category are contracts for services, contracts for real property, and mixed contracts in which the majority element of the contract is one of these two things. Contracts with common law parties in this category would be subject to the strict common law consideration rules discussed above. However, a commercial contract for the sale of goods with a common law party is subject to special rules under the American contracts statute, the UCC, or internationally under the CISG. The next Section addresses these codes.

IV.
SALE OF GOODS CONTRACTS

Proving that a contract has sufficient consideration in common law contracts is less problematic in goods contracts than it is in service or real property contracts. This is largely the result of two important statutes governing sales of goods—the UCC and the CISG. While the CISG dispenses entirely with consideration (discussed below), the UCC makes it easier to prove. It bears repeating that these acts apply only to commercial goods contracts.

A. The Uniform Commercial Code

The UCC is a uniform law adopted by all states that attempts to streamline the process of contracting across states within the United States. Drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, the UCC was first published in 1952.[227] As a model code, the UCC is not a law itself. Rather, it is a uniform code of principles that states would choose to adopt, modify or ignore. Given the broad interest in reducing the cost of doing business, each state adopted the uniform law into its own legal code.[228]

The UCC governs contracts between parties when those contracts involve the sale or lease of goods, negotiable instruments, or a related commercial exchange. Specifically excluded from the coverage of the UCC are service contracts, real property contracts, and currency contracts.[229] If a contract

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227. *See* Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 800 (1958).

228. *See, e.g.*, Christian Paul Callens, *Louisiana Civil Law and the Uniform Commercial Code: Interpreting the New Louisiana U.C.C.-Inspired Sales Articles on Price*, 69 TUL. L. REV. 1649, 1651 (1994) (discussing the civil law heritage of Louisiana and its effect on that state's adoption of the UCC).

229. *See* U.C.C. §§ 2-105, 107 (AM. LAW INST. & UNIF. LAW COMM'N 1977) (defining "goods").

includes both goods and services, such as a product design contract, the UCC will govern only if the goods component of the contract is more valuable than the services component.[230] In cases in which the UCC does not apply, common law will govern the interpretation and enforcement of the contract.

Unlike the CISG, the UCC maintains the need for consideration in commercial contracts. Though not defined in Article I (definitions), the UCC describes consideration in Article 3-303, referring to the enforcement of negotiable instruments, as follows:

> [A]ny consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a), the instrument is also issued for consideration.[231]

Accordingly, contracts formed under the UCC should expressly denote the valuable consideration being exchanged between the parties in order to ensure enforceability. I will discuss mechanisms for denoting consideration properly later. However, it should be noted that the UCC does offer a few exceptions to this rule:

1. Firm Offers

Under UCC § 2-205, a merchant who makes a written offer to a buyer that promises to hold that offer open for a given period of time and who signs that offer forms a binding agreement with the buyer despite any lack of consideration.[232] This rule imposes a higher standard on merchants than consumers in making offers by locking them into their promises without requiring the consumer to provide any consideration. The common law rule would allow the seller to revoke their offer at any time prior to acceptance.[233]

The UCC firm offer rule picks up where the common law concept of reliance leaves off. Detrimental reliance, or promissory estoppel, gave a promisee a remedy if they foreseeably relied upon the promise of another and suffered harm as a result.[234] This remedy left parties in this position helpless if they could not prove both foreseeable reliance and harm.

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230. *See, e.g.*, Fleet Bus, Credit, LLC, v. Grindstaff, Inc., No. W2007-01341-COA-R3-CV, 2008 WL 2579231 (Tenn. Ct. App. June 30, 2008) (explaining that the amounts charged for the good and service, in addition to other factors, will determine whether the UCC or common law govern the transaction).

231. U.C.C. § 3-303 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

232. *Id.* at § 2-205 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

233. *See, e.g.*, Cooke v. Oxley [1790] 3 TR 653 (Eng.) (allowing a defendant to withdraw an offer that he promised to hold open for a specified period of time); *see also* Morrison v. Thoelke, 155 So. 2d 889, 898 (Fla. Dist. Ct. App. 1963).

234. *See* Drennan v. Star Paving, 333 P.2d 757, 760 (Cal. 1958).

2. Missing Terms

In certain cases, the UCC will allow a contract to be formed even if some essential terms are missing. "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[235] Likewise, a goods contract where the buyer agrees to purchase all of a given seller's output, even though a specific quantity is not specified, will not fail due to a lack of valid consideration.[236] The same is true of a contract in which a seller agrees to sell all that he can produce to a given buyer. Under the common law, these indefinite contracts could be challenged for lacking consideration since the parties never explicitly agreed on the nature of the exchange.[237]

3. Contract Modifications

Once a contract has been formed, making changes to that contract requires the parties to agree upon new terms—modifications. In theory, these new terms dispense with the original agreement and form a new agreement altogether. For this reason, the common law requires that modifications to contracts include new consideration to be valid.[238] This can be cumbersome for long-term and frequently modified contracts, so the UCC eliminated the requirement that additional consideration be identified for contract modifications in the case of sales contracts.[239] Section 2-209 of the UCC arose out of the awareness that "merchants and industrial managers preferred settling contract breakdowns outside the courts and often without concern about the contract's requirements."[240] Courts have validated this practice. For instance, in *Gross Valentino Printing Co. v. Clarke*,[241] the court upheld a contract modification that raised the price for the printing of magazines after the contract had been performed despite the lack of any new consideration for the increased price.

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235. U.C.C.§. 2-204(3) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

236. Id. at § 2-306 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

237. However, bear in mind that most quantity-based contracts involve the sale of goods and thus would be governed by the U.C.C. See, e.g., Acad. Chi. Publishers v. Cheever, 578 N.E.2d 981, 983–84 (Ill. 1991) (finding a publishing contract unenforceable where parties excluded essential terms such as the number of stories to by published and the delivery date for the manuscript); Joseph Martin Jr. Delicatessen v. Schumacher, 417 N.E.2d 541, 543–44 (N.Y. 1981) (finding a lease that included a renewal term specifying the price "to be agreed upon" to be insufficiently definite to form a valid contract); Nellie Eunsoo Choi, *Contracts with Open or Missing Terms under the Uniform Commercial Code and the Common Law: A Proposal for Unification*, 103 COLUM. L. REV. 50 (2003).

238. *See* Corbin, *supra* note 196, at 366.

239. UCC § 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

240. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 61–62 (1963).

241. Gross Valentino Printing Co. v. Clarke, 458 N.E.2d 1027, 1030 (Ill. App. Ct. 1983).

Likewise, the CISG, which is silent regarding consideration anyway, allows parties to modify their contracts with "mere agreement."[242]

To summarize, new commercial contracts and common law contracts must have an explicit exchange of consideration in order to ensure their enforceability. I will next turn to the CISG.

B. The Convention on the International Sale of Goods

The CISG makes no mention of consideration whatsoever and it includes two articles that effectively override the consideration problem in practice. The lack of a consideration requirement is the result of the strong influence of civil law countries in the original drafting of the CISG rules, which overpowered the largely American push to include mechanisms that would equate CISG contracts to common law contracts. As one author noted on this matter, "the CISG was bold enough to abolish a time-honoured though disputed legal institution that is part of many national laws."[243]

It is important to note at the outset that the CISG does not govern all contracts. It will only apply in cases in which all of the following are true:

- Both parties are merchants;
- The transaction is for the sale of goods;
- The merchants maintain their principal place of business within a CISG member state (81 parties as of September 2014); and,
- The parties have not opted-out of the CISG by contract.[244]

The CISG arose out of the efforts of English, German, French and Scandinavian scholars who joined forces to form UNIDROIT (the International Institute for the Unification of Private Law) in 1929.[245] An initial attempt to form an international law governing sales transactions was made by UNIDROIT in 1964. At that meeting, UNIDROIT members, including the United Kingdom, adopted the Uniform Law of International Sales and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods.[246] However, as these conventions were seen as largely drafted for and

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242. United Nations Convention on Contracts for the International Sale of Goods art. 29, Jan. 1, 1988, 1489 U.N.T.S. 3 [hereinafter CISG].

243. Ulrich Magnus, *The Vienna Sales Convention (CISG) Between Civil and Common Law—Best of All Worlds?*, 3 J. CIV. L. STUD. 67, 89 (2010).

244. *See, e.g.*, Martini E. Ricci v. Trinity Fruit Sales, 30 F. Supp. 3d 954, 968 (E.D. Cal. 2014).

245. *See, e.g.*, Joanne M. Darkey, *A U.S. Court's Interpretation of Damage Provisions under the U.N. Convention on Contracts for the International Sale of Goods*, 15 J. L. & COM. 139 (1996); E. Allan Farnsworth, *The Vienna Convention: History and Scope*, 18 INT'L L. 17 (1984).

246. Henning Lutz, *The CISG and Common Law Courts: Is There Really a Problem?*, 35 VICTORIA U. WELLINGTON L. REV. 711, 713 (2004).

biased toward civil law countries, they were not widely accepted at first, including by the United States.[247]

The United Nations Conference on International Trade Law (UNCITRAL) was established in 1966 and began with the initial lofty goal of forming an agreement on the international sale of goods that would encompass the principles of both civil and common law jurisdictions.[248] The Convention on the International Sale of Goods (CISG) was the result of this attempt to develop an international sales convention that would be acceptable by both civil and common law countries. The draft CISG was by UNCITRAL in 1978.[249] The United States ultimately ratified the convention in 1986 and it took effect in 1988.[250]

Though the CISG makes no mention whatsoever of the doctrine of consideration, notes from the drafting sessions suggest that parties from civil and common law jurisdictions attempted to assert principles inherent in their own legal systems.[251] In the end, however, consideration was left out of the document.[252] One possible explanation for the removal of consideration as a requirement for the formation of a contract under the CISG is that the convention only speaks to commercial contracts where both parties have express obligations.[253] Article 29 of the CISG, explained further below, dispenses with the requirement for consideration in the modification or termination of a contract, much like the UCC does for contract modifications.[254] However, the official commentary to that CISG article states that the CISG intended to

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247. *Id*. at 712.

248. *See, e.g*., *id*. at 713; *see also* Rep. of the U.N. Comm'n on Int'l Trade Law on the Work of Its Second Session, U.N. Doc. A/7618, at 99-100, Mar. 3-31, 1969; GAOR, 24th Sess., Supp. No. 18 (1969).

249. U.N. Secretary-General, *Incorporation of the Provisions of the Draft Convention on the Formation of Contracts for the International Sale of Goods into the Draft Convention on the International Sale of Goods*, at 121, U.N. Doc. A/CN.9/145, (Mar. 29, 1978).

250. Mathias Reinmann, *The CISG in the United States: Why It Has Been Neglected and Why Europeans Should Care*, 71 RABEL J. COMP. & INT'L PRIV. L, 115, 117 (2007) (discussing the United States as one of the earliest adopters of the Convention, despite its minimal relevance in U.S. law).

251. Gyula Eorsi, *Common Law v. Civil Law*, in PROBLEMS OF UNIFYING LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, PACE U. L. SCH., http://www.jus.uio.no/pace/problems_of_unifying_law_on_formation_of_contracts_for_international_sog.gyula_eorsi/_4.html (last visited Apr. 4, 2016).

252. *See* Lutz, *supra* note 216, at 721 (explaining that the official commentary to the CISG indicated an intent to overrule the consideration requirement).

253. Joseph D. Mattera, Comment, *The United Nations Convention on Contracts for the International Sale of Goods ("CISG") and Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc. / Apothecon, Inc. v. Barr Laboratories, Inc.: The U.S. District Court for the Southern District of New York's Application and Interpretation of the Scope of the CISG*, 16 PACE INT'L L. REV. 165, 174 (2004).

254. UCC art. 2-209(1) (AM. LAW INST. & UNIF. LAW COMM'N 1977).

overrule and eliminate the requirement of consideration in all aspects of contract formation.[255]

The impact of this omission appears to be minimal since the majority of agreements governed under the CISG, which requires payment and delivery terms set forth in the agreement, would already include the foundational elements of valid consideration under common law rules. However, some authors have noted that these rules only govern the terms of the agreement between the contract parties; it would not cover any extra-contractual promises, such as warranties, that are not embodied in the agreement. This begs the question, would consideration ever become an issue in a dispute under a CISG-governed contract?

To answer this question, we must examine three specific articles of the statute—Article 4, 16 and 29. To begin, Article 16 limits the revocability of an offer prior to acceptance.

1. Revocation of Offers

Under the common law, an offer not based on any valuable consideration from the offeree can be revoked at any time prior to acceptance. The Firm Offer Rule of the UCC discussed above allows an exception to this rule if a merchant makes the offer in writing and signs that offer. The CISG goes further and allows for both the merchant's rule of the UCC and a second exception for parties that reasonably rely on an offer to block the offeror's ability to revoke.

CISG Article 16 states:

> (1) Until a contract is concluded an offer may be revoked if the revocation reaches the offeree before he has dispatched an acceptance.
> (2) However, an offer cannot be revoked:
> (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable; or
> (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer[256]

Accordingly, Article 16 allows offerees to form contracts without giving any consideration when those offers specify a response deadline or when they would be reasonably expected to rely on such offers.

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255. *Secretariat Commentary, Guide to CISG Article 29*, PACE L. SCH. INT'L & COM L. (last updated Aug. 29, 2006), http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html; *see also* Petra Butler, *The Doctrines of Parol Evidence Rule and Consideration—A Deterrence to the Common Law Lawyer?*, Collation of Papers at UNCITRAL-SIAC Conference, Singapore (22-23 Sept. 2005), at 61–62.

256. CISG Art. 16.

2. Contract Modifications

To further purge the international commercial system of the historical requirement of consideration, Article 29 of the CISG specifically dispenses with the need for new consideration when modifying contracts. In part, that agreement notes that "[a] contract may be modified or terminated by the mere agreement of the parties."[257] The official commentary to this Article explains that this language explicitly excludes consideration from this type of agreement. Keep in mind that new consideration is not required under the UCC either, but it is a certain requirement under common law contracts. *Shuttle Packaging Systems LLC v. Jacob Tsonakis*, discussed in more detail below, elaborates on this issue.

CISG Article 29 states the following:

> (1) A contract may be modified or terminated by the mere agreement of the parties.
> (2) A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.[258]

This Article allows an existing contract to be modified by either party upon mere agreement. The common law treats contract modifications as new agreements and thus requires new consideration before any party will be bound by a promise they make subsequent to the conclusion of their contract. The UCC has no such requirement for additional consideration—it tracks the language of the CISG for contract modifications.

These two articles confirm that there is no need for consideration to prevent revocation of most unilateral offers for a period of time or to modify existing contracts. But what about the formation of the contract itself when no such acceptance deadline is promulgated? This has generally been treated by courts as an issue of contract *validity*—an area that the CISG expressly defers to the domestic jurisdiction in which the contract was formed.

3. Contract Validity

Under CISG Article 4(a), local law determines validity of a contract.[259] This is one of the topics that was explicitly excluded from CISG coverage. However, neither the CISG nor associated case law clearly defines the term "validity." It has generally been found to mean that the contract is not void, voidable or unenforceable.[260] The CISG, then, considers anything that would

257. CISG Art. 29.

258. CISG Art. 29(2).

259. *Id*. Art. 4(a).

260. *See, e.g.*, Helen Elizabeth Hartnell, Rousing the Sleeping Dog: The Validity Exception to

lead a contract to be void, voidable or unenforceable, to be an issue of validity and subject to interpretation by domestic law, not CISG interpretation.[261]

> The potential for conflict between the domestic and international legal orders is especially great where the domestic rules in question concern issues, such as validity, so vital to the domestic legal order that they are excepted from the realm of contractual freedom.[262]
>
> Article 4(a) poses a particular danger to the development of a coherent jurisprudence of international trade, because it gives adjudicators wide discretion to determine when to apply domestic law rather than the CISG to contracts for the international sale of goods.[263]

Article 4(a) of the CISG specifically states that the rules of contract validity, that is, whether the contract is valid at the outset, will be determined by the domestic law that the parties specified or that otherwise governs the contract.

> (4) This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
>
> (a) the validity of the contract or of any of its provisions or of any usage.[264]

Under the CISG, the validity of an alleged contract is decided under domestic law. By validity, CISG refers to any issue by which the "domestic law would render the contract void, voidable, or unenforceable."[265] The effect of this provision, though not entirely settled by the courts, appears to be that the consideration requirement in common law jurisdictions remains alive and well even under CISG contracts when enforced in common law courts.[266]

Accordingly, if the applicable local law is common law, the validity of the contract would be largely dependent upon the rules set forth in the common law, including the doctrine of consideration. In the example given in the previous paragraph, we might conclude that warranties given by one party without any bargained-for-exchange with the other party would be unenforceable for lack of consideration if the contract formation were governed by common law rules.

In the case below, the parties to the supply contract are both based in countries that are parties to the CISG—the United States and Canada. These are also both common law countries. Thus, even though the CISG has no

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the Convention on Contracts for the International Sale of Goods, 18 Yale J. Int'l L. 1, 3 (1993).

261. CISG Arts. 18-19.

262. Helen Elizabeth Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 3 (1993).

263. *Id*. at 6.

264. CISG Art. 4(a).

265. Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d 236, 282–83 (S.D.N.Y. 2002), aff'g in part, & rev'd in part, 386 F.3d 485 (2d Cir. 2004) (internal quotations omitted).

266. Barbara Berry, S.A. de C.V., v. Ken M. Spooner Farms, Inc., 2006 U.S. Dist. LEXIS 31262, at *3–4 (W.D. Wash. Apr. 13, 2006).

consideration requirement, following rule 4(a) of that treaty requires a court, in assessing the validity of a contract, to apply local law.[267]

What should happen when a supply firm sends a letter of support to a manufacturer indicating that it is able to supply a needed element in the manufacturer's fabrication process and that manufacturer uses that letter to solicit governmental approval for their production? In the *Geneva Pharmaceuticals* case from 2002, a Canadian chemical supplier, ACIC, was to provide a chemical that would be used in the manufacture of an anti-coagulant drug by Geneva Pharmaceuticals, a U.S. pharmaceutical company.[268] In order for Geneva to receive governmental approval for the manufacture of this drug, it needed to present a letter from a supplier explaining availability of the chemical and security of their manufacture process.[269] ACIC provided this letter to Geneva.[270] The U.S. Food and Drug Administration (FDA) subsequently approved the drug and Geneva placed orders with ACIC for the needed chemical.[271]

Some time after the FDA granted approval and Geneva placed a large order from ACIC, the supplier refused to send the chemical, claiming that Geneva monopolized the market and prevented ACIC from acquiring other customers.[272] Geneva filed suit in New York against ACIC claiming, among other things, breach of contract.[273] As one of its defenses, ACIC argued that there was no valid contract because they never provided any valuable consideration to Geneva.[274]

The District Court in *Geneva Pharmaceuticals* explained that the CISG takes a very liberal approach to contract formation, allowing contracts to be formed "by a document, oral representations, conduct, or some combination of the three."[275] However, the court also reiterated that the CISG left certain issues to the courts to decide, stating "While embodying a liberal approach, the CISG does not vitiate the need to prove concepts familiar to the common law, including offer, acceptance, validity and performance."[276] This reaffirmed the implicit requirement within the CISG in cases involving a common law party in a common law court.

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267. CISG art. 4(a).

268. Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 201 F. Supp. 2d at 247-48.

269. *Id*. at 247.

270. *Id*. at 248.,

271. *Id*. at 249.

272. *Id*. at 261. Geneva Pharm. Tech. Corp. v. Barr Labs., Inc., 386 F.3d 485, 493 (2d Cir. 2004).

273. *Id*.

274. *Id*.

275. *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc*., 386 F.3d at 493.

276. *Id*.

On this basis, and citing to a number of similar federal cases, the court found sufficient consideration to form a valid contract under common law rules.[277] The judge reiterated the fact that consideration need not be equal on both sides of a transaction.[278] In this case, the court fashioned an implied-in-fact contract, a contract established by the circumstances of a transaction rather than via a clear contractual agreement. The valuable consideration here was the American company's reliance on the Canadian company's letter, which prompted the American company to submit their FDA application and effectively guaranteed the supplier a customer for its *Clathrate*. [279]The court found this to be reasonable inducement by the supplier, which the buyer relied upon.[280]

The *Geneva Pharmaceuticals* case is a prime example of how consideration remains a concern for common law parties under the CISG when there exists a question of contract validity and a common law court is answering that question.[281] It also reflects on the deference given to the court interpreting the validity of the contract. A common law court infrequently examines the adequacy (amount) of consideration between the parties; however, it does require that some sufficient (legal value) consideration exist to form a valid contract. Sufficient consideration, despite its inadequacy, was found here and thus the contract was upheld as validly formed.

In the *Shuttle Packaging Systems* case, the court addressed whether a party has to provide additional consideration in order to add a new requirement under an existing contract that was validly formed.[282] The case involved a Greek seller and a U.S. buyer of plastic gardening products. The contract originally included a non-compete agreement, but it did not lay out the terms and stated instead that they would be established in a subsequent agreement. When the non-compete agreement was later entered into, the buyer objected to the scope of the non-compete clause. The contract specified that the non-compete clause would be governed under the law of Michigan (the overall contract was governed by the CISG). The buyer asserted that the clause, which was a contract "modification," was invalid for lack of consideration. The court concluded that CISG Article 29 allowed modifications without consideration and, although local law established in the contract governs the interpretation of the clause, the CISG governs its validity under Article 29 since it is a modification and not a new contract.

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277. *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 201 F. Supp. 2d at 284.

278. *Id.* at 283.

279. *Id.*

280. *Id.*

281. *See, e.g.*, Lutz, *supra* note 216, at 721–22 (3/2004) (calling the article 4(a) exception a "black hole").

282. Shuttle Packaging Sys. v. Tsonakis, 2001 U.S. Dist. LEXIS 21630 (W.D. Mich. Dec. 17, 2001).

Whether a contract modification like the one considered in the *Shuttle Packaging Systems* case will be enforced without consideration depends on whether the contract is governed by the CISG or by common law principles.[283] In the civil law, an agreement between the parties to modify the contract is effective if there is sufficient *causa* even if the modification relates to the obligations of only one of the parties. In the common law, however, a modification of the obligations of only one of the parties is, in principle, unenforceable because new "consideration" is lacking. Many of the modifications envisaged by Article 29 of the CISG are technical modifications in specifications, delivery dates, or the like, which frequently arise in the course of performance of commercial contracts. Even if such modifications to the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements, according to article 27(1) *[draft counterpart of CISG article 29(1)],* are effective, thereby overcoming the common law rule that "consideration" is required."[284]

The *2P Commercial Agency* case is indicative of the oft-difficult position that common law courts are placed in when navigating common law consideration rules applied to a contract governed by the CISG.[285] In this 2013 case, SRT USA offered to sell 2P 400 iPhones via an executed purchase order.[286] 2P made an initial deposit into SRT's bank account for $55,360.[287] Between that point and the start of this lawsuit, Len Familiant, the initial sales consultant from SRT, made a personal guarantee to 2P in the amount of $300,000 should SRT fail to deliver the goods.[288] The goods were never delivered, and 2P sued both SRT for breach of goods contract and Familiant for breach of guarantee.[289]

Though the CISG clearly governed this contract dispute, the relevant issue for discussion was one of consideration.[290] The personal guarantee by Familiant was made after the initial contract was executed, so the question became whether this guarantee was a modification to the original sales contract, in which case it would be governed by and permissible under CISG Article 29, or whether it was a new agreement altogether, in which case it would be a question

283. *Id*.

284. *Secretariat Commentary, Guide to CISG Article 29*, PACE L. SCH. INT'L & COM L. (last updated Aug. 29, 2006), http://www.cisg.law.pace.edu/cisg/text/secomm/secomm-29.html.

285. 2P Commercial Agency S.R.O. v. SRT United States, No. 2:11–cv–652–FtM–29SPC, 2013 U.S. Dist. LEXIS 9186 (M.D. Fla. Jan. 23, 2013).

286. *Id*. at *1.

287. *Id*.

288. *Id*.

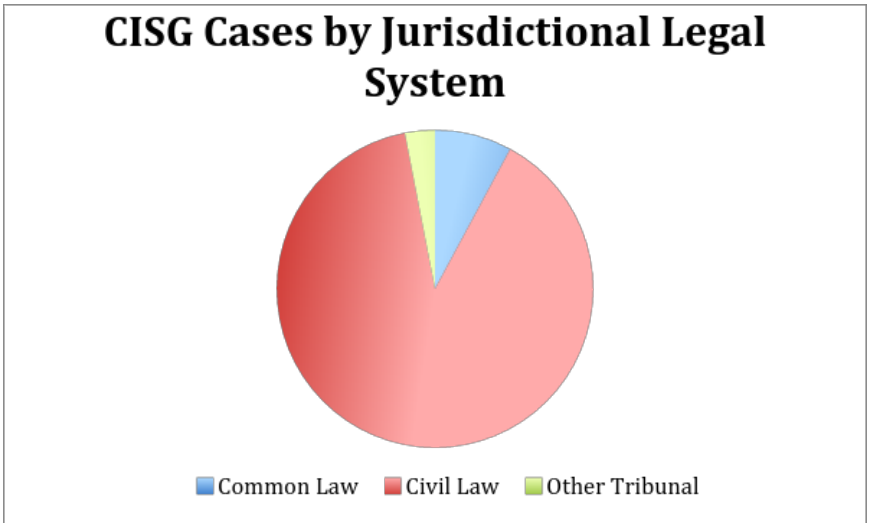
289. *Id*.

290. *Id*. at *5.

of contract validity governed by Article 4(a).[291] The court ultimately concluded that this was a question that needed additional argument and consequently denied the plaintiff's motion for summary judgment.[292] The outcome of this case was not known as of the time of this writing.

The cases that are mentioned in this Section are rare in that they involve contracts governed by the CISG and heard in common law courts.[293] The vast majority of cases heard by courts that apply CISG rules are found in countries that apply civil law. As the chart below shows, less than ten percent of the total CISG cases worldwide have been tried in common law jurisdictions where Article 4(a) might lead a tribunal to address the issue of consideration. This trend suggests that parties to international sales contracts from common law countries either opt-out of the CISG altogether in favor of some other choice of law (which is often advised by counsel in the United States) or they have included binding commercial arbitration clauses, which may or may not have applied the CISG rules,[294] but which are generally disputed privately.

Figure 1. CISG Cases by Jurisdiction (2014).



* Current as of September 2014. Source: Pace Law School CISG Database and Author's calculations.

291. *Id*. at *6.

292. *Id*.

293. *See, e.g*., Lutz, *supra* note 216, at 714 (finding that out of 1,265 CISG cases, only 56 were decided by U.S. courts).

294. *See, e.g*., Nils Schmidt-Ahrendts, *CISG and Arbitration*, 3 BELGRADE L. REV. 211 (2011).

V.
ATTEMPTED SOLUTIONS TO THE CONSIDERATION PROBLEM

As can be seen from the foregoing cases and discussion, consideration is a potential requirement for contracts between parties in civil and common law jurisdictions, but it is not always clear whether it will be a bar to establishing contract validity. This uncertainty has led many parties to take preemptive steps to avoid having their contract fail for lack of consideration. This Section examines the most common of these approaches—the consideration recital. Recitals are statements made, usually in the preliminary clauses of the contract, asserting generally agreed upon principles between the parties. These statements do not create obligations or give rights to any party; rather, they are meant to assert facts to which the parties have agreed. Below is an example of a consideration recital:

> In consideration of the promises and the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows.

A clause like this appears in many corporate contracts as boilerplate language. However, the clause alone does not overcome the problem of consideration.[295] In the event that a court finds that a contract lacks valid consideration, the inclusion of a consideration recital will have no effect on the validation of that contract in a common law jurisdiction. Consideration is found by examining the promises and acts of the parties to the contract, not in the statement of a recital.

The problem is that a recital of consideration fails to show the existence of sufficient legal consideration. Courts have consistently held that the "mere recital of consideration, which is one of the weakest elements to be found in any written contract, to be weighed against the granting and descriptive clauses, which, to say the least, are of vital importance in any instrument."[296] Yet the boilerplate inclusion of this recital provides contracting parties with false confidence that additional actions confirming the bargained for exchange are unnecessary.

A recent example of the failure of boilerplate language to constitute valid consideration occurs in *Yessenow*, where an Indiana federal court invalidated a

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295. *See, e.g.*, Kenneth Adams, *Drafting a New Day: Who Needs that "Recital of Consideration"?*, BUS. L. TODAY, Mar./Apr. 2003, at 2 ("the traditional recital of consideration will in most contracts be ineffective to remedy a lack of consideration. . . . ").

296. McCann v. Glynn Lumber Co., 34 S.E.2d 839, 844 (Ga. 1945); see, e.g., Smith v. Nationwide Mut. Ins. Co., 546 N.Y.S.2d 522, 523 (Sup. Ct. 1989) (finding that receipt of consideration in addition to a recital is necessary for contract validity); *see also* Socko v. Mid-Atl. Sys. of CPA, Inc., 99 A.3d 928, 932 (Pa. Super. Ct. 2014) (explaining the need for valuable and not merely nominal consideration); Adams, *supra* note 256; Joseph Siprut, *Comments: The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is not Binding, but Should be*, 97 N.W. U. L. REV. 1809, 1823-24 (2003); RESTATEMENT (SECOND) OF CONTRACTS 79 cmt. c (AM. LAW INST. 1979).

$1.5 million indemnity contract because it lacked valuable consideration.[297] The case involved two doctors who invested in a hospital that later went bankrupt. One doctor, Yessenow, vouched for the debts of the hospital and secured his guarantee by offering his Chicago condo as collateral. Subsequently, he sought to protect against his risk by securing an indemnity agreement from another doctor, Hudson. The indemnity agreement relied upon the following language in their contract: "[f]or good and valuable consideration, the parties hereto, intending to be legally bound, hereby agree as follows."[298]

After the hospital went bankrupt and sought to foreclose on Yessenow's condo, Yessenow turned to Hudson for indemnification. Hudson refused. Yessenow sued and the court made it eminently clear that a mere recital of consideration will not suffice to support a valid contract, stating "it is also black-letter contract law that a 'false recital of consideration' is 'a mere pretense of bargain [that] does not suffice' to create a contract."[299] The court continued: "[i]f merely saying in writing that a specified fictitious consideration had been received were enough to make a promise binding, a new kind of formal obligation would be created."[300]

It should be noted that some states have dispensed with the requirement of consideration for certain contracts.[301] A prominent recent example is the state of Pennsylvania, which, through its Uniform Written Obligations Act allows an agreement to form a binding and valid contract if it is signed and the parties clearly evidence their intent to be bound by its terms.

> [A] written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound.[302]

This closely tracks the current civil law approach to contract validity and, while not widespread, is evidence that frustration over the consideration doctrine permeates common law jurisdictions.[303] Note that Utah had also adopted this Act but later repealed it, making Pennsylvania the only state that applies it.[304]

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297. Yessenow v. Hudson, No. 2:08-CV-353 PPS, 2012 U.S. Dist. LEXIS 101132, at *10 (N.D. Ind. July 19, 2012).

298. *Id*. at *3.

299. *Id*. at *8, (citing RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b (AM. LAW INST. 1981)); *see also* Kenneth Adams, *Drafting a New Day: Who Needs that "Recital of Consideration"?*, BUS. L. TODAY, March/April 2003, at 1 ("a recital cannot transform into valid consideration something that cannot be consideration.").

300. RICHARD A. LORD, 3 WILLISTON ON CONTRACTS § 7:23 (4th ed. 2011).

301. The minority rule allows false recitals of consideration to support a contract that is otherwise valid. See 1464-Eight, Ltd.. v. Joppich, 154 S.W.3d 101, 110 (Tex. 2004) (recognizing that the decision to recognize a false recital of consideration is not the majority rule).

302. Pennsylvania Uniform Written Obligations Act, 33 PA. CONS. STAT. § 6 (1927).

303. Socko v. Mid-Atl. Sys. of CPA, Inc., 99 A.3d 928, 932 (Pa. Super. Ct. 2014).

304. *See* James D. Gordon, *supra* note 6, at 311.

VI.
AVOIDING THE CONSIDERATION PROBLEM IN COMMERCIAL CONTRACTS

The intention of this Article is not only to highlight the distinctions between contract formation and enforcement in common and civil law jurisdictions, but to provide practical guidance in order to avoid an enforcement problem based upon faulty consideration. To do that this final Section begins with a set of general technical recommendations, and then suggests specific language to include in both contracts and contract modifications, to effectively counter consideration challenges.

Parties to a contract that have selected a common law jurisdiction for enforcement will have to show valuable consideration to establish the validity of their contract. This is true whether the contract is governed purely by the common law (i.e., real property, services), by the UCC, or by the CISG if common law validity principles are applied. To reiterate, the common law requires consideration, the UCC has not dispensed with this requirement, and common law courts applying CISG principles have tended to interpret Article 4(a) as requiring them to apply local law to determine the validity of the contract, including the requirement of consideration. Accordingly, unless a contract is being exclusively formed and enforced in civil law jurisdictions, parties would be wise not to ignore the doctrine of consideration.

Although some commentators argue that consideration is an unnecessary and archaic doctrine, it remains central to the enforceability of contracts in common law courts. "There is no socially useful reason for a legal system to enforce agreements that are not supported by consideration."[305] Parties that choose to ignore it in their contracts do so at the risk of non-enforcement in a common law jurisdiction.

The key to overcoming a consideration challenge is to show that the parties bargained for their exchange. This is not as easy as it sounds. For instance, as discussed in the previous Section, a simple recital in a contract attesting to the existence of valuable consideration will usually not survive scrutiny by a common law court. The parties must be able to prove that entry into the agreement was induced by the actions or promises of the other party and this must be made clear by the language of the contract.

A. General Recommendations

This Section begins with a set of general recommendations for overcoming the risk of non-enforcement due to lack of consideration in a common law jurisdiction. These are suggestions based upon specific common law court decisions that questioned the nature of the consideration provided by the parties. Each of these points should be contemplated when drafting the initial contract:

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305. Yessenow v. Hudson, 2012 WL 2990643, at *10.

1. Include evidence of the receipt of consideration when relying on a consideration recital to prove the bargain. As discussed above, consideration recitals, while they may substantive and clearly state the obligations of the parties to the agreement, may also be superficial and meaningless. If a recital is used, ensure that it clearly identifies the basis for the consideration on the part of both parties.
2. Do not commit as valuable consideration assets that have already been committed elsewhere and that may not be available during the performance of the contract under negotiation. When the object of consideration is committed elsewhere, it cannot serve as valuable consideration in a subsequent contract since it may not actually exist at the time of contract execution. Only commit assets that are or will be available during the performance period of the contract.
3. Avoid nominal consideration. Though a peppercorn may serve as valuable consideration in a commercial contract, a court will be highly skeptical of the agreement, especially if the peppercorn (or other nominal consideration) is not actually transferred. Though a court will not generally evaluate the adequacy (amount) of consideration in a contract, they will look to party intent to assess whether the parties undertook any true risk. If the parties have not agreed upon the specifics of the consideration at the time of contract formation but intend to do so during the performance period, the contract can include the following language: "For good and valuable consideration, the sufficiency and receipt of which is hereby acknowledged, the parties agree as follows. . ." Bear in mind that if consideration is challenged under a provision such as this, the parties will indeed have to prove that such consideration existed and was exchanged.
4. Make the bargained-for-exchange aspect of the consideration conspicuous in the contract. A contract should be entered into by an offeree on the basis of an offer from the offeror, and vice versa. The formation of a contract depends on the inducement of the other party and this should be reflected in the consideration exchanged by the parties. Language in the contract recital or clause can easily reflect this: "Party A shall provide Party B with money *in exchange for* Party B's promise to perform X service." The italicized language makes clear that the contract is *quid pro quo* and that the basis of Party A's performance is the promise of Party B, and vice versa.

B. The Consideration Clause

Now that we understand the weaknesses of the consideration recital, we can evaluate an alternative approach—the consideration clause. A contract clause within the core provisions of the contract goes much further than a recital and specifically identifies not only the existence of consideration, but also how it

was bargained for. There may still be doubts as to whether the consideration was exchanged at all, but this clause provides evidence that the parties understood the nature of the consideration and that they were induced by the promise of the other when agreeing to the contract. This is known as the consideration clause.

Before delving deeper into the consideration recital and clause, it is important to note that the lack of either in a contract does not seal its fate as unenforceable in a common law court. Several courts have concluded that consideration can be implied from other terms of the contact or from the actions of the parties. One court noted, "a finding of consideration does not depend on the existence of a consideration clause or a money payment."[306] However, as the cases cited throughout this Article have shown, the surest way to avoid a consideration challenge is to include express language in the contract attesting to the nature of the exchange.

Commercial contracts in the common law, unlike the civil law, are about taking risks and creating expectations. When a party makes an offer to another party, that offer may induce acceptance by the offeree, at which point a contract may have been formed. At that moment, both the offeror and the offeree have taken on a new risk—a risk that their bargain will not give them what they hoped for. If Party A offers to sell his racehorse to Party B for $5,000, he risks receiving less than the true value of the horse (or that the value of the horse increases after the sale). If Party B accepts, he risks paying more than the true value of the horse (or that the value will diminish after the sale). Because both parties are taking a risk in the contract formation process, we can easily identify valuable consideration.

To be sure that a commercial contract is enforceable in the common law context, evaluate whether both parties have taken on a real risk by agreeing to the terms of the contract. Spell this risk out as clearly as possible in a consideration clause, not merely a recital. The difference between a consideration recital and a consideration clause is in the obligation created. Recitals are intended to assert statements of fact about the parties of the transaction. They are often used to provide background to the agreement—what led the parties to the negotiating table in the first place. A consideration recital might look like this:

> Jones owns a factory located at 100 Maple Leaf Drive and wishes to sell that factory and all of its operating assets to Smith, who has concluded a Deposit Agreement with Jones (Exhibit A) providing good and valuable consideration for this purchase.

The language appears to suggest that Jones bargained for the money identified in the Deposit Agreement by offering to sell Smith his factory, and

306. Lake Cable v. Trittler, 914 S.W.2d 431, 434 (Mo. Ct. App. 1996) (finding that the parties bargained for the right of first refusal, which limits the actions of the other party and thus creates sufficient consideration); *see also* McRentals, Inc. v. Barber, 62 S.W.3d 684, 706 (Mo. Ct. App. 2001) (finding implied promises valid to support an employment and stock option agreement).

that may very well be the case. However, unlike a core contract clause or even a representation, recitals are not actionable in the event of breach because they provide no obligation to perform, and thus no remedy in the event of non-performance. "When the recital of consideration merely acknowledges the receipt of a fixed sum, such recital is generally considered to be merely a noncontractual receipt."[307]

The recitals are meant to provide the court with evidence of intent to enter the contract. These are undoubtedly helpful in overcoming a challenge to the consideration in a contract, but they may be insufficient to show that the parties bound themselves to each other through bargained-for obligations, which would only appear in the body of the contract.

A consideration clause, on the other hand, should focus on the nature of the exchange between the parties—who is paying, how much are they paying, what are they paying for, and who is giving them something in return. It should apply language of mutual obligation and make clear that the parties are entering the contract based upon the commitments of the other. A consideration clause in an employment contract might look like this:

> In exchange for A's valuable services as a sous chef at B's restaurant, B hereby agrees to compensate A in the amount of $100,000 annually, which B shall provide to A in monthly installments on the last calendar day of each month.

In a goods contract, the phrasing would be slightly different:

> A shall pay B $10,000 as good and valuable consideration in exchange for B's promise to deliver 100 blue widgets, which shall conform to the specifications outlined in Exhibit 1 of this contract.

The use of the "shall" term signifies an obligation, making this an enforceable clause should a dispute arise. However, it is wise to limit the scope of the consideration clause to only the value being exchanged and to leave specifics about timing, delivery, and other specifications to other sections of the contract dedicated to these matters. Including such detail here runs the risk of creating overlapping obligations with potentially distinct requirements.[308]

C. Contract Modifications

It is fair to say, however, that consideration is more of a concern for parties when they are drafting their initial contract than after they have begun performance under that contract. But it is still very important to reiterate the role of consideration in making contract modifications. As discussed earlier, the preexisting duty rule prevents a contract modification from being enforced in a common law contract. Thus, when A has contracted with B to perform a valuable service and B proposes a change in terms (e.g., price) due to changed

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307. 29A AM. JUR. 2D, *Evidence* § 1141, Westlaw (2016).

308. *But see* Tina L. Stark, *Drafting the Consideration Provision of a Contract*, 51 THE PRACTICAL LAW 11, 12 (2005) (suggesting that the consideration clause should include adequate detail to identify the means, method, and conditions for payment).

circumstances, a common law court would be unlikely to permit that modification based upon the preexisting duty of B to perform his original obligations. We also know that this rule does not apply to UCC or CISG contracts. But even within the common law, how much of a problem does this pose?

A 1992 survey of businesses inquired about their willingness to allow contract modifications without additional consideration.[309] In that survey, ninety-five percent of respondents replied that they would not insist on strict compliance with the terms of the contract in the face of a proposed modification.[310] Most respondents stated that they would accept modifications if they were reasonable under trade practice or if they were interested in maintaining long-term positive relations with the requesting party.[311]

The Restatement (Second) of Contracts states that a contract modification is not valid if one party merely performs what he has already obligated himself to do.[312] This is the preexisting duty rule. However, the Restatement leaves room for modifications unsupported by new consideration in cases in which the parties face an unanticipated change in circumstances and act in good faith to adapt the contract accordingly.[313] The basis for this requirement is found in the court's fear that a party could be persuaded to give more than they bargained for by a party trying to exploit a situation.

> [T]here is often an interval in the life of a contract during which one party is at the mercy of the other. A may have ordered a machine from B that A wants to place in operation on a given date [and] may have made commitments to his customers that it would be costly to renege on. As the date of scheduled delivery approaches, B may be tempted to demand that A agree to renegotiate the contract price, knowing that A will incur heavy expenses if B fails to deliver on time. A can always refuse to renegotiate, relying instead on his right to sue B for breach of contract if B fails to make delivery by the agreed date. But legal remedies are always costly and uncertain.[314]

This language from Judge Cardozo is particularly enlightening of the practical effect of the common law's prohibition on contract modifications without new consideration. A party is often better off accepting the "new" agreement, which undoubtedly reduces the welfare of the party preferring the original terms, rather than confronting the other party in court and paying the

309. Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WISC. L. REV. 1, 18 (1992).

310. *Id*. at 17.

311. *Id*. at 18.

312. RESTATEMENT (SECOND) OF CONTRACTS § 86 (AM. LAW INST. 1981).

313. *Id*. at § 89(a); *see also* Robert A. Hillman, *Contract Modification Under the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 680, 692 (1982).

314. United States v. Stump Home Specialties, Inc., 905 F.2d 1117, 1121–22 (7th Cir. 1990).

associated costs.[315] This is likely part of the reason that so many businesses accept modifications so willingly.

This leaves two practical questions. First, how can parties prevent contract modifications without new consideration? And second, how can parties successfully modify an existing contract? I will address these briefly below.

Many parties are aware that contracts may sometimes be modified, explicitly or implicitly, by the conduct of the parties. Failing to enforce a particular right within a contract, for instance, may result in the party waiving its ability to enforce that right in the future and thereby implicitly modifying the contract. Alternatively, parties may agree expressly to divert from an obligation within the contract, temporarily or for the remaining term, without adding new consideration. Both of these situations pose risks to the parties that they will not receive the benefit of their original bargain.

Accordingly, a number of contracts today include both "no oral modification" clauses as well as "no waiver" clauses. The clauses look like this:

> No waiver of satisfaction of a condition or nonperformance of an obligation under this agreement will be effective unless it is in writing and signed by the party granting the waiver.

Clauses that require any contract modification to be in writing have been dismissed in cases where the actions of the parties show assent to a verbal modification.[316] "No waiver" clauses have been more successful in blocking modifications without new consideration. However, even in cases in which both "no oral modification" and "no waiver" clauses appear in a contract, courts have found ways to ignore them based upon the party's apparent intent and actions.[317]

The next question is how to successfully modify an existing written contract, even where the contract attempts to prevent changes. This was the issue in the *Green v. Millman Bros, Inc.* case, in which a landlord and tenant orally agreed to modify the amount to be charged for rent each month.[318] Their actions demonstrated acceptance of this modification. However, they ultimately disagreed about how long this modified rental amount would be permitted. When the landlord sued for the original amount, he claimed that the modification lacked consideration. The tenant contended that his willingness to

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315. Christine Jolls, *Contracts as Bilateral Commitments: A New Perspective on Contract Modification*, 26 J. L. STUD. 203, 218-21 (1997).

316. LUCY D. ARNOLD, FULBRIGHT & JAWORSKI LLP, I DIDN'T SAY THAT!: "NO ORAL MODIFICATION" CLAUSES IN ENERGY TRANSACTIONS (2011).

317. *See, e.g.*, Salma S. Safiedine, Mary Clarke, and Amanda Galbo, *Oral Modifications Notwithstanding a No Oral Modification Clause: Preserving the Right to Contract or Enabling Havoc?*, AM. BAR ASS'N: WHITE COLLAR CRIME COMM. NEWSLETTER, Fall 2014, at 2, http://www.americanbar.org/content/dam/aba/publications/criminaljustice/wcc_newsletter_fall14_oral_mod.authcheckdam.pdf ("parties to a contract are free mutually to waive or modify their agreement through written and oral agreements, as well as through conduct, notwithstanding the presence of [preventive clauses] purporting to restrict that ability.").

318. 7 Mich. App. 450 (1967).

continue the rental was what bargained in exchange for the reduced rental amount. The court disagreed. It stated that "[t]he general rule [for consideration] is that a promise to do that which the promisor is legally bound to do, or the performance of an existing legal obligation, does not constitute consideration, or sufficient consideration, for a contract."[319] The tenant was already obligated to continue the rental under the original contract, so he had given no new consideration for the modification. Accordingly, the modification was invalid for lack of consideration.

What we learn from these cases is that preventing contract modifications through preventive clauses is not a foolproof mechanism. If we want to permit such modifications in an existing contract, we will have to identify additional consideration not present in the original contract. This additional consideration could be as simple as adjusting the overall cost of the contract in exchange for an earlier or later delivery date, taking on an additional task for an additional benefit, or adjusting the quality of materials in exchange for a higher cost. Whatever the modification, some bargained-for benefit must be provided by the party seeking the modification to withstand challenge later on.

With these recommendations in mind, a party drafting a contract or modifying a contract subject to common law rules can do so more confidently knowing that it will withstand a consideration challenge. Including a recital, as well as covenants, attesting to the risks that the parties took on in agreeing to the terms of the contract provide the best defense to a consideration challenge in a common law court.

CONCLUSION

The potential conflict that may ensue between parties to cross-border transactions involving both civil and common law jurisdictions for purposes of contract interpretation is significant. Ignoring the element of consideration in a contract that has any possible linkage to a common law jurisdiction is dangerous and may result in the contract being unenforceable in common law courts. Yet as discussed in the previous Section, including appropriate language identifying the consideration is not a heavy burden for the drafting party from any jurisdiction.

Since its inception in the seventeenth century, consideration has stood for the proposition that a contract can only be enforced if both parties made their agreement on the basis of mutual benefit. It provides the justification for the parties to agree to the bargain. Over time, courts have occasionally sought to turn consideration into a formality that might be dispensed with under certain conditions.[320] However, "requiring mutual inducement means that the law

319. Green v. Millman Brothers, Inc., 151 N.W.2d 860, 863 (Mich. Ct. App. 1967).

320. *See, e.g.*, James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 986 (1990); Wessman, *supra* note 194, at 731.

favors beneficial transactions."[321] As discussed, at least one common law jurisdiction, Pennsylvania, has already dispensed with the requirement of consideration and allows statements of intent to suffice as a substitute.[322] Also, some non-U.S. common law jurisdictions, such as Singapore, have explicitly recognized that a contract lacking consideration may be upheld as valid and enforceable under conflict of laws rules.[323]

In commercial contracts, the Article contends that consideration continues to serve a valuable purpose. Gratuitous promises, while undoubtedly an important part of doing business, must not be construed and enforced as binding contracts because they create unilateral benefits and unilateral obligations on either side of the same transaction, calling into question the mutuality of the obligation. This lack of mutuality removes the motivation that binds parties to a valid contract—namely, risk. A party enters a contract on the basis of risk, expecting a return on that risk upon completion of performance. Without risk, a party cannot rely upon the enforcement provisions inherent to contract law, nor can they pursue their expectation interest should the other party breach. The resulting uncertainty weakens the value of binding yourself to a contract in the first place.

In today's rapidly globalizing business environment, firms are increasingly entering contracts involving parties in both common and civil law countries. This trend will likely continue, especially as barriers to cross-border trade fall as a result of trade agreements that reduce tariff and non-tariff barriers to trade.[324] Private parties are not protected under these agreements with respect to enforcement of purely private contracts and due consideration should be paid to the development of written agreements that will be enforceable in both common and civil law jurisdictions.

Accordingly, this Article cautions parties to contracts that may have their formation judged by a common law court to take seriously the doctrine of consideration. Failure to properly account for mutuality both within the terms and the performance of the contract risks the very validity of the contract. A small investment of time spent on this element at the outset of the drafting process can substantially strengthen the likelihood of enforcement in the future.

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321. Val Ricks, *Consideration and the Formation Defenses*, 62 KAN. L. REV. 315, 339 (2013).

322. *See, e.g.*, Pennsylvania Uniform Written Obligations Act, 33 PA. CONS. STAT. § 6 (1927).

323. The Conflict of Laws: Choice of Law § 6.3.6, (2015) (Sing.) http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-6 ("in domestic Singapore law, the doctrine of consideration is an essential ingredient of a contract not made under deed. Nevertheless, an agreement not supported by consideration can be characterised as a "contract" for choice of law purposes, in recognition that other legal systems do not use consideration to resolve the problems that the common law uses that doctrine to resolve (Re Bonacina [1912] 2 Ch 394).").

324. Consider, for example, the Trans-Pacific Partnership, signed in February 2016. *See, e.g.*, Tim Worstall, Opinion, *The TPP, World's Largest Trade Pact, Finally Gets Signed*, FORBES (Feb. 4, 2016), http://www.forbes.com/sites/timworstall/2016/02/04/the-tpp-worlds-largest-trade-pact-finally-gets-signed/#3a2adbc24062.