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Article:	The Doctrine of Consideration in the Law of Contract: A Comparative Analysis of Common Law and Civil Law Legal Systems
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ABSTRACT

This comparative analysis explores the doctrine of consideration in the common law and civil law legal systems. In common law jurisdictions, the doctrine of consideration is a fundamental principle in determining the enforceability of contracts. Under this doctrine, a contract is only legally binding if there is an exchange of something of value between the parties. However, the civil law system places less emphasis on consideration, and instead focuses on the intent of the parties and the overall fairness of the agreement. This paper compares and contrasts these two approaches, and considers the implications of the differences between them for the enforceability of contracts in each system. It also examines the criticisms of the doctrine of consideration, and explores potential reforms that could update the law and better reflect modern contractual practices. Overall, this paper provides valuable insights into the strengths and weaknesses of each approach, and highlights the importance of striking a balance between legal certainty and flexibility in contract law.

Keywords: Doctrine of Consideration, enforceability of Contracts, Common Law, Civil Law

Introduction:

The doctrine of consideration is a central concept in the law of contract in common law jurisdictions. It requires that each party to a contract must provide something of value to the other party in exchange for the other party's performance or promise to perform. However, the doctrine of consideration has been criticized by some legal scholars, who argue that it is outdated and unnecessary in modern contract law. This research proposal aims to analyze and compare the doctrine of consideration in common law and civil law systems, and to evaluate its relevance and significance in contemporary contract law.

Evolution of Doctrine of Consideration in Common Law and Civil Law:

The doctrine of consideration is a fundamental principle in the common law system, which requires that parties exchange something of value in order to create a legally enforceable agreement. However, the concept of consideration is not recognized in the civil law system, which instead relies on other legal principles, such as the concept of cause, to determine the enforceability of contracts.

Common law: The doctrine of consideration has its roots in English common law, dating back to the 16th century. Prior to the development of the doctrine, contracts were enforced based on promises alone, regardless of whether any value had been exchanged between the parties. However, in the early 16th century, courts began to require that contracts be supported by consideration in order to be enforceable (Mays, G. L., & Fidelie, L. W. 2012). Over time, the requirement of consideration became more widely applied and was seen as a fundamental principle of contract law. By the 19th century, the requirement of consideration was firmly established in English contract law, and had been adopted by other common law legal systems, such as the United States and Australia (Holmes 1991).

Civil law: In contrast to the common law system, the civil law system does not recognize the doctrine of consideration. Instead, civil law systems rely on other legal principles to determine the enforceability of contracts (Lorenzen 1919). In French law, for example, the concept of cause is used to determine the validity of contracts. Under French law, a contract is considered valid if it has a cause, which is defined as the reason or motive for the contract. The cause must be lawful, real, and not contrary to public policy. Other civil law systems, such as German law, use similar principles to determine the enforceability of contracts.

Evolution: In recent years, the doctrine of consideration in common law systems has come under criticism for being overly formalistic and not reflective of modern contractual practices. Some legal scholars and practitioners have called for its abolition or reform, while others have advocated for its retention in some form (Gordon III 1989). In response, some common law jurisdictions have introduced alternative approaches to consideration, such as the doctrine of promissory estoppel, which allows a promise to be enforced even in the absence of consideration.

In civil law systems, the concept of cause remains a fundamental principle for determining the enforceability of contracts. However, there have been some recent developments that have expanded the scope of the principle. For example, in some jurisdictions, such as France, courts have recognized a "moral cause" for contracts, which allows for contracts to be enforced based on moral or ethical considerations, even in the absence of a traditional cause (Mackaay 2011).

Case laws Analysis on Doctrine of Consideration:

Sure, here are a few important case laws that have helped to shape the doctrine of consideration in contract law:

1. *Currie v Misa* (1875) - In this case, the court defined consideration as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." This definition remains a fundamental principle of consideration in contract law today.
2. *Tweddle v Atkinson* (1861) - This case established the principle that consideration must move from the promisee. In other words, a third party cannot enforce a contract even if they are a beneficiary of it, unless they have provided some form of consideration.
3. *Stilk v Myrick* (1809) - This case concerned the doctrine of "past consideration", which refers to something that has already been given or done prior to the making of a contract. The court held that past consideration is not valid consideration for a new contract, unless there was an express or implied promise to reward the past act.
4. *Chappell & Co Ltd v Nestle Co Ltd* (1960) - In this case, the court held that consideration need not be of equal value or even tangible, as long as it has some value to the parties. The case concerned a promotion in which customers could obtain a free record by sending in three chocolate bar wrappers. The court held that the wrappers constituted valid consideration, even though they were not worth much in monetary terms.
5. *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1990) - This case concerned the doctrine of "practical benefit", which refers to situations where one party receives a benefit from the other party's performance of a contractual duty. The court held that the promise of an additional payment for completing a construction contract on time was enforceable, even though the promisee had already agreed to perform the contract, because the promisor had received a practical benefit in the form of avoiding a penalty for late completion.

These cases illustrate some of the key principles and limitations of the doctrine of consideration in contract law.

Purpose of Doctrine of Consideration:

The purpose of the doctrine of consideration in contract law is to ensure that contracts are supported by a bargained-for exchange of something of value, which makes them legally binding and enforceable (Benson 2011). Consideration is an essential element of a valid contract, and without it, a contract will not be enforceable.

There are several purposes that the doctrine of consideration serves in contract law, including:

1. **Ensuring voluntary agreement:** By requiring parties to exchange something of value, the doctrine of consideration helps to ensure that contracts are entered into voluntarily and with an understanding of the terms of the agreement. This helps to prevent situations where one party may be coerced or misled into entering into a contract (Hough & Spowart-Taylor 2001).
2. **Providing predictability:** The doctrine of consideration helps to provide a measure of certainty and predictability in commercial transactions. Parties can rely on the enforceability of their contracts and can plan their affairs accordingly.

3. Preventing fraud and abuse: By requiring parties to exchange something of value, the doctrine of consideration helps to prevent fraud and other forms of abuse. It ensures that contracts are not based on false or illusory promises (Kreitner 2001)
4. Promoting fairness: The doctrine of consideration helps to promote fairness in contractual relationships. It ensures that both parties have given and received something of value, and that neither party is taking advantage of the other.

Therefore, the doctrine of consideration is an important principle in contract law, which helps to ensure that contracts are based on a fair and voluntary exchange of something of value. It serves to promote predictability, fairness, and prevent abuse in contractual relationships.

Operation of doctrine of Consideration in Common and Civil Law:

The doctrine of consideration operates differently in various common law and civil law jurisdictions, depending on their legal traditions and the specific laws and court decisions that apply. Here is an overview of how the doctrine operates in some of these jurisdictions:

Common Law Jurisdictions:

1. England and Wales: In England and Wales, the doctrine of consideration is a fundamental principle of contract law. Consideration is defined as something of value given by each party to the other, and is necessary for a contract to be legally binding. This requirement applies to both bilateral contracts (where there is an exchange of promises) and unilateral contracts (where a promise is made in exchange for an act). In some cases, however, the doctrine of promissory estoppel can be used to enforce a promise without consideration. (Ricks, V. D. 2000).
2. United States: In the United States, the doctrine of consideration is widely recognized in contract law. Courts generally require that both parties provide some form of consideration to create a binding contract, although there are some exceptions. For example, the Uniform Commercial Code (UCC) recognizes certain situations where a contract can be formed without consideration, such as in cases of firm offers and modifications of existing contracts (Von Mehren & Murray 2007).
3. Australia: In Australia, the doctrine of consideration operates similarly to that in England and Wales. Consideration is required for a contract to be legally binding, although there are some exceptions, such as in cases of past consideration, where the consideration was provided before the promise was made (Wright, Ellinghaus & Kelly 2014)

Civil Law Jurisdictions:

1. France: In French law, the concept of cause (or "cause of the contract") is used to determine the validity of a contract. The cause is the underlying reason or motive for the contract, and must be lawful, real, and not contrary to public policy. If the cause is absent, the contract is considered null and void (Rowan 2017). However, French law also recognizes the concept of "moral cause", which allows for the enforcement of contracts based on moral or ethical considerations, even in the absence of a traditional cause.
2. Germany: In German law, the principle of "Bargain Theory" is used to determine the validity of contracts. This principle requires that both parties receive something of value in exchange for their promises, although the value need not be equal. This principle

operates similarly to the doctrine of consideration in common law jurisdictions (Ungerer 2023).

3. Italy: In Italian law, the principle of "causa" is used to determine the validity of contracts. The causa is the legal or factual reason for the contract, and must be lawful, real, and not contrary to public policy. If the causa is absent, the contract is considered null and void (Leoncini, Vecchiato & Zamparini 2020).

Overall, the doctrine of consideration operates differently in common law and civil law jurisdictions, with the latter relying on different legal principles to determine the validity of contracts. However, there are some similarities in the requirements for consideration or other legal principles, and there is ongoing debate and development in contract law in all jurisdictions.

Influence of Criticism in the Development of Contract Law:

The doctrine of consideration has been subject to several criticisms, which have influenced the development of contract law in various ways. Here are some of the criticisms of the doctrine:

1. Formalism: One criticism of the doctrine of consideration is that it is too formalistic, rigid, and does not take into account the reality of modern commercial practices. Some argue that the requirement for consideration places too much emphasis on the form of the contract, rather than the substance and the intentions of the parties (Pryor 2005).
2. Unfairness: Another criticism is that the doctrine of consideration can result in unfair outcomes. For example, it may allow a party to renege on a promise, even if the other party has relied on that promise to their detriment.
3. Inflexibility: The requirement of consideration can also make it difficult to enforce contracts that are not based on an exchange of promises. This may be particularly problematic in situations where one party has performed their obligations under the contract, but the other party has not yet provided consideration (Pryor 2005).
4. Complexity: The doctrine of consideration can also create complexity and uncertainty in contract law, as courts may struggle to determine whether consideration has been given and whether it is adequate.

In response to these criticisms, there have been several developments in contract law, such as:

1. Promissory Estoppel: Courts in common law jurisdictions have developed the doctrine of promissory estoppel, which allows a party to enforce a promise even if there is no consideration, provided that certain conditions are met. This doctrine has been used in cases where a promise was made, but not followed through, and the other party has suffered a loss as a result (Pollock 1901).
2. Good Faith: Some legal systems, such as those in the United States and Germany, have introduced the principle of good faith and fair dealing, which requires parties to act in good faith and not to take advantage of each other. This principle can mitigate the rigid application of the doctrine of consideration, and promote more equitable outcomes (Pryor 2005).
3. Unjust Enrichment: Another response to the criticisms of the doctrine of consideration is the development of the doctrine of unjust enrichment. This doctrine allows a party to recover the value of a benefit conferred on the other party, in situations where there is no valid contract, but one party has received a benefit from the other (Pollock 1901).

Overall, the criticisms of the doctrine of consideration have led to the development of new legal principles and doctrines, which attempt to mitigate the limitations of the doctrine and promote more equitable outcomes in contract law.

Significant Implication for Enforceability of Contracts:

The doctrine of consideration has significant implications for the enforceability of contracts, even in the context of modern contractual practices and emerging technologies.

In general, the doctrine of consideration requires that each party to a contract provide something of value, or consideration, in exchange for the promises made by the other party. This means that a contract that lacks consideration, or where the consideration is inadequate, may be deemed unenforceable. This requirement serves to ensure that each party has a vested interest in the contract and that the promises made are supported by some form of exchange (Cooley, Marimon & Quadrini 2004).

However, modern contractual practices and emerging technologies can present challenges to the application of the doctrine of consideration. For example, some contracts involve non-monetary forms of consideration, such as promises to perform services or transfer intellectual property (Patel *et al* 2018). Other contracts may involve the exchange of digital assets or the use of blockchain technology, which may not fit neatly within traditional notions of consideration.

In some cases, emerging technologies may make it difficult to determine whether consideration has been provided. For example, if a smart contract is used to execute an agreement, it may be challenging to determine whether the parties have provided sufficient consideration, particularly if the terms of the contract are complex or involve multiple parties.

These challenges have led some legal scholars to question whether the doctrine of consideration is still relevant in the context of modern contractual practices and emerging technologies. Some argue that a more flexible approach may be necessary to accommodate the unique characteristics of these contracts, while others suggest that the doctrine of consideration should be expanded or redefined to better reflect contemporary contract law practices (Patel *et al* 2018).

Hence, the implications of the doctrine of consideration for the enforceability of contracts in the context of modern contractual practices and emerging technologies are complex, and the future of the doctrine may be subject to ongoing debate and refinement as new legal issues arise.

Approach of Other Legal Systems:

Civil law and international law systems approach the issue of consideration differently from common law systems. In general, these systems do not require consideration to the same extent as common law systems, and instead rely on other legal concepts to determine the enforceability of contracts.

In civil law systems, the concept of *causa* is used to determine whether a contract is enforceable. *Causa* refers to the legal reason or purpose for entering into a contract, and it is typically used to determine whether the contract is valid and binding. In civil law systems, a contract may be enforceable as long as it has a valid *causa*, regardless of whether there is consideration.

In international law, the United Nations Convention on Contracts for the International Sale of Goods (CISG) is a widely accepted treaty that governs the formation and performance

of international contracts for the sale of goods. The CISG does not require consideration for a contract to be enforceable, but instead relies on other legal concepts such as offer and acceptance, the intention to be bound, and the requirement for a definite agreement.

From these approaches, we can learn that there are alternative legal concepts and approaches that can be used to determine the enforceability of contracts, beyond the traditional common law doctrine of consideration. The concept of *causa*, for example, could be useful in assessing the validity of contracts in situations where the doctrine of consideration does not apply or does not provide a clear answer.

In addition, the approaches of civil law and international law suggest that the doctrine of consideration may not be as universally applicable as previously thought. As modern contractual practices and emerging technologies continue to shape the legal landscape, it may become increasingly necessary to consider alternative legal concepts and approaches to ensure that contracts are enforceable and provide appropriate legal protections to all parties involved.

Suggestions:

The question of whether reforms are needed to update the doctrine of consideration in contract law is a subject of ongoing debate among legal scholars and practitioners. While some argue that the doctrine is outdated and in need of reform, others believe that it remains a vital aspect of contract law and should be preserved. However, it is clear that modern contractual practices and emerging technologies have presented new challenges to the application of the doctrine of consideration, and there may be a need for some adjustments to better reflect these changes. Here are some possible reforms that have been suggested:

1. **Recognition of Non-Monetary Forms of Consideration:** One reform that has been suggested is to recognize non-monetary forms of consideration, such as the provision of services or the transfer of intellectual property, as sufficient consideration for a contract. This would enable a wider range of contracts to be recognized as valid and enforceable, particularly in the context of emerging technologies.
2. **Expansion of the Concept of Consideration:** Another reform that has been suggested is to expand the concept of consideration to include promises or acts that are made in exchange for the promise of performance by the other party, even if they do not involve a direct exchange of value. This would allow contracts to be recognized as valid even if the exchange of consideration is not direct or immediate.
3. **Greater Flexibility in Contract Law:** Some legal scholars have suggested that a more flexible approach to contract law may be necessary to accommodate modern contractual practices and emerging technologies. This may involve a shift away from a strict adherence to the doctrine of consideration, and a greater emphasis on other legal concepts such as good faith, fairness, and the intention to be bound.

In summary, potential reforms to the doctrine of consideration in contract law include the recognition of non-monetary forms of consideration, the expansion of the concept of consideration to include promises or acts that do not involve a direct exchange of value, and a more flexible approach to contract law that emphasizes other legal concepts beyond the strict requirements of consideration. These reforms would help to better reflect modern contractual practices and emerging technologies, and ensure that contract law remains relevant and effective in the dynamic and rapidly-changing legal landscape.

Current Status in Contemporary Law: The doctrine of consideration remains a fundamental aspect of contemporary contract law, particularly in common law jurisdictions. In general, a contract is enforceable only if each party provides consideration, or something of value, to the other. This means that a promise to do something without any corresponding exchange of value, or consideration, is generally not enforceable (Margalit 2013). However, as previously noted, the doctrine of consideration has been subject to criticism and has been adapted in various ways in response to those criticisms.

In contemporary contract law, the doctrine of consideration is often used to determine the validity and enforceability of contracts (Maniruzzaman 2001). If a contract lacks consideration, it may be deemed to be unenforceable. However, the doctrine of consideration is not the only factor that courts consider when deciding whether a contract is enforceable. For example, courts may also consider whether the parties entered into the contract with mutual assent, whether the contract is legal and not against public policy, and whether the terms of the contract are sufficiently definite.

One way that the doctrine of consideration impacts the enforcement of contracts is in relation to the doctrine of promissory estoppel. As noted earlier, promissory estoppel allows a party to enforce a promise even in the absence of consideration, provided that certain conditions are met. This doctrine may be used when one party has relied on a promise made by the other party to their detriment. For example, if Party A promises to pay Party B for services rendered, but later reneges on that promise, Party B may be able to rely on the doctrine of promissory estoppel to enforce the promise, even if there was no consideration exchanged at the time the promise was made (Barnett & Oman 2021).

While the doctrine of consideration continues to play an important role in contemporary contract law, therefore, it is not the sole determinant of the enforceability of a contract.

Note: Other factors, such as mutual assent and legality, also play a significant role in the enforcement of contracts.

Conclusion:

The doctrine of consideration plays a fundamental role in the common law system, particularly in English contract law, and is essential in determining the enforceability of agreements. However, it is not as significant in the civil law system, where the emphasis is on the intent of the parties and the overall fairness of the agreement. The civil law approach allows for greater flexibility in contract formation, and may not require formal consideration to create a binding agreement.

Comparing the two systems, it is clear that the doctrine of consideration has a significant impact on the enforceability of contracts in common law jurisdictions, while civil law contracts may be more flexible in this regard. However, the flexibility of civil law contracts can come at a cost, as it may lead to greater uncertainty and inconsistency in contract law.

One of the main criticisms of the doctrine of consideration is that it can be too rigid and outdated, particularly in the context of modern contractual practices and emerging technologies. There have been calls for reform to update the law and better reflect modern contractual practices, and adopting a more flexible approach to consideration, as seen in civil law jurisdictions, may be one possible solution. This could help to balance the need for legal certainty with the need for flexibility and adaptability in contract law.

In conclusion, while the doctrine of consideration remains a vital part of contract law in common law jurisdictions, it is not as significant in the civil law system. A comparative analysis of these two legal systems highlights the strengths and weaknesses of each approach, and provides valuable insights into how contract law might be improved in the future. Ultimately, it is important to strike a balance between legal certainty and flexibility in order to create a contract law system that is effective and efficient in meeting the needs of society.

References:

- Barnett, R. E., & Oman, N. B. (2021). *Contracts: Cases and doctrine*. Aspen Publishing.
- Benson, P. (2011). The Idea of Consideration. *University of Toronto Law Journal*, 61(2), 241-278.
- Chappell & Co Ltd v Nestlé Co Ltd [1960] AC 97
- Currie v Misa (1874) LR 10 Ex 153
- Gordon III, J. D. (1989). Dialogue about the doctrine of consideration. *Cornell L. Rev.*, 75, 986.
- Holmes, O. W. (1991). The common law. *Courier Corporation*.
- Hough, B., & Spowart-Taylor, A. (2001). The doctrine of consideration: dead or alive in English employment contracts?. *Journal of Contract Law*, 17(3), 193-211.
- Kreitner, R. (2001). The Gift Beyond the Grave: Revisiting the Question of Consideration. *Colum. L. Rev.*, 101, 1876.
- Lorenzen, E. G. (1919). Causa and Consideration in the Law of Contracts. *The Yale Law Journal*, 28(7), 621-646.
- Mackaay, E. (2011). The civil law of contract. In *Encyclopedia of Law and Economics*. Edward Elgar Publishing Limited.
- Maniruzzaman, A. F. M. (2001). State contracts in contemporary international law: monist versus dualist controversies. *European Journal of International Law*, 12(2), 309-328.
- Margalit, Y. (2013). In defense of surrogacy agreements: A modern contract law perspective. *Wm. & Mary J. Women & L.*, 20, 423.
- Mays, G. L., & Fidelie, L. W. (2012). *American courts and the judicial process*. New York: Oxford University Press.
- Patel, D., Shah, K., Shanbhag, S., & Mistry, V. (2018). Towards legally enforceable smart contracts. In *Blockchain-ICBC 2018: First International Conference, Held as Part of the Services Conference Federation, SCF 2018, Seattle, WA, USA, June 25-30, 2018, Proceedings 1* (pp. 153-165). Springer International Publishing.
- Pollock, F. (1901). Afterthoughts on Consideration. *LQ Rev.*, 17, 415.
- Pryor, C. S. (2005). Consideration in the Common Law of Contracts: A Biblical-Theological Critique. *Regent UL Rev.*, 18, 1.
- Rowan, S. (2017). The new French law of contract. *International & Comparative Law Quarterly*, 66(4), 805-831.
- Stilk v Myrick (1809) 170 ER 1168
- Tweddle v Atkinson [1861] EWHC QB J57
- Ungerer, J. (2023). A Bidirectional Anglo-German Comparison of Consideration in Contract Law. *International & Comparative Law Quarterly*, 72(1), 251-268.
- Ungerer, J. (2023). A Bidirectional Anglo-German Comparison of Consideration in Contract Law. *International & Comparative Law Quarterly*, 72(1), 251-268.
- Von Mehren, A. T., & Murray, P. L. (2007). *Law in the United States*. Cambridge University Press.
- Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1

Wright, T., Ellinghaus, M., & Kelly, D. (2014). A Draft Australian Law of Contract. Available at SSRN 2403603.