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The Rise and Fall of the Doctrine of Consideration: A Comparative Analysis of Contractual Enforcement in Common Law and Civil Law Systems

Bachelor's Thesis

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I hereby declare that I am the sole author
of this Bachelor's Thesis and it has
not been presented to any other
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Abstract

The doctrine of consideration, which grew into the realms of prominence and admiration, is now an Achilles' heel among the established doctrines of English contract law. Furthermore, its application and functionality, in conjunction with its interpretation, resulted in a conundrum of outcomes for parties seeking to enforce lawful serious intentions. The fundamental issue with consideration is that it operates as an unnecessary technical requirement that parties must insert with their promises when contracting. This requirement is not of tangible value nor is it of fair value; consideration is a requirement measuring the sufficiency of promises made. This measurement ignores the lawful serious intentions of contracting parties, which leads to lawful promises being struck down and allowing persons in breach to escape from their own promises. These outcomes include contradictory, contrary, and illogical results which perplex the very thought of sound justice. Moreover, these outcomes would be inevitable because of the patchwork of the rules and principles that give life to the ideology of consideration. Therefore, this thesis discusses the flaws and solutions to deal with the problem of consideration. In order to derive solutions, this thesis first defines the scope and stitched-up nature of the doctrine of consideration while reflecting on its history. Secondly, it outlines the contractual theory around the idea of the enforcement of promises in the context of the leading schools of thought and analysis. Thereafter, the doctrine of consideration is evaluated -in the light of contractual theory- to highlight the disparity between the *status quo* and the ideal position. Thirdly, the German model of the enforcement of promises is examined to extrapolate principles and solutions that are compatible with the ideal goal. Lastly, this thesis discusses the implied 'call to action for change' in the form of reformation or abolition- guided by judicial and legislative proposals of intervention. Therefore, the patchwork of rules and principles that gave buoyancy to the doctrine of consideration are now deflated and not fit for purpose. Thus, English contract law must come to the realisation that the doctrine of consideration must ride off into the sunset of history. Most importantly, English contract law must remodel itself to enable better efficacy of the enforcement of the lawful serious intentions of contracting parties.

Table of Abbreviations

A & E	Admiralty and Ecclesiastical Cases Law Reports
AC	Appeal Cases
App	Case Appeal Cases Law Reports (1875-1890)
B & S	Best and Smith's Reports
BGB	Bürgerliches Gesetzbuch (The Civil Code of Germany)
CB	Common Bench Reports
CC	Le Code civil des Français (The Civil Code of France)
CH	Chancery Division
CLR	Commonwealth Law Reports
Co Rep	Coke's Reports
ER	English Reports
EWCA Civ	England and Wales Court of Appeal Civil Division
EWCA	England and Wales Court of Appeal Criminal Division.
EWHC	High Court of England and Wales
Hob	Hobart's Reports
KB	King's Bench
LJ Ex	Law Journal Exchequer
LR	Law Reports
PECL	Principles of European Contract Law
QB	Queen's Bench
SGCA	Supreme Court of Singapore- Court of Appeal
UNIDROIT	International Institute for the Unification of Private Law
WLR	Weekly Law Reports

Introduction

English contract law over centuries of uninterrupted development gave birth to a controversial auditor of enforceability called the doctrine of consideration. It rivals other doctrines emanating from other legal systems around the world where they ensure that not all agreements can be enforceable in law.[1] Operating parallel to the doctrine, but to a lesser degree, is the rule of contractual formality that prescribes the legal-physical structure of a contract. In English contract law, the role of contractual formality saw its limitation over time leaving most of the filtering work to consideration. As a result, the doctrine of consideration is repeatedly faced with an identity crisis among its fellow principles in the room of requirements for contractual formation. The identity crisis is attributed to judicial distortion and scholastic criticism, which persists to this very day. Moreover, the doctrine's application throughout its history gave rise to uncertainty and injustice. As such, jurists labelled the doctrine as outmoded and redundant, and suggest that there are other legal tools that could better serve its role.[2] Case after case, further alterations of the doctrine drew more ire of jurists about its suitability.[3] Thus, legal scholars continue to wrestle with consideration in the quest of seeking a settlement solution.

The doctrine's critics question its existence in the context of legal systems endeavouring to harmonise laws. In particular, consideration faces comparative scrutiny with the favoured German model of *Pacta Sunt Servanda*.[4] This model also has its strengths and its weaknesses and is subject to some academic inspection. However, when compared to the English model, the German model has little to worry about in this regard. In German contract law, there is no doctrine equivalent to consideration. German contract law subscribes to the notion that an agreement is enforceable unless barred by law. Progressive legal scholars in their quest to find a harmonious solution to contract law across legal systems adopted this simplicity. Moreover, in recent times, the French adopted the German approach to their own system of contractual enforcement. One major reason for the popularity of the German model is that it avoids the severe judicial scrutiny that may yield legal instability and injustice. Thus, many Common Law jurists petition for the adoption of the German approach to enhance the efficacy of contracting.

[1] McKendrick, E., Contract Law. 9th edn. Basingstoke, Palgrave Macmillan 2011, p 63.
[2] Gay Choon Ing v Loh Sze Ti Terence Peter [2009] SGCA 3, par 92.
[3] Ballantine, H. W. Is the Doctrine of Consideration Senseless and Illogical? Michigan Law Review, 11 (3) 1913, pp 423-434, p 423.
[4] Berger, K. P. The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts. Law and Policy International Business (now Georgetown Journal of International Law), 1997, 28 (4), pp 943-990, p 944.

A corollary, there are calls for consideration to be reformed or abolished since its current state serves no relevance, use, value, or purpose. Therefore, this paper argues that doctrine of consideration rose to prominence on a patchwork of rules that contributed to its ultimate demise. Thus, the doctrine of consideration ought to be reformed or abolished - in light of the German contract law model, in order to facilitate the better efficacy of contractual enforcement in English contract law. After comprehensively examining this thesis, proposals will be outlined and reviewed to resolve the state of instability caused by the doctrine of consideration.

1. The Research Under Study, Aims and Objectives, and Methodology

The research under study seeks to examine and analyse the doctrine of consideration in light of what pertains in Germany. Emphasis will be specifically concentrated on the problems inherent to the doctrine of consideration in its application to various cases. Particularly, the doctrine's function and application to contractual formation, enforcement, and contractual modification will be examined to determine its future role in English contract law. The reason for the focus on contractual formation, enforcement, and modification rests upon four (4) grounds of contention: 1) the doctrine clashes with the spirit of contractual theory, 2) the doctrine is dysfunctional in its interpretation and application, 3) the doctrine fails to concretise a single position on contractual modifications, and 4) the doctrine is under threat by the rising doctrines of economic duress and promissory estoppel. These contentious grounds invoke academic scrutiny whereby academia can contribute to the settlement plan by dissecting, bisecting, and trisecting the doctrine itself.

Contractual formation deals with the functionality of the doctrine from theoretical and practical perspectives. When parties seek to contract with each other, contractual principles come into play in order to establish a legally binding agreement. Chief of among the requirements for the enforcement of lawful promises is consideration. However, it is viewed that the "intention to create legal relations" is preferred as a better contractual principle to give juridical effect to contractual intentions. Therefore, under this head, the doctrine's functionality must be established in order to determine its application. Contractual modification is, from the case law, more contentious than contractual formation. When parties to an existing contract seek to alter existing agreements for a particular objective, the applicability of the doctrine may result in decisions that are contrary to the original will of parties. However, to prevent such an outcome, Common Law courts tend to exercise their judicial activism powers in order to obtain what they view as an equitable outcome. The application of the doctrine itself faces competition from other emerging doctrines such as the doctrines of economic duress and promissory estoppel. These doctrines are seen as better auditors of contractual modification rather than judicially stretching consideration beyond its reasonable elasticity. Therefore, this thesis will explore the four (4) grounds of contention in the pursuit of proceeding aims and objectives.

1.1. Aims and Objectives

This thesis endeavours to analyse contractual enforcement in English contract law and compare it with contractual enforcement in Germany. Contractual enforcement is dependent on the initial formation of the contract and any subsequent alterations. As such, the solutions of enforcement from the jurisdictions under study may yield a comprehensive answer to the debates underlying the research. Moreover, in order to achieve that endeavour, this thesis seeks to fulfil four (4) aims in order to examine the four (4) aforementioned grounds of contention.

The first aim is to examine and evaluate the current doctrine of consideration in relation to contractual enforcement. This aim will be covered in Chapters 3 - 6 where the central doctrine is scrutinised from the historical, philosophical, present-day, and academic perspectives. Additionally, an analytical evaluation will be conducted to highlight the problematic areas of consideration. The second aim is to examine the German model in like manner as English model. This aim will be realised in Chapter 7. Thirdly, also in Chapter 7, there will be the juxtaposition of the English model with new French model to discuss a system that abolished a fundamental doctrine in a move towards the German model. The final aim is to offer proposals to resolve the legal issues caused by the functionality and application of the doctrine of consideration. This aim will be fulfilled in Chapter 8 which will also factor in recommendations that could shape the future of contractual enforcement in English contract law. Additionally, judicial and legislative pathways will be discussed in this regard. It is upon those four (4) aforementioned aims that the conclusion will reinforce the ethos of the thesis.

1.2 Research Methodology

The "qualitative traditional comparative legal method" is the main *modus operandi* deployed in proving the thesis true. The study of comparative law is essentially a legal method that looks at the legal materials, legal history, legal philosophy, and the sociology of law from an objective point of view.[5] This involves extracting and examining the analysis of the doctrines from legal texts, cases, and materials published in world-leading publications authored by eminent legal academics. Moreover, the analysis extrapolated from the aforementioned sources will be used to compare the contractual models under study to explore the grounds of contention.

[5] Bussani, M., Mattei, U. (eds.) The Cambridge Companion to Comparative Law. Cambridge, Cambridge University Press 2013, p 21.

Most importantly, this thesis applied the *praesumptio similitudinis* principle[6] in the quest of seeking to establish the differences and similarities of the contract law models under study. *Praesumptio similitudinis* presupposes that the models under study are similar in function and purpose. The author presumed that English and German litigants have similar needs and interests to have their lawful serious intentions upheld. Therefore, the comparative methodological angle used is the 'Functional Comparative Method'. The advantage of this method is that it focuses on the resemblance, evaluation, and harmonisation of law.[7] This method fits in with the over-arching purpose of the thesis, which seeks to harmonise the efficacy of the enforcement of bilateral promises. The aforementioned methods applied to the literature also produced the "micro-level comparison effect" i.e. the study of the objectives of legal rules. Furthermore, the qualitative method will involve translating schools of thought and testing them against each other to determine which is better for English contract law and its embattled doctrine of consideration. Therefore, the methodology applied will guide the manner in which the proposed thesis is argued, supported, and concluded.

[6] Reimann, M., Zimmermann, R. (eds.) The Oxford Handbook of Comparative Law. Oxford, Oxford University Press 2006, p 106.
[7] *Ibid,* p 380.

2. Review of Literature

The nature and method of the research applied to this thesis is based on the evaluation and application of evidence extrapolated from legal texts, cases, and materials. Moreover, the literature utilised in this thesis supports the five (5) components of the thesis statement. These components use the evidence from the literature to build upon each other in order to substantiate the issues that this thesis seeks to addresses. Thus, the use of literature enabled the author to apply comparative legal methods to fulfil the stated aims and objectives.

The first component of the thesis is to define the doctrine of consideration. This component was established through the use of core English case law and prominent modern legal texts. It is important to note that the legal texts are leading books and materials used by major British Universities in their contract law course syllabus. The use of case law from the courts of England and Wales, dating back to the sixteenth century up until the current date, also facilitated the establishment of the span of the doctrine. Cases and academic articles from other Common Law jurisdictions were engaged to bring different forms of analysis to this component in a systematic manner.

The second component builds upon the previous component by exploring the layers of case law, legal texts, and statutes to establish the patchwork of the doctrine of consideration. This component looks at the scope and history of the doctrine using materials concerning legal history, historic case law, and historical reports.

The third component looks at the normative nature of the thesis i.e. “ought” which implies a standard that English contract law fails to adhere. To establish the standard of contractual enforcement, the ideas of Professor Patrick S. Atiyah (the pragmatic approach to contractual enforcement) were contrasted with the ideas of Sir Guenter Heinz Treitel (the conservative approach to contractual enforcement). The two aforementioned ideas were examined in light of the leading comparative analysis of both schools of thought by Professor Ewan McKendrick. Their publications sit at the nucleus of this thesis while taking into consideration other legal texts and materials from other academics, jurists, and legal philosophers to provide further analysis.

The fourth component calls for a comparative examination of the German model of contractual enforcement. As such, the German Civil Code was engaged to harness the relevant provisions

and to shed light on the functional similarities of the English and German models. Furthermore, legal texts, materials, and case law examined the Roman roots and the current state of the German contractual system and the French model's realignment. Legal texts from leading philosophers such as Aristotle, Marcel Planoil, Friedrich Carl von Savigny, and Immanuel Kant sought to trace the development of German contract law principles. It must be noted that at the time of initial engagement with the original literature, the French model took a drastic change whereby very few academics posited their opinions. As such, the new French model, which came into being in late 2016, does not enjoy the level of academic scrutiny, as did the old model.

The final component embodies the essential message of the thesis: a "call to action" to change the doctrine of consideration. This call to action whipped up the core ideas of the preceding components and brings them into context with posited recommendations by academics, the findings of law commission reports, and statements made in *obiter* by prominent Common Law judges. This component continues from the author's evaluation of the doctrine by providing a way forward for English contract law to be compatible with modern contract law theory and principles.

3. Consideration

3.1 What is the doctrine of consideration?

The doctrine of consideration is a fundamental principle of English contract law, which necessitates that an agreement between parties must be backed by something of legal significance. The main idea behind of the doctrine is that there must be a form of reciprocity whereby a promisee cannot enforce his promise unless he puts forward a promise or contributed to something in exchange for his promise.[8] The authoritative definition of the doctrine was outlined in *Currie v Misa*[9] where consideration is said to be:

> "[I]n the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."[10]

In other words, consideration demands contracting parties to exchange promises that comprise of, to a degree, a reciprocal benefit-detriment to both parties. This follows the English reciprocity theory that flows from the bargain between the parties contracting in like manner of *quid pro quo* and not only where one party stands to gain. The requirement of consideration sits among other requirements for the formation of an agreement that give rise to enforceable legal obligations. An agreement (offer and acceptance), a contractual intention, and consideration all combine to form a valid agreement under English contract law. The absence of any of the three requirements will result in the invalidation of a contract. However, there are certain types of agreements that would also require a specific form in order for them to be constitutive. One such type of contract is a unilateral gratuitous agreement where one party promises to give another party something without receiving anything in return. This type of promise requires the promisor to execute a deed. The deed under this category requires: 1) a document clearly indicating that it is a deed or words to the effect that it is a deed, 2) the said document must be signed by its author, 3) the signature must be attested by another if signed by the author, or attested by two other persons if signed on someone's behalf, and 4) it must be delivered or executed in a manner to give rise to one's intentions.[11] Furthermore, there are other statutory

[8] McKendrick (2011), *supra* nota 1, p 69.
[9] Currie v Misa [1875] LR 10 Ex 153.
[10] *Ibid*
[11] McKendrick (2011), *supra* nota 1, p. 63; Sections 1(2), 3 of Law of Property (Miscellaneous Provisions) Act 1989 as amended by the Regulatory Reform (Execution of Deeds and Documents) Order 2005 SI 2005/1906.

requirements of form one way or the other.[12] Thus, in contracts that are not subject to statutory form, the doctrine of consideration plays the formal role bestowing that badge of enforceability on the agreement between parties. Therefore, the functions, scope, application, and other intervening doctrines must be examined in order to fully appreciate the formality of the doctrine of consideration.

3.2 The Scope of the Doctrine of Consideration

3.2.1 The Functions of Consideration

Professor Fuller[13] cited three interdependent functions of formalities in contract law. These functions of formality also apply to the doctrine of consideration due to its necessity in the formation, modification, and validation of a contract. Firstly, there is the "evidentiary function" that signals and indicates the existence of the agreement and its contents. It is upon this function that the statutory requirements, in particular, extrapolate their rationale for certain types of contracts to be in a specific form. Secondly, there is the "cautionary function", which brings to the attention of contracting parties their duty of care to each other, and the importance of the transaction flowing from the agreement.[14] Lastly, there is the "channelling function", which provides a pathway for a court to determine objectively the contractual nature of the agreement rather than a mere benevolent impulse or informal declaration of intent.[15] The interdependency of the aforementioned functions hinges on the fact that in order for the court to determine the reciprocal nature of the agreement, the agreement must exist from the full awareness and duties of contracting parties. Moreover, that agreement must be of a serious nature in the eyes of the court so as to not trifle the court in determining whether to enforce a 'mere agreement'. The rules of consideration, established in the Common Law over centuries, also determine whether a mere agreement can be enforced. However, consideration seeks to uphold the aforementioned functions in the context of simple contracts without the practical problems of formality in simple contracts. Hence, the English reciprocity theory flowing from the bargain theory acts as a form of evidence of the parties' intentions to bring a contract into being. The reciprocity theory in particular also serves as a cautionary element to ensure that parties owe a duty of performance to each other. As such, the evidence of an agreement and the caution against non-

[12] Bills of Sale Act 1878 (Amendment) Act 1882; Section 3(1) Bills of Exchange Act 1882; Sections 52 and 54(2)Law of Property Act 1925; Section 2(1) Law of Property (Miscellaneous Provisions) Act 1989; and Section 4 Statute of Frauds Act 1677.
[13] Fuller, L. Consideration and Form. Columbia Law Review, 1941, 41 (5), pp 799-824.
[14] McKendrick (2011), *supra* nota 1, p 64.
[15] Brian, B. A. Contracts, Examples & Explanations. 4th ed. New York, Aspen Publishers 2004, p 164.

performance will invoke the court to examine, in the case of a dispute, the nature of the agreement on a whole. This type of examination by the court is provided for in the rules of consideration where English courts ignore the lawful serious intention of parties and look at a checklist of rules concerning contractual formation and variation. These rules bring into being the channelling function but are in themselves contentious. However, they sustain the recognition of the doctrine despite their bombardment from academic artillery.

3.2.2 Rules of consideration

The atomic composition of the doctrine of consideration is made up of six (6) rules that are used to regulate the applicability of the doctrine. These rules are: 1) consideration must be sufficient, but it need not be adequate, 2) consideration must not be *praeteritum* i.e. not be in the past, 3) consideration must move from the promisee, 4) an existing public duty will invalidate consideration, 5) an existing contractual duty will invalidate consideration, and 6) part payment of a debt in a promise to discharge the sums outstanding may not amount to valid consideration. These rules emit a sense of welfare by regulation via the reciprocal theory when contracting. In other words, the courts provide parameters around the freedom to contract. It must be noted that the freedom to contract is not an absolute right; it is a limited right as evidenced by the limitations embodied in the six (6) rules outlined.

3.2.2.1 Consideration Must Be Sufficient, But it Need Not Be Adequate

This rule is illustrated in the classic case of *Chappell & Co v Nestlé*[16] where the defendant spearheaded a marketing initiative. The essence of the initiative was that persons would receive a gramophone record if they submitted three (3) chocolate bar wrappers and a postal order of 1 shilling 6d. The claimants, who are the copyright owners of one of the records used in the campaign, decided to obtain an injunction to prevent records from being sold under their usual retail price of 6 shillings 8d. Section 8 of the Copyright Act 1956 required retailers to give notice to the copyright holders of the retail price and make payments of 6.25% of the retail price. Nestlé submitted the request notice outlining the retail price to be three (3) chocolate bar wrappers and 1 shilling 6d. As such, the claimants rejected that the chocolate bar wrappers did not constitute "adequate" consideration. The court granted the injunction based on the failure to comply with the statutory requirement; however, the court held nonetheless that the

[16] [1960] AC 87.

wrappers, though economically trivial in value, formed part of the consideration of the object. It was Lord Somervell who wrote the infamous comparative illustration: "[A] contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like peppers and will throw it away."[17] The economic premise of this rule traces its roots to the case of *Thomas v. Thomas*[18] where the court held that "consideration must be something which is of value in the eyes of the law." As such, as long as a transaction of reciprocity involves an object that has some sort of legal value, the eyes of the law will see the beauty in that object to hold it as valid consideration.

Additionally, "natural affection" is not sufficient to be held as valid consideration (or legal value). This was established in the case of *Bret v JS*[19] where the cause of action then- the *assumpsit,* had the same role as consideration today. Moreover, in *White v Bluett,*[20] a son's promise not to nag his father about the distribution of his property among his other siblings was held not to constitute valid consideration. The court applied another interpretation in an even earlier case in *Wade v Simeon*[21] where a promise not to enforce a valid claim, which is unknown to be an unfounded claim, will be held as good consideration. However, in *Cook v Wright,*[22] the court held that a promise not to enforce a valid claim that was honestly held is valid consideration.[23]

3.2.2.2 Consideration Must Not Be Praeteritum

This rule stipulates that a promise cannot be enforced if consideration or the thing one is seeking to exchange was provided in the past. This means that the seeds of consideration must sprout at the time of contracting or result from the time of contracting. The rule was concretised in *Re McArdle*[24] where a promise made, premised on actions done in the past, was held to be invalid consideration. The severity of the rule was felt in *Eastwood v Kenyon*[25] where the promise of a young lady's husband to pay off a loan obtained by her guardian before the marriage was held to be unenforceable for want of valid consideration. Another dimension to this rule was

[17] *Ibid*, par 11.
[18] [1842], 2 QB 851.
[19] [1600] Cro Eliz 756.
[20] [1853] 23 LJ Ex 36.
[21] [1846] 2 CB 548.
[22] [1861] 1 B & S 559.
[23] McKendrick (2011), *supra* nota 1, p 75.
[24] [1951] Ch 669.
[25] [1849] 11 A & E 438.

espoused in the post-Elizabethan case of *Lampleigh v Brathwait*[26] where the defendant, who was on death row, asked the claimant to plead for his pardon before King James I. Upon securing the pardon, the defendant then promised to pay the claimant £1000. The court held that the claimant's claim was enforceable. This implies an exception to this rule where the act of the promisee must be realised upon the request of the promisor, and there must be a definitive payment quantum was agreed. As such, in a recent case before the Judicial Committee of the Privy Council- *Pao On v Lau Yiu Long,*[27] the court endorsed that view and the reasoning in *Lampleigh v Brathwait* by laying the premises to invoke that exception: 1) the promisee's act must be done at the request of the promisor, 2) at the time of engagement, parties understood that compensation would follow from the act, and 3) the promise would be enforceable in the eyes of the law even if compensation been made in prior to the act.

3.2.2.3 Consideration Must Move From the Promisee

Under this rule, the promisee must provide consideration in order to enforce the promisor's promise. As such, the promisee himself must provide consideration in the form of incurring a benefit or detriment; hence, the promisee must be party to the contract. This rule is grounded in the "doctrine of privity of contract" where a person who is not party to a contract cannot seek to enforce a promise arising out of the said contract. Such was the case in *Tweedle v Atkinson*[28] where a groom sought and failed to enforce an agreement made between his father and his father-in-law. From another angle, a promise to confer a benefit on a third party at the request of the promisor is held to be valid consideration as per the ruling in *Bolton v Madden.*[29] In this case, Blackburn J held that "the adequacy of the consideration is for the parties to consider at the time of making the agreement, not for the Court when it is sought to be enforced." This statement is viewed as a critique to the disastrous effects that the free reign of consideration caused. Moreover, Blackburn's remarks can be construed as pushing the doctrine of consideration and its rules into the hands of the will theory (legal focus on the intention of parties). In cases similar to *Tweedle v Atkinson*, where a third party stands to benefit, and the said third party seeks to enforce that agreement but cannot do so, was resolved to a degree by statute after the rule became even more unstable. The Contracts (Rights of Third Parties) Act

[26] [1651] Hob 105.
[27] [1980] AC 614.
[28] [1861] EWHC QB J57.
[29] [1873] LR 9 QB 55.

1999[30] which provides that third parties who stand to receive a benefit from a contract can enforce the agreement which confers the benefit. In order for the third party to rely on the statute, the agreement must expressly provide the conferral of benefit or must purport to confer that benefit upon the third party.[31] Therefore, the statute undermines this rule to degree by pushing the law of contract into the realms of the will theory, and creating grounds both in statute (no consideration needed) and common law (consideration needed).

3.2.2.4 An Existing Public Duty Will Invalidate Consideration

Consideration will be invalid if premised on an existing duty imposed by law. Using the traditional interpretation, consideration requires a sacrifice. By doing what one must or ought to do cannot amount to a sacrifice. This rule stems from the case of *Collins v Godefroy*[32] where claimant sought to recover fees from the defendant for lost time as a result of being subpoenaed to court; however, he never gave evidence at trial. The court held that the claimant could not enforce payment because he was under a public duty. In *Ward v Byham*[33] a mother was able to enforce an agreement between herself and her child's father for the payment of £1, which was conditional that the child was happy and given the best care et al. The father ceased payments, and the mother sued; the father argued that the mother was under an existing legal duty to take care of the child and as such, the mother provided no consideration. However, the court allowed the mother's claim that consideration was provided because she went over and beyond her motherly duties. Going beyond one's legal duty is valid consideration as per *Glasbrook Ltd v Glamorgan CC*[34]; however, that role is said to play a regulatory role in public policy against public officers extorting money from others for work they must do in law. In returning to *Ward v Byham*, the court searched a letter written to the mother by the father and extract consideration from the conditions of the payment. As such, this implies that the emotions of a third party who stands to benefit from the agreement is in itself considered consideration. This goes contrary to the "sufficiency" of consideration, which bars emotions and affections as constituting consideration.

[30] Contracts (Rights of Third Parties) Act 1999 c 31.
[31] *Ibid*, Section 1 (a)-(b).
[32] [1831] 1 B & Ad 950.
[33] [1956] 1 WLR 496.
[34] [1925] AC 260.

3.2.2.5 An Existing Contractual Duty Will Invalidate Consideration

In manner of the rule discussed above, an existing contractual duty flowing from a pre-existing contract will not amount to consideration. The rationale is also similar to the past consideration rule in that consideration must birth itself at the time of contracting. Thus, a new promise must be backed by new consideration since the used consideration cannot be used again. This rule was set in the case of *Stilk v Myrick*[35]. The claimant was a crewmember who entered into an agreement with the defendant to sail on a round trip to the Baltics for £5 monthly. There were originally eleven (11) crewmembers in total who made up the sailing team; however, two (2) crewmembers abandoned the voyage. Unable to find replacements, the defendant subsequently agreed to share among the other crewmembers the wages that were set aside for the crewmembers who abandoned the voyage. This was on the condition that they would manage the ship back to London. The crewmembers agreed and fulfilled the condition; upon their return to London, they demanded their share of the promise, but the defendant refused. The claimant sought to enforce the agreement, but the court sided with the defendant on the basis that the claimant did not provide "new consideration for the new promise". This reasoning was affirmed in *North Ocean Shipping Co v Hyundai Construction Co Ltd*[36]; however, the rule is not without controversy. Professor Atiyah attacked this rule by highlighting the point that, given the traditional definition of consideration, there was an actual benefit and detriment in *Stilk v Myrick.*[37] As such, this rule contradicts the previous rules when seeking to interpret benefit and additional sacrifice from the traditional approach. Others would hold that the rule in *Stilk v Myrick* was grounded on public policy to prevent extortion and bars any form of duress;[38] and as such, may also add to the growing factors undermining the rule itself.

An exception to the rule that erodes the rule of an existing duty not being consideration is the judicial concept of a "practical benefit". This exception, which deals with the question of contractual modification, sits equal to that of going beyond one's contractual duty and is fiercely debated as a major reason why consideration ought to be outmoded. The "practical benefit" exception arose in the landmark case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd.*[39] In that case, the defendants were contracted to refurbish a block of flats by

[35] [1809] 2 Camp 317 and 6 Esp 129.
[36] [1979] QB 705.
[37] Atiyah, P. S. Essays on Contract. New York, Oxford University Press 1990, p 181.
[38] Luther, P. Campbell, Espinasse and the Sailors: Text and Context in the Common Law. Legal Studies, 1999, 19 (4), pp 526–551.
[39] [1989] EWCA Civ 5.

their principal employers. The defendants then subcontracted the carpentry work for the block of flats to the claimants for £20,000. Because the claimants mismanaged the tasks and undervalued the full cost of the work, they ran into financial problems midway during the refurbishment. If the defendant did not complete the refurbishment as agreed, they would be liable to a penalty under the agreement between themselves and their principal employer. As such, the defendants negotiated with the claimants and agreed to pay them £10,300 (£575 per flat) to complete their work within the scheduled time. The claimants completed eight (8) more flats and only received a payment of £1,500. The claimant eventually brought proceedings for the enforcement of payments for the outstanding sum of money. However, the defendants submitted, in reliance on *Stilk v Myrick* that the claimants had an existing contractual duty, and as such, provided no valid consideration

The court ruled however that the claimant indeed provided valid consideration in the form of a "practical benefit", which on the face of it, undermines he very rule in *Stilk v Myrick.* However, the court insisted that its decision did not overrule *Stilk v Myrick,* it only sought to "limit" and "refine" its application. Therefore, the court in this instance tore up the old concept of benefit-detriment and its limited scope. Whereas before a benefit was something of value in the eyes of the law, W*illiams v Roffey Bros & Nicholls (Contractors) Ltd* realigned the concept of benefit to a pragmatic gain.

3.2.2.6 Part Payment of a Debt May Not Amount to Valid Consideration

This rule is also tied to the other rules in relation to an existing duty owed to a promisor not amounting to consideration and to a lessor extent contractual modification.[40] The rationale is that a debtor is already contractually obligated to liquidate the debt; and as such, he cannot enforce a promise to liquidate the debt for less than required. However, the exception is that consideration will be valid if the debtor agrees to liquidate the debt earlier than scheduled.[41] The rule was set in the *Pinnel's Case*[42] where the court also outlined further exceptions to the rule. The exceptions are that the promisor requesting part payment must do so: 1) before the due date, or 2) with a chattel instead of cash, or 3) to a different destination than specified. This rationale of not discharging an obligation by part-performance was also adopted in *Foakes v*

[40] McKendrick (2011), *supra* nota 1, p 84.
[41] *Ibid*
[42] [1602] 5 Co Rep 117a.

Beer[43] where the promise to cease a claim on a debt by only paying the initial sum was not backed consideration. In the later case of *Collier v P & M J Wright (Holdings) Ltd,*[44] limitations to the rule were outlined on the grounds of equity- promissory estoppel.

3.2.3 Economic Duress

Purchas LJ in W*illiams v Roffey Bros & Nicholls (Contractors) Ltd* in following the Espinasse Report[45] stated that *Stilk v Myrick* was decided in the context of:

> "[T]he extraordinary conditions at the turn of the 18th century under which seamen had to serve their contracts of employment on the high seas. There were strong public policy grounds at the time to protect the master and owners of a ship from being held to ransom by disaffected crews."[46]

The stated policy grounds invoked the essence of economic duress, which also acts as a tool to determine whether a contract is enforceable. Glidewell LJ defined economic duress in *Williams v Roffey Bros & Nicholls (Contractors)* as "securing the contractor's promise by taking unfair advantage of the difficulties he will cause if he does not complete the work."[47] He further went on to discuss that even where consideration appears to be valid; a contract could be invalidated on the grounds of economic duress. Where consideration and economic duress clash is upon the notion that the latter can "displace"[48] the former in cases of extortion. That rationale is based on the idea that the decision to promise the sharing of the wages (of the crewmembers who fled) was triggered because of the economic situation burdening Stilk at the time. Ergo, an agreement born out of economic duress, though appearing to be valid on the face of it, may not be valid. Economic duress has the effect of rendering a contract voidable and not void- which is a better and clearer control mechanism of contractual enforcement for modifications than consideration.[49] The factors to consider when pondering upon the presence of economic duress

[43] [1884] 9 App Cas 605.
[44] [2007] EWCA Civ 1329; [2008] 1 WRL 643.
[45] Luther (1999), *supra* nota 43; *see also the discussion on the interpretation of the Campbell and Espinasse reports on Stilk v Myrick*
[46] *Supra* nota 40.
[47] *Supra* nota 39
[48] Phang, A. Whiter Economic Duress? Reflections on Two Recent Cases. Modern Law Review, 1990, 53 (1), pp 107-116, p 107.
[49] Adam Opel GmbH v Mitras Automotive UK Ltd [2007] EWHC 3252; [2007] All ER (D) 272 Dec, para 42 of Deputy Judge of the High Court, David Donaldson QC.

were outlined in *Pao On v Lau Yiu Long* and further summarised in the case of *The Universal Sentinel*[50] outlining that economic duress includes the absence of choice and illegitimate pressure. Therefore, a voidable contract leaves room open for courts to determine whether there is a practical benefit and if that benefit was induced by economic duress. Moreover, consideration would even be apparently irrelevant to cases involving modification. Thus, doctrine of estoppel is another tool that challenges the application of consideration.

3.2.4 Promissory Estoppel

The doctrine of estoppel is a "principle of justice and equity"[51] which is a bulwark in the jurisprudence of the Common Law. The essence of the doctrine of estoppel is that it prevents a promisee from incurring a detriment because the promisor wants to contradict their original promise upon which the promisee relied.[52] In terms of "promissory estoppel", the enforcement of an agreement will only be possible where there is reliance even in the absence of consideration or formality.[53] Promissory estoppel was concretised with the help of Lord Denning in the seminal case *Central London Property Trust Ltd v High Trees House Ltd.*[54] Central London Trust in 1937 leased a block of flats to High Trees House Ltd at an annual rent of £2,500 per year as per the 99-year lease agreement. As a result of the outbreak of World War II in 1939 and the exodus from London, High Trees found it difficult to sublet the flats. Therefore, Central London Property Trust Ltd agreed to reduce the annual rent to £1,250 (which was not backed by 'consideration'). After the war in 1945, the buoyancy of the housing market returned. Central London Property Trust Ltd then demanded the resumption of the original rate that was set aside. However, High Trees refused to honour the demand for the restoration of the original rental payment rate. The cause of disagreement, in this case, was due to the fact that a definitive time for the reduced rent was not expressed. The court held that the rent must return to the original rate but only from early 1945 when the flats were all let. Denning J (as he was then), noted that the doctrine of promissory estoppel prevented Central London Property Trust Ltd from claiming the difference accrued during the war years. Ergo, they could not renege their promise to accept a lower rent payment even though it was unsupported by consideration.

[50] [1983] 1 AC 366.
[51] Lord Denning *in* Moorgate Mercantile Co Ltd v. Twitchings [1975] 3 AER 302, par 241.
[52] Chen-Wishart, M. Contract Law. 5th ed. Oxford, Oxford University Press 2015, p 148.; *see also* McKendrick (2011), *supra* nota 1, p 92.
[53] *Ibid*
[54] [1974] KB 130.

Denning J also noted that denying promissory estoppel the footing of a cause of action allows the doctrine of consideration to stand firmly against "side-wind" especially in the case of contractual modification. However, the courts in Australia in the case of *Waltons Stores (Interstate) Ltd v Maher*[55] accepted that the doctrine of promissory estoppel could be used as a cause of action in cases where there was no pre-existing contractual relationship between parties. The court's reasoning in granting the promissory estoppel as a sword was based on the notion that the doctrine did not seek to make a promise or an expectation binding, it did so to circumvent the detriment suffered by the promisee due to the "unconscionable conduct" of the promisor. This approach did not gain favour with jurists in the Common Law world outside of Australia.

The winds certainly blew on the doctrine of consideration in the recent case of *Collier v P& MJ Wright (Holdings) Ltd.*[56] In this case, the applicant was one of three (3) partners in property development. All three (3) jointly owed money to the respondent; however, the applicant alleged that he entered into an oral agreement (disputed) with the respondents to pay only a third of the total sum. Upon payment of that sum however, the respondents claimed that he was fully liable for total sum outstanding because his colleagues went bankrupt. The court however held that the applicant could arguably invoke the doctrine of promissory estoppel. Arden LJ, premised her reasoning on expanding the exceptions in the *Pinnel's Case* and merging with the rules in *Central London Property Trust Ltd v High Trees House Ltd.* The expanded exceptions are: 1) the debtor makes an offer to liquidate part of what it owed, 2) the creditor accepts the offer voluntarily, and 3) the debtor pays in full the part offered to be liquidated upon the creditor's reliance. It must be noted however that the court was only asked if the applicant had the right to invoke the doctrine of promissory estoppel and not to use it as a defence.

The position in *Collier v P& MJ Wright (Holdings) Ltd* seemingly side steps the reasoning that barred the validity of a similar agreement in *Foakes v Beer* and even usurps the conclusion in the *Pinnel's Case.* Ergo, the part-payment of a debt to discharge obligations, where there is an apparent agreement stemming from an existing contractual relationship, can be upheld via the doctrine of promissory estoppel unlike the doctrine of consideration. Further sidestepping of the doctrine of consideration clearly occurred in *Central London Property Trust Ltd v High*

[55] [1988] 164 CLR 387.
[56] *Supra* nota 44.

Trees House Ltd, where the agreement of the reduced rent was held to be valid despite the non-existence of consideration. What distinguishes and halts a complete sidestepping of the doctrine of consideration is the fact that the doctrine of promissory estoppel cannot be invoked to create new rights or create a cause of action. As such, the doctrine's interpretation has been the subject of debate among legal academics. However, before an overview of the academic debate is outlined, it is important to provide a reminder of whence the doctrine of consideration came in light of the infighting of the doctrine in its modern application.

4. The History of Consideration

The rise of consideration emerged from its humble origins in Anglo-Saxon contracts.[57] At that time, the formal contract called "*wed*" was a procedural contract whereby its constitution came about through a ceremony.[58] In cases of disputes between families in relation to the state of facts, the matter was handed over to the *gemot*[59] to make a decision. The ceremony entailed handing over a "*wed*" (usually a stick or a small object) by the accused to the family of the plaintiff, and the family of the plaintiff would hand over the same to the family of the defendant.[60] It is important to note that the "*wed*" had the effect of submitting the debtor into the power of his sureties. Approaching the end of the Anglo-Saxon period, the importance of the "*wed*" diminished since delivery of the goods and being in possession of the said goods was sufficient to be held as a "*wed*". This gave rise to the term delivery-promise, which was factored into the form of contracting and the consequences of backing the form. The need for sureties was soon abolished since the law held everyone to justice; this ushered in the confinement of actionable debt-cases to those where parties incurred a benefit or detriment in the reign of Henry II. Under his reign, the *writ of debt* became the tool that gave action to the enforcement of a claim.[61]

The *writ of debt* is a general remedy for a breach of contract brought by a creditor before a court outlining the specific sums owed by a debtor.[62] The general nature of the *writ* allowed it to prosper on many grounds to include obligations, promises, and requirements (form) that may arise before the King's Court.[63] Therefore, in order to institute the *writ*, the agreement must be documented and witnessed; failure to do so will bar an action for recovery before the King's Court. Those cases falling short of that requirement fell within the remit of the Ecclesiastical Courts' jurisdiction.[64] Apart from the aforementioned, an action for debt required *quid pro quo*

[57] Henry, R. L. Consideration in Contracts 601 A.D. to 1520 A.D. The Yale Law Journal, 1917, 26 (8), 1917, pp 664-698, p 676. *see also* Holmes, O. W. The Common Law. Clark, New Jersey, The Lawbook Exchange Ltd 2005.
[58] *Ibid*, p 676-677.
[59] A "Gemot" is an Anglo-Saxon legislative or judicial assembly.
[60] Henry (1917), *supra* nota 57, p 677.
[61] Simpson, A. W. B. A History of The Common Law of Contract. Oxford, Clarendon Press 1987, p 53. *hereon* (Simpson I).
[62] Jenks, E. The History of The Doctrine of Consideration In English Law. 1st ed. Cambridge University Press 2016, p 164. *see also* Simpson, A. W. B. A History of the Common Law of Contract: The Rise of the Action of Assumpsit. Oxford, Clarendon Press, 1975 p 61. *hereon* (Simpson II).
[63] *Ibid*
[64] Hogg, M. Promises and Contract Law-Comparative Perspectives. Cambridge, University Press Cambridge, 2011, p 120.

i.e. "something actually given or done".[65] Judges in the fifteenth and sixteenth centuries sought to shape a suitable remedy that would allow for the enforcement of simple contracts.[66] More importantly, it was understood during that time it was inequitable for someone to breach a contract flagrantly. As such, the Chancery Court headed by the Lord Chancellor eventually stepped in to fill the need for such a remedy, although it was in equity. It is important to understand that equity only stepped in when the application of the common law was "inadequate or unfair" (which rings true for the doctrine of consideration); thus, the Chancellor did not interfere with the development of contract law in common law.[67] Therefore, Common Law judges adapted that equitable intervention as an enforcement instrument that developed into the forerunner of consideration- the action of *assumpsit*.

The action of *assumpsit* took off by the 1500s, enforcing simple contracts for breaches of a particular nature. The cases by that time involved the recovery of damages for personal injury and property damage by the conduct of the defendant. As such, however, the recovery for damages in that regard was in tort and not contract law.[68] Hence, it was adapted to contract law and expanded whereby an action of *assumpsit* came into being when the defendant failed in his obligation to do what he "assumed and faithfully promised"[69] to the claimant. Therefore, the promissory element of the claim imbued new life and meaning into the scope of the newly polished action. The term consideration was used for the first time in the *Duke of Buckingham's Case*[70] in 1504 (undecided). This involved a Duke who renege on a covenant made to bestow property on the lady married to his younger brother- the Lord. However, the bestowment of property would only occur after his death. However, he subsequently decided to grant the property, upon his death, to his brother and his wife jointly. The central issue was whether the original covenant vested the lady with a right or interest in the promised property; this would ultimately depend on the presence of some form of consideration. It was argued by counsel in favour of the revocation that if there had been any bargain between the Duke and the Lord, or any other "consideration", a corollary, the latter grant would be effective.[71] However, it was in

[65] Holdsworth, W. S. Debt, Assumpsit, and Consideration. Michigan Law Review, 1913, 11 (5), pp 347-357, p 348.
[66] *Ibid*, p 349.
[67] *Ibid*
[68] Ames, J. B. The History of Assumpsit. I. Express Assumpsit. Harvard Law Review, 1888, 2 (1), pp 1-19, p 2.
[69] In latin: *assumpsit et fideliter promisit*
[70] Simpson I, *supra* nota 61, p 340.
[71] *Ibid*, *see also* Legal History: The Year Books. School of Law, Boston University. www.bu.edu/phpbin/lawyearbooks/display.php?id=21969. (1.02.2017).

Jocselin v Shelton[72] and later refined in *Hunt v Bate*[73] where consideration was incorporated into the scope of an action of *assumpsit*. It was in the latter case that past consideration was rejected as valid consideration. The action of *assumpsit* hereon required consideration, as noted in the *Pinnel's Case* that clarified the then scope of consideration.

From thereon, the further refinement of consideration took place in *White v Bluett*[74] by Pollock CB, in *Currie v Misa*[75] by Lush J, in *Bolton v Maden*[76] by Blackburn J, and in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd*[77]. These cases adapted, added, and construed consideration as one entailing a benefit and detriment with a degree of reciprocity throughout the "classical age"[78] of English law. However, Glidewell LJ shook up what was the classical construction of consideration in *Williams v Roffey Bros (Contractors) Ltd*. This lead to the big bang of revisionist discussions reflecting on the role and relevance of consideration since newer doctrines were seemingly plagiarising the functions of consideration. Out of this big bang sprung the institutional elements of today's English contract law: offer, acceptance, and the intention to create legal relations.[79]

[72] [1557] 3 Leon 4, Benl 57, Moo KB 51
[73] [1568] 73 ER 605, *see also* Simpson II, *supra* nota 62, p 452.
[74] *Supra* nota 20.
[75] *Supra* nota 9.
[76] *Supra* nota 29.
[77] [1915] AC 847, p 855.
[78] Teeven, K. Mansfield's Reform of Consideration in Light of the Origins of the Doctrine. Memphis State University Law Review, 21 (4), 1991, pp 669-703, p 702.
[79] Lord Goff in White v Jones [1995] 2 AC 207, 262-63; *see also* Mindy Chen-Wishart, Contract Law, 2nd ed. Oxford, Oxford University Press 2007, p 161.

5. The Philosophy of Bilateral Contracting

The doctrine of consideration seemingly came into existence and thrived through *ad hoc* means and methods. Ironically, its growth was sustained, and shaped through the exchange of judicial wisdom, knowledge, and understanding of the law of contract. A corollary the centuries of exchange formed a supposedly 'functional' area of law, though lacking a systematic structure. This view is supported by Atiyah who posited, "[m]odern contract law probably works well enough in the great mass of circumstances, but its theory is a mess."[80] Therefore it is necessary to find the theories and inquiries that influenced the principles of the modern contract law which many legal systems seek to emulate. The starting point of the theory of contract is the natural law concept of a promise. Aristotle posited the following on the ethos of the concept of promise:

> "[T]he truthful man is another case of a man who, being intermediate, is worthy of praise, and both forms of untruthful man are culpable, and particularly the boastful man. Let us discuss them both, but first of all the truthful man. We are not speaking of the who keeps faith in his agreements, i.e. in the things that pertain to justice or injustice (for this would belong to another virtue), but the man who in matters in which nothing of this sort is at stake is truthful both in word and in life because his character is such. But such a man would seem to be as a matter of fact equitable."[81]

Aristotle's view speaks to the concept of 'the individual' who should and ought to possess an honest character. Moreover, Aristotle sort to skilfully interject and link the notion of the individual with one who keeps his faith in what he agrees i.e. his promise to that of justice. Ergo, the invocation of justice hinges on whether a man keeps his promise or not. The emphasis on the individual and his promise is a normative justification that fuels the first major theory- The Classical Contract Law Theory.[82] Adopted mainly by western civilisations, the Classical Contract Law Theory in relation to individualism submits that it is the job of social and political institutions to serve the interest of the individual.[83] Moreover, the individual is equal to any

[80] The Hamlyn Trust, Atiyah, P. S. Pragmatism and Theory in English Law, London, Stevens & Sons, 1987 http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/Pragmatism_and_Theory_in_English_Law.pdf, p 173.
[81]Ross, W. D., Brown, L. (ed.) Aristotle., The Nicomachean Ethics. 1st ed. Oxford, Oxford University Press 2009, p 102.
[82] Rosenfeld, M. Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory. Iowa Law Review, 1985, 70 (4), pp 769-900, p 771., pp 776-777.
[83] *Ibid*, p 777.

other individual and to the entire social order.[84] Essentially, the classical theory says that the individual is autonomous, equal, and free; however, justice regulates the conflicts that may arise from certain tendencies of the individual.[85] Individual self-interest is a negative output of human behaviour; thus, co-operation or contracting will temper that negative output.

Rawls recognises two (2) types of procedures leading to the realisation of justice. Firstly, there is the "imperfect procedural justice" which calls for the requirement of an independent criterion of justice to determine what is, or what is not fair. Moreover, there must be an appending procedure that acts a conduit leading to the desired outcome.[86] Secondly, there is the "pure procedural justice", which holds that there is no independent criterion of justice; what only matters is the procedure which must be fair and duly followed which result in the desired outcome.[87] As such, scholars classify the idea of contracting as purely procedural because it preserves individualism leading to cooperation. Moreover, it also balances the interests of individuals without compromising their belief of the good being achieved.[88] In other words, it allows parties, through fair dealings over time, to achieve their own fair contracting and cooperation. Moreover, it avoids complexities in relation to the varying comparative position of individuals.[89] This approach does not look at every exchange in isolation; as such, it looks at the structure as a whole, which ought to be judged.[90] Rawls, however, acknowledged that following a fair procedure may not in itself be just, what is essential is that the outcome is fair which flows from a fair procedure.[91] Thus, an impartial system of institutions must be in place to ensure that outcomes are fair-based on a fair procedure in cases where problems arise out of contracting and cooperation. In this regard, Atiyah noted that contract law ought to act as the "Law of Wills" where intervention would only happen when the wills of contracting parties fail adhere to mandatory law.[92]

Therefore, what remains is to determine how contract law should interpret the concept of individualism. Within the concept, there are three genres of interpretation. Firstly, there is the "Libertarian Paradigm", sitting close to 'extreme individualism', which holds that the

[84] *Ibid*
[85] Rawls, J. A Theory Of Justice, Revised Edition. 1st ed. Cambridge, Harvard University Press 1971, p 12.
[86] Ibid, p 74.
[87] *Ibid*
[88] Rosenfeld (1985), *supra* nota 82, p 782.
[89] Rawls (1971), *supra* nota 85, p 76.
[90] *Ibid*
[91] *Ibid*
[92] Atiyah, P. S. The Rise and Fall of Freedom of Contract. Oxford, Oxford University Press 1985, pp 405-406.

individual is self-sufficient but may need to cooperate with others if they chose.[93] Secondly, there is the "Contractarian Paradigm" which holds that social cooperation is needed in order to fulfil individual goals and that being abnormally self-sufficient is counterproductive.[94] Thirdly, there is the "Utilitarian Paradigm", which holds that social cooperation must be done, and result in the good for the greatest number of individuals.[95] Of relevance to this thesis is the Contractarian Paradigm, which views the contract as the principle tool of reciprocity, limits, and well-defined cooperation based on consent and justice as fairness.[96] The idea of justice as fairness was espoused by Hart who posited that the collectives rule of reciprocity, limits, and cooperation and consenting are the embodiment of equity, which must yield and flow from the initial conduct of contracting.[97] Moreover, that embodiment of equity and its sinews create the legal obligation to adhere to the "promise-made-promise-kept principle". Street supports this view by positing that legal obligations and the mutuality of promises create the legal obligation.[98] Therefore, the reciprocity theory must be construed as the exchange of promise or wills which is seemingly compatible with the "will theory".

It is upon that basis that the rise of the will theory (a product of the classical contract law theory) challenged the doctrine of consideration its view of reciprocity. The will theory holds that a promise is a principle at the nucleus of a contract.[99] With its roots in continental Europe, the will theory also provides that contract law be built upon the enforcement of promises and not a hoard of vitiating rules. Legal scholars add to that concept by stating that upholding promises is the very essence of contracting which explains the reason for state enforcement of most contracts.[100] As such, consideration with its internal inconsistencies and instability creates tensions within the very notion of upholding a promise.[101] Thus, the creator of the will theory-Charles Fried posited that the contract itself regulates freedom and self-sufficiency of wills, and as such, courts should not interfere with what parties freely and lawfully choose.[102] The theories behind the law of contract are vast; however, by highlighting the main themes, the foundation has been laid to examine the schools of thought in relation to the doctrine of consideration

[93] Rosenfeld (1985), *supra* nota 82, p 784.
[94] *Ibid*
[95] *Ibid*
[96] Rosenfeld (1985), *supra* nota 82, p 791.
[97] Hart, H. L. A. Are There Any Natural Rights? The Philosophical Review, 1955, 64 (2), pp 175-191, p 185.
[98] Street, A. The History And Theory Of English Contract Law. 1st ed. Maryland, Beard Books 1999, p 108.
[99] Fried, C. Contract as Promise: A Theory of Contractual Obligation. Cambridge, Harvard University Press 1982.
[100] Bix, B. H. Theories of Contract Law and Enforcing Promissory Morality. Suffolk University Law Review, 45, 2012, pp 719-734, p 719.
[101] *Ibid*
[102] *Ibid*

5.1 Schools of Thought

The interpretation of the reciprocity theory that underlines the doctrine of consideration is subject to criticism by the eminent legal academic Professor Atiyah. The main contention of Professor Atiyah in this regard is that the doctrine of consideration is void of logic when examined closely. He remarks:

> "[T]he truth is that the courts have never set out to create a doctrine of consideration. They have been concerned with the much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced When the courts found a sufficient reason for enforcing a promise they enforced it; and when they found that for one reason or another it was undesirable to enforce a promise, they did not enforce it. It seems highly probable that when the courts first used the word "consideration" they meant no more than there was a 'reason' for the enforcement of a promise. If the consideration was 'good', this meant that the court found sufficient reason for enforcing the promise."[103]

Professor Atiyah's submission is that consideration, as it is, ought not to exist because the courts utilised the tool of a 'good reason' sieve out a valid reason to give legal effect to an agreement. The tool of 'good reason' implies that the terms and conditions of an agreement are desirable, sufficient, and within the law, thus meeting the level of 'sufficiency' to justify enforcement. This approach, in essence, eliminates the better interpretation of the reciprocity theory and installs a judicial reason for enforcement. This view did not go unchallenged; another eminent legal academic, Professor Treitel, sought to torpedo Professor Atiyah's analysis in defence of the doctrine. Professor Treitel submitted that English contract law endorse the very being of a "complex and multifarious body of rules known as 'the doctrine of consideration'".[104] He also argues that to construe consideration as a "reason" for enforcement is the "negation of the existence of any applicable rules of law" based on the premise that a "good reason" fails to outline the concrete cases in which the court will enforce an agreement.[105] However, Professor Treitel admits that there are some cases in which the courts "invented consideration" i.e. courts "have treated some act or forbearance as consideration quite irrespective of the question whether the parties have so regarded it."[106] This admission, or rather mitigation by Professor

[103] Atiyah (1990), *supra* nota 37.
[104] Peel, E., Treitel, G. H., The Law of Contract. 12th ed. London, Sweet and Maxwell 2007, p 174.
[105] Trietel, G. H. Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement. Australian Law Journal, 1976, 50, pp 439-449, p 449.
[106] McKendrick (2011), *supra* nota 1, p 70.

Treitel sought to justify the questionable outcomes in certain cases within the scope of the traditional philosophy of the doctrine. Ergo, courts had to extract consideration (judicial reason of enforcement) using some reciprocity or bargaining rationale in cases where such was not clear and where it was judicially necessary to do so. However, Professor Atiyah quickly replied by arguing that Professor Treitel invented the notion of an invented consideration as a way of reconciling the many distorted outcomes in cases with what he perceives as the "true" or "real" doctrine.[107] Professor Atiyah also argues against the traditional method by submitting that the doctrine is rigid and void of firm reasoning.[108]

Other legal academics and jurists also had their say in the debate on the validity of the doctrine of consideration. In support of the doctrine from Professor Treitel's point of view, Peter Benson submitted:

> "No doctrine of the common law of contract has been longer settled or more carefully developed than consideration… [It] embodied an idea of reciprocity that had continuously animated the long history of contract law stretching back to fourteenth-and fifteenth-century English medieval law... [F]rom the late sixteenth and early seventeenth centuries, consideration stipulated a general and necessary prerequisite for a kind of liability that is still widely viewed as distinctively 'contractual.' If there has ever been a basic contract doctrine that, as a matter of self-conscious legal practice, has presented itself as reflecting a unified conception of contract, consideration is it."[109]

However, judicial critique of the doctrine started in the 1780's where Lord Mansfield in *Hawkes v Saunders*[110]held:

> "Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. A fortiori, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honest and rectitude of the thing is a consideration. As if a man promises to pay a just debt, the recovery of which is barred by State of Limitation: or if a man, after he comes off again, promises to pay a meritoriousness dent contracted during his minority, but for necessaries; or if a bankrupt, in affluent

[107] *Ibid*
[108] Morgan, J. Great Debates In Contract Law. 2nd ed. Basingstoke, Palgrave Macmillan 2015, p 32.
[109] Benson, P. The Idea of Consideration. University of Toronto Law Journal, 61 (2), 2001, pp 241-278, p 241.
[110] Hawkes v Saunders (1782) 1 Cowp 289, 98 ER 1091; *see also* Mitchell, C., Mitchell, P. Landmark Cases In The Law Of Contract. 1st ed. Oxford, Hart Publishing 2008, p 40.

> circumstances after his certificate, promises to pay the whole of his debts; or if a man promises to perform a secret trust, or a trust void for want of writing, by the Statute of Frauds." [111]

In summary, the doctrine is viewed is subjected to two (2) schools of thought. On the one hand, there is the Trietel School of Thought, which construes the doctrine of consideration as one where there must be a benefit or detriment; if not made clear on the face of the contract, the courts have the power to find such. On the other hand, there is the Atiyah School of Thought that construes the doctrine of consideration as finding "good reasons", apart from the benefit and detriment analysis, to judicially enforce an agreement. Therefore, the problematic areas of the doctrine revealed through an evaluation in the proceeding section.

[111] *Ibid*

6. An Evaluation of the Doctrine of Consideration

As seen from the preceding chapters, it is observed that the doctrine of consideration is highly uncertain and has destabilised the enforcement of promises in English contract law. Moreover, the doctrine overlaps with other elements of the formation of a contract, frustrating the original intention of parties- producing absurd results. These problematic results are based on four (4) central issues with the doctrine of consideration, of which, one is an actual threat to the doctrine itself.

The first issue is the doctrine's clash with the spirit of contractual theory. Aristotle planted the seed of contractual theory in the concept of the individual.[112] As such, he held that the individual ought to be truthful, honest, and keep their promise. It follows that primarily the parties themselves must uphold their lawful intentions. This further implies that the contractual theory, premised on the individual, is one that ought to be based on equitable contracting. This type of contracting has at its core the autonomy of the individual who is equal and free. To put another way, the autonomous individual ought to be equal and free subject to the law. It is not for the courts to substitute or replace the lawful intentions and interests of the individual with its own.[113] Hence, the purely procedural justice, which rejects an outside checklist of intentions in order to uphold an agreement. It also puts emphasis on ensuring that the intentions and interests of contracting parties do not violate the fairness and lawfulness. Unlike the doctrine of consideration, it does not seek to impair the lawful intentions and interests of contracting parties. Such interference is evident in the cases of *Foaks v Beer*, *Tweedle v Atkinson*, *Eastwood v Kenyon*, *Stilk v Myrick* et al. In those cases, the parties originally agreed to pursue certain goals; however, one party decided not to keep their promise, and the court's use of consideration endorsed their breach on the grounds of want of consideration. As such, consideration was not applied to keep the parties to what they originally agreed; it was applied as a "value judgment" upon the lawful intentions of parties- usurping the interests of parties to the luck of the party in breach.

The second issue with the doctrine of consideration is that it is dysfunctional in interpretation and application. As mentioned above, the imposition of value judgments, disguised as consideration, resulted in contradictory and contrary results. In *Bret v Js*, natural affection was

[112] Ross (2009), *supra* nota 81.
[113] Gordon III, J. D. Dialogue About the Doctrine of Consideration. Cornell Law Review, 1990, 986 (75), pp 987-1006, p 1005.

held not to be consideration; however, in *Ward v Byham*, a job that is essentially the natural affectionate role of a mother was held to be consideration. From another angle, in *Eastwood v Kenyon,* consideration to raise and provide financial resources for a child was said to be in the past and that a moral obligation cannot be transformed into legal obligation. Contrary in *Shadwell v Shadwell,*[114] consideration was found in an agreement to pay a nephew, already engaged to a young lady, a sum of money if he married her. There is no legal obligation to marry, but consideration was found nonetheless because it conferred a right on a third party. This also contradicts the result in *Tweedle v Atkinson* and creates an escape route around the rule. In *Lampliegh v Brathwait* and *Pao On v Lau Yiu Long*, it can also be argued that there exist no legal obligation, but consideration was found nonetheless because of the specificity of the promise. In *Foaks v Beer* the part payment of debt, even when specified, was held not to be valid consideration. However, part payment was accepted albeit under promissory estoppel in *Collier v P & MJ Wright (Holdings) Ltd.* There is even greater discord in relation to consideration and an existing duty. In *Stilk v Myrick*, consideration was not found because new consideration was not provided; however, in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*, where there is no consideration for a new promise and arguably an existing duty, consideration was nonetheless found based on the practical benefit obtained. The examples prove that the doctrine of consideration will yield different results depending on the rule of consideration relied on during litigation. The doctrine's interpretation and application have been heavily criticised as outlined in previous chapters; moreover, the dysfunctional doctrine proves Atiyah's School of Thought true. Consideration is not applied along the lines of the benefit-detriment interpretation of the reciprocal theory; as per Atiyah, it is clearly applied as a "good reason" to uphold a promise on a case-by-case basis.

The third issue is that the doctrine of consideration fails to concretise a single position on contractual modifications. Contractual modifications are plenteous in the realms of business; as such, there ought to be certainty in the law. The rise of the "practical benefit" concept in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* is seemingly in a tug-of-war with the benefit-detriment concept in *Stilk v Myrick*. In relation to contractual modifications, the benefit-detriment approach in *Stilk v Myrick* was not overruled in *Williams v Roffey Bros & Nicholls (Contractors) Ltd.* That approach was said to be "refined" and "limited";[115] thus, it leaves to wonder under which conditions the benefit-detriment approach would apply vis-à-vis the

[114] [1860] EWHC CP J88.
[115] McKendrick (2011), *supra* nota 1, p 80.

practical benefit approach. It has been said that *Stilk v Myrick* applied to "wholly gratuitous" promises;[116] however, the promise made to the crewmembers cannot be held as such based on the facts of the case. The failure of the common law to overrule *Stilk v Myrick* creates legal uncertainty during litigation where both grounds might have to be pleaded to determine whether the court would find consideration. Maybe in such circumstances the court will have to find a "good reason" to enforce the promise.

Finally, the doctrine of consideration is under threat by the rising doctrines of economic duress and promissory estoppel. In *Adam Opel GmbH v Mitras Automotive UK Ltd,*[117] the court stated in *obiter* that the doctrine of economic duress provides a better control mechanism to void contracts than the mechanisms established under *Stilk v Myrick.* Legal academics even go further to suggest that the doctrine of economic duress should "displace" the doctrine of consideration in extortionate situations.[118] This erases the benefit-detriment and possibly the practical benefit approaches in cases where the lack of consideration might be presumed to be an extortionate situation. As a result, under the old rule, consideration would not be found. In other words, the lack of some reciprocal or exchange (benefit-detriment) in the eyes of consideration equates to unjust enrichment. However, under economic duress, the concept is better rationalised in the context of the modern legal approach as per the *Universal Sentinel* test. This test avoids the "good reason" not to enforce promise; it directly provides a legal basis not to enforce a given promise that may lead to unjust enrichment.

In addition, in relation to the doctrine of promissory estoppel, the only reason why this doctrine does not wipe away consideration altogether is that it can only be used a shield. If it were used as a sword, as in *Walton Stores (Interstate) Ltd v Maher*, the doctrine of consideration would be rendered dead since it would bring English contract law into terms of enforcing the lawful intentions and equitable interests of contracting parties. However, remedies provided in estoppel are dependent on reliance and rather than expectations (another trifling boundary).[119] These artificial boundaries are there to protect the doctrine of consideration from the winds of change; however, if those boundaries were removed, the efficacy of contracting would be made easier. Moreover, the removal of those boundaries would place the concept of the individual into the heart of contracting in law.

[116] Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries Co Ltd (No. 2) [1990] 2 Lloyd's Rep 526, par 544-45.
[117] [2007] EWHC QB 3251, par 42.
[118] Phang (1990), *supra* nota 48.
[119] McKendrick (2011), *supra* nota 1, p 102.

What is clear from the four (4) premises of evaluation is that it is **t**ime to clean up and clarify the doctrine of consideration once and for all. As such, the legal tool that is used to enforce promises and validating contracts must be fit for purpose and enforce stability and certainty in the enforcement of promises. Therefore, an examination of other enforcement models must be considered in order to seek solutions to the chronic issues plaguing English contract law by the doctrine of consideration.

7. Pacta Sunt Servanda: The German Model

Unlike English Law, German Law of Contract does not require an extra step of scrutiny for the enforcement of promises between parties that indirectly affects the validity of the contract. All that is required is an agreement and an intention to create legal relations. The aforementioned requirements are reflected in §145 of the Bürgerliches Gesetzbuch (BGB) where it defines the formation of a contract as:

> "A person who offers to another to conclude a contract is bound by the offer (*Antrag)*, unless he has excluded this binding effect."[120]

This provision has three essential elements, they are: 1) an offer, 2) to another to conclude, and 3) the binding force of the offer. The first two are treated as an offer and acceptance respectively, which are construed as the declarations of the parties' intention.[121] The declaration of intention is a key component of German contract law because it is premised on the freedom of contract (*Vertragsfreiheit)* which is a right provided by the Basic Law.[122] As such, parties are given the latitude to decide (*Inhaltsfreigeit*) albeit subject to other legal requirements or a specific form (*Formfreiheit*).[123] Therefore, it is upon that basis that the declaration of intention- in the form of a statement or action, must consist of a shared aim leading to a defined result.[124] The legal rules concerning the declaration of intention are outlined in §116-114 BGB which give the court the power to examine the declarations of the contracting parties. Finally, the binding force of the offer is dependent upon its effectivity, which explains the prohibition of revocation (dependent upon the expiration of the offer as per the stipulated time or reasonable time for acceptance).[125]

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[120] §145, Title III, Book I Bürgerliches Gesetzbuch (BGB), Maastricht Collection, p 278.
[121] Markesinis, B., Unberath, H., Johnston, A. The German Law of Contract: A Comparative Treatise. 2nd ed. Oxford, Hart Publishing 2006, p 56.
[122] Manfred P. A Study of the Signficant Aspects of German Contract Law. Annual Survey of International & Comparative Law,1996, 3 (1), Article 7, p 111.; *see also* Article 2(1) of the Grundgesetz (Federal Constitution).
[123] Ibid; *see also* §125 and §134 BGB, Title II, Book I Code Bürgerliches Gesetzbuch, Maastricht Collection, pp 277-278.
[124] Foster, N., Sule, S. German Legal Systems and Law. 3rd ed. New York, Oxford University Press 2008, p 383.
[125] Manfred (1996), *supra* nota 122, p 116-117.; *see also* §146-155 BGB, Title III, Book I, Bürgerliches Gesetzbuch, Maastricht Collection, p 279.

Other essential components of the German contract are the capacity of parties,[126] the subject matter of the contract,[127] performance duties,[128] and other obligations flowing from the conduct of contracting (inclusive of the principle of good faith (*Treu und Glauben*) and common practice (*Verkehrssitte*)).[129] It is important to note that German Law of Contracts is premised on the "abstraction doctrine" or the "principle of separation".[130] (*Trennugsprinzip*) whereby the actual transfer of the subject matter (ownership) (*Verfügungsgeschäft*) bears no effect on the contract of obligations (*Verpflichtungsgeschäft*). [131] Thus, when it comes to the modification of contracts, parties must create another contract called a contract of amendment (*Änderungsvertrag)*.[132] Once parties are dissatisfied with terms and conditions of the original contract, they can create the *Änderungsvertrag,* referring to the main obligations and outlining the adjusted terms.[133] Moreover, the *Änderungsvertrag* must be made in like manner of the original agreement and subject to the same rules of contracting.[134]

German Law of Contract is very systematic and concise where "good reasons" do not interfere with the efficacy of enforcing promises. The consensus of parties can be construed from the provisions outlined above which puts the simplicity of German contract law under the contractual doctrine of the will theory. According to academics, the will theory played a significant role in the development of German Law complimented by the declaration theory, which makes the law pragmatic.[135] Therefore, in order to understand the workings of German Law of Contract, it is necessary to take a brief look its philosophical underpinnings and its departure from the French-Roman model (as it was then).

7.1 History of Roman Roots and Departure

Legal systems of the civil tradition are rooted in the Roman legal tradition as established. As such, the German and French Legal Systems also shared at one point the Roman theory of the

[126] §2, 104-113, 164 BGB, Title I, Book I, Bürgerliches Gesetzbuch, Maastricht Collection, pp 275-276.
[127] §119 BGB, Title II, Book I, Bürgerliches Gesetzbuch, Maastricht Collection, p 277.
[128] §241-287, Title I, Book II, Bürgerliches Gesetzbuch, Maastricht Collection, pp 281-284.
[129] §242, Title I, Book II, Bürgerliches Gesetzbuch, Maastricht Collection, p 281.
[130] Beale, H., Fauvarque-Cosson, B., Rutgers, J., Tallon, D., Vogenauer, S. Contract Law: Ius Commune Casebooks for the Common Law of Europe. 2nd ed. Oxford, Hart Publishing 2010, p 90.
[131] Ibid, §433 and §929 BGB; *see also* Markesinis, Unberath, Johnston (2006), *supra* nota 121.
[132] Wendler, M., Tremml, B., Buecker, B. J. Key Aspects of German Business Law: A Practical Manual. Heidelberg, Springer Verlag 2006, p 75.
[133] *Ibid*; *see also* §311 BGB.
[134] *Ibid*
[135] Street (1999), *supra* nota 98, p 264.

(un)enforceability of *nude pacts,*[136] which was premised on the then meaning of *causa.* However, this theory was abandoned in favour of the new theory of *causa,* as it is known today.[137] It was in the eighteenth century that Canon Law shaped the new doctrine on the premise that breaching one's promise equates to a lie -which in turn will be a sin; and as such, excommunication was a corollary of the penalty.[138] Moreover, jurists from the natural law of jurisprudential thinking shaped the new doctrine further by holding that the Roman rule on *pacts* was contrary to natural law.[139] This was premised on the old Germanic legal thought that all formal agreements were enforceable because of the "duty of keeping faith".[140] However, it was subsequently revealed that Germanic law only accepted "formal and real" contracts, and excluded consent contracts.[141]

Over time, the 'straightjacket' requirements of Roman law gave way to liberal doctrines, which saw the rise of *causa* as a condition to be fulfilled for obligations to be created.[142] Moreover, this notion is what Marcel Planiol furiously criticised as a misinterpretation and the fallacy of *causa*.[143] The new form of *causa* was accepted as a contractual necessity in France, but in Germany, Planiol's interpretation of the enforceability of promises was accepted. This interpretation, 'attributed' to old Germanic law, held that an agreement is lawful once it was entered into with a serious intention of being legally binding upon parties, regardless of the manner of expression.[144] Furthermore, this interpretation is said to be the interpretation of the Roman theory that dominated Germany.[145] With the rise of German Idealism through Immanuel Kant's concept of the individual's freedom and moral autonomy, the will theory of contracting started to take shape.[146] Absorbing Kant's new theories was the German jurist- Friedrich Carl von Savigny- who went on to shape classical German contract law.[147] According to Savigny, the amalgamation of the wills with the aim of establishing a legal relationship ought to be

[136] Lorenzen, E. G. Causa and Consideration in the Law of Contracts. Yale Law Journal, 1919, 28 (7), pp 621-646, p 623.
[137] *Ibid*, pp 630-631.
[138] Ibid; *see also* Berman, H. J. Law And Revolution - The Impact Of The Protestant Reformation In The Western Legal Tradition. 2nd ed. Cambridge, Belknap Press of Harvard University Press 2006, p 157.
[139] Lorenzen (1919), *supra* nota 136, p 631.
[140] *Ibid*
[141] *Ibid*
[142] *Ibid*
[143] Planiol, M. Traité Élémentaire de droit civil. 6th ed. no.1031 cited in Lorenzen (1919), *supra* nota 136, p 634
[144] Lorenzen (1919), *supra* nota 136, p 632.
[145] Hoecke, M. (ed.), Epistemology And Methodology Of Comparative Law (European Academy Of Legal Theory Series). 1st ed. Oxford, Hart Publishing Limited 2004, p 181.
[146] Kessler, F. Some thoughts on the Evolution of the German Law of Contracts: Part I (1975). Faculty Scholarship Series. Paper 2644. www.digitalcommons.law.yale.edu/fss_papers/2644. (22.02.17), p 1068.
[147] *Ibid*

protected and respected.[148] As such, this theory became the bedrock of all legal transactions or juristic acts (*Rechtsgeschäfte*) in Germany today.[149] As work began on the German Civil Code (BGB) in 1874, the will theory and the "ideology of the individual" prevailed, thus forming part of the BGB today.[150]

7.2 Overview of the Doctrine: German Pacta Sunt Servanda

Premised on the better view of the will theory, the consent of parties under the German Legal System will be sufficient for promises to be enforced, which translates into a binding contract.[151] The English and German contract law systems both agree that form is necessary in the case of gratuitous promises; however, both systems diverge when assessing the binding nature of the parties' declaration of the wills.[152] The English system intensely scrutinises and measures the declared wills whereas the German system dear not tread in such a manner. The only assessment that is equivalent to the level of scrutiny conducted by the English systems is the concept of unjust enrichment provided in §812-822 BGB read with §118 BGB (a declaration not intending to be serious will be void; however, courts will narrowly apply this exception).[153] Thus, where there is the lack of "mutual consent", German courts will not seek to weigh the promises of contracting parties.[154] Instead, German courts will examine the transaction overall, adjudicating on the conduct of parties, to ensure that they do not conflict with the intention requirement.[155] In other words, German courts will use different tools in order to better assess and interpret the declared intention.

§ 113 BGB is the starting ground for the interpretation of the declaration of intention in obligation relationships (*Schuldverhältnisse*).[156] It provides that "[w]hen a declaration of intent is interpreted, it is necessary to ascertain the true intention rather than adhering to the literal meaning of the declaration."[157] To put another way, "in contracts, what matters is not what real intention [lays] behind what one contractor said but what the other contractor must in the

[148] *Ibid*, p 1069.
[149] *Ibid*
[150] Foster, N. G., Sule, S. German Legal System And Laws. 1st ed. Oxford, Oxford University Press 2011, p 32.
[151] Zweigert, K., Kötz, H., Weir, T. Introduction To Comparative Law. 3rd ed. Oxford, Oxford University Press 2008, p 397.
[152] Markesinis, Unberath, Johnston, Markesinis (2006), *supra* nota 121, p 87.
[153] *Ibid*
[154] Hogg (2011), *supra* nota 64, pp 278-279.
[155] *Ibid*, p 279.
[156] Youngs, R. English, French & German Comparative Law. 1st edn. Abington, Taylor and Francis 2014, p 562.
[157] Maastricht Collection, *supra* nota 125.

circumstances have understood him to mean".[158] As such, the objective approach is taken in the view of looking at the agreement in totality in the context of good faith.[159] Thus far, it is observed that the declaration of intent (inclusive of the intention to create legal relations), good faith, and the regulatory provisions of contracting (inclusive of unjust enrichment) are the three validating components that conduct the work of an objective version of consideration in German Law. These components will be examined in turn to understand fully how promises in relationships of obligations are binding.

The declaration of intent as mentioned before is brought about through the offer and acceptance stage. The validity of the promises here rests on the validity of the offer and acceptance in accordance with the conduct of parties. According to §145 BGB, an offeror is bound to his offer unless it expires because of a lapse of the stipulated time for acceptance or as a result of a lapse of reasonable time.[160] The result of the binding nature of the offer is that the offeror cannot withdraw it once it has exited the offeror's sphere of influence. The BGB takes it a step further beyond the bindingness of an offer to the "effectiveness" of an offer. In §130 BGB, the declaration of intent becomes effective when it arrives within the sphere of influence of the offeree.[161] Another critical component to the declaration of intention is that parties must agree to the essential element (*essentialia negotii*) of the contract, lest it would not be binding. Thus, in the *RG*[162] case, the court held that a pre-contract, which seeks to establish the maximum price in a contract for sale, is not binding.[163] Additionally, in the *OLG Hamm*[164] case, where contracting parties understood that they were bound to the agreement *ipso facto* by their performance, there would be a presumption of a valid agreement. This rationale is affirmed in § 155 BGB which provides that where the parties are yet to agree on all points (not individual points) within a contract and where there is doubt, the contract cannot be formed.[165] As such, once there is a valid agreement on the essential terms, the meeting of the minds to form the intention behind the declaration would be the next step. The meeting of the minds entails an outer element and an inner element- the former rooted in the physical behaviour through words or conduct, while the latter is rooted in having an awareness of a conscious and desired will.[166]

[158] Zweigert, Kötz, Weir (2008), *supra* nota 15, p. 404; *see also* Guttentag, J. Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich, 1, 1896, p 155.
[159] Zweigert, Kötz, Weir (2008), *supra* nota 151, p 404.
[160] *Ibid*, pp 361-362.
[161] *Ibid*, p 362.
[162] RGZ 124, 81.; *see also* Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer (2010), *supra* nota 130, p 324.
[163] *Ibid*
[164] NJW 1976,1212; *see also* Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer (2010), *supra* nota 130, p 325.
[165] Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer (2010), *supra* nota 130, p 327.
[166] Zweigert, Kötz, Weir (2008), *supra* nota 15, p 365.

As such, this proves why the bargain theory has no place in the German system since the central role of the declaration of intent is the consensus between contracting parties to engage in lawful legal relations. Thus, the principle of *pacta sunt servanda* (agreements must be kept) stands as a well-reasoned principle of German contract law through its various non-intensive or non-will-erosive mechanisms. The latter two validating components of German contract law (good faith and unjust enrichment) protect the parties in contracting relations, which is what the bargain theory is supposed to police in English contract law.

Good Faith (*Treu und Glauben*) is a most fundamental legal principle in Civil Law systems. In the case of German contract law, it serves as a compass for the intention of parties and the enforcement of agreements. This principle is enshrined in §157 BGB which states, "[c]ontracts are to be interpreted in accordance with good faith [*Treu und Glauben*], taking common practice [*Verkerhrssitte*] into consideration."[167] This provision ought to be read with §241(2) BGB (also to be read with §242 BGB) which bestows an obligation on parties to take into account the rights, legal interests and other interests of the other party.[168] As such, German contract law upholds good faith in the objective form whereby the principle establishes a benchmark of conduct to which contracting parties must abide and be judged.[169] Another way to look at good faith is to deconstruct the two elements that comprise its genetic structure, they are '*Treu*' and '*Glauben*'. On the one hand, '*Treu*' is a German phrase which denotes faithfulness, loyalty, reliability, and fidelity.[170] On the other hand, '*Glauden*' denotes "faith and reliance".[171] Thus, when combined, good faith ensures that when the courts are looking at the intention of parties, they must look at each party's honesty, reliance, and considerate behaviour rather than what legal benefit they bring to the contract. To go a step further, it implies that contracts must be interpreted and enforced in a manner that a reasonable person would understand the terms to be in light of the conduct of parties. This approach is observed to be a normative methodology to the enforcement of promises in a contract (inclusive of the *Änderungsvertrag*). A corollary, this approach facilitates the supplementing, interpretive, and restrictive functions of good faith.[172] Therefore, unlike other doctrines, good faith takes into consideration the contracting interests

[167] Title I, Book II, Bürgerliches Gesetzbuch, Maastricht Collection, p 281.
[168] *Ibid*
[169] Zimmermann, R. and Whittaker, S. Good Faith In European Contract Law. 1st ed. Cambridge, Cambridge University Press 2000, p 30.
[170] *Ibid*
[171] *Ibid*
[172] Smits, J. M. Contract Law, A Comparative Introduction. 1st ed. Cheltenham, Edward Elgar Publishing Limited 2014, p 140.

of parties rather than technical rules that may invalidate a legitimate promise. It was Lord Bingham in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*[173] who summed up good faith as "playing fair" or "putting one's cards face upwards on the table".

Finally, unjust enrichment also plays a role similar to the original bargain theory, but it is applied *sensu stricto.* This concept is established in §812(1) BGB whereby when a person obtains something from another or otherwise at his expense without legal justification, that person is under a duty of restitution.[174] This concept is seemingly analogous to the doctrines economic duress and estoppel preventing situations where contractual action does not result in the detriment of another party who acted in good faith.[175] As established before, the intention of parties must be lawfully beneficial in accordance with the mutual intentions of parties. Thus, if a contract is formed based on an offer expressed - whether actually, potentially, directly, or indirectly- with the intention to obtain more than what is permitted in good faith, courts will not enforce that promise. Therefore, the intention of contracting parties ought or should not result in unjust enrichment lest the declaration is rendered void.[176] As such, this principle also forbids a party from moving away from a promise and obtaining a benefit, contrary to good faith, with the help of a legal technicality. Thus, it is observed that the rules underpinning the declaration of intentions force the court to interpret and enforce a contract in accordance with the reasonable objectives. This flows, a corollary, from the contracting terms and the reasonable objectives that are in keeping with normative values. This observation is endorsed by §133 BGB, on the interpretation of a declaration of intention, states that "the actual intention is to be ascertained rather than adhering to the literal meaning of the expression."[177] Hence, German contract law demonstrates how agreements are kept i.e. the German model of *Pacta Sunt Servanda* in this manner. However, the model empowers the German courts a degree of flexibility, analogous to Common Law Courts, when seeking to enforce a contract. The flexibility of the courts, though seemingly a blessing, has been subject to criticism about "certainty" and "predictability" (*Einzelfalgerechigkeit*).[178]

[173] [1987] EWCA Civ 6.
[174] Title IV, Book II, Bürgerliches Gesetzbuch, Maastricht Collection, p 295.
[175] Johnston, D., Zimmermann, R. Unjustified Enrichment: Key Issues in Comparative Perspective. 1st ed. Cambridge, Cambridge University Press 2002, p 196.
[176] Hoecke (2004), *supra* nota 145, p 201.
[177] Title I, Book I Bürgerliches Gesetzbuch, Maastricht Collection, p 278.
[178] Smits (2014), *supra* nota 172, p 138.

7.3 The 'Problem' with the German Model

Unlike the doctrine of consideration, the German model of *Pacta Sunt Servanda* is not subjected to a tsunami of criticism nor is it notorious for yielding absurd results. In 1933, Justus Wilhelm Hedemann in his booklet titled *Die Flucht in die Generalklauseln: eine Gefar für Recht und Staat* (The Escape into General Clauses: a Danger for Law and State), posited his concerns about the court's application of §242 BGB and its related provisions.[179] In particular, though describing the principle of good faith as the "queen of rules", Hedemann believed that the manner in which the courts interpreted the concept of good faith was a threat to the efficacy of the doctrine itself. His criticism came after decision made by the then Imperial Court when it departed from using the nominal value in a judgment in relation to the 'Reichsmark'.[180] The case involved a debtor who obtained credit prior to the First World War and sought for it to be discharged. This endeavour was being achieved during a period when the rate of inflation was astronomically high due to the government's inaction. As a result, the debtor found that the sum to be liquidated must be based on the nominal value rather than the market value incurred. Thus, in seeking to bridge the divided between inaction on the part of the government and justice, the Imperial Court, using §242 as a legal basis, fixed a new rate of exchange. Furthermore, this judicial creativity also addressed, from the legal point of view, the unforeseeable devaluation in the mark in the context of the nominal value principle and the expected good faith in the discharge of obligations under such conditions. As such, the Imperial Court struck a balance between the need for a debtor to perform his obligations and the need of the creditor to be repaid, albeit at a different rate. Hedemann labelled the decision as a "bombshell" that "unhinged the established legal world".[181] He argued that the Court acted *ultra vires* when it decided to correct the rate of exchange, which is tantamount to an erroneous form for 'judicial interventionism'.[182] Moreover, he posited that such a decision could give rises to 'dangers for State and law'.[183] The intervention by the judiciary may be viewed as taking advantage of a flexible principle, which may turn German judges into a Common Law judges- law making.

It is thus observed that judicial interventionism may be a distant cousin to the application of consideration; however, unlike the doctrine of consideration, the inherent rules of the German model will not render results contrary to true justice. It is the opinion of the author of this thesis

[179] *Ibid*, p 137; *see also* Zimmermann and Whittaker (2000), *supra* nota 169, p 20.
[180] *Ibid*
[181] *Ibid*, p 21.
[182] *Ibid*
[183] *Ibid*

that such judicial interventionism -using the flexibility of the doctrine of good faith- should not be seen a problem. The flexibility should only be a concern when it departs from the original intentions of parties; however, the Imperial Court in this instance sort to use the doctrine to restore and maintain the original intentions given the dire economic situation. Ergo, the Imperial Court used the flexibility of the doctrine to enforce the declared intentions of the parties while simultaneous circumventing a temporary external factor. As such, there should be no fear that the German courts will abuse the flexibility of the established doctrines because the courts are only concerned with enforcing and not the usurpation of the original intention of contracting parties. Therefore, the apparent issues with the German model are nowhere inherently problematic as the doctrine of consideration.

7.4 French Contract Law Reforms Alignment with German Contract Law

Similar to the doctrine of consideration, the French doctrine of *causa* was subjected to an onslaught of criticisms by many legal academics and practitioners over the centuries. Chief of the *causa* critics is the nineteenth century Marcel Planiol who scathingly reduced *causa* as 'false' and 'useless'.[184] His rationale was that the creation of an obligation in a contract stemmed from the consent of parties entering a consensual contract who prescribed words in a stipulation.[185] Planoil further went on to hold that the extinguishing or performance of a legal duty is dependent the fulfilment of the other party's conditional duty; thus, if the stipulated condition does not exist, then the obligation will also not exist.[186] Even when examining the subjective twist of *causa*, some argue that other areas of law such as fraud and mistake are better suited to examine the underlying motive of a contract.[187] As such, many modern French legal scholars agree with Planoil viewing *causa* as legal conjecture that creates confusion rather than serving a meaningful purpose.[188] Many civil legal systems such as that of Germany, Switzerland, Greece, Portugal, The Netherlands et al., abandoned the *causa* confusion as result of the shift towards "a serious intention of being legally bound".[189] However, the civil legal systems of Austria, Luxembourg, Italy, Belgium, and Spain retain the doctrine of *causa* in the formation of contracts.

[184] Lorenzen (1919), *supra* nota 136, p 634
[185] *Ibid*, p 634.
[186] *Ibid*
[187] Smith, J. D. A Refresher Course in Cause. Louisiana Law Review, 1951, 12 (1), pp 2-36, p 13.
[188] Lorenzen (1919), *supra* nota 136, p 634
[189] Lando, O., Beale, H. G. Principles Of European Contract Law. 1st ed. London, Kluwer Law International 1999, p 141.

It is of special note to mention that France abandoned the doctrine of *causa* as of 1 October 2016 after a fundamental reform of the *Code Civil's* Law of Obligation.[190] This fundamental change in the law originated from the period following the celebrations of the 200th anniversary of the *Code Civil* when the 'Europeanisation of private law' was in full blossom.[191] Moreover, the motivation was further triggered by a report published by the World Bank- 'Doing Business'[192], ranking France's legal system at 44th interns of the attractiveness of conducting international trade. In an initial reform attempt, there was the *Avant-Project* (*de réforme du Droit des obligation et de la prescription),*[193] brought into being out of the cooperation between legislators and legal academics, which sought to maintain the doctrine of *cause*.[194] The retention of *cause* as a fundamental requirement for the validity of a contract was proposed in their draft Article 1124- similar to Article 1108 CC. However, an alternative proposal was put forward by the eminent French Law professor- Francois Terré, was incorporated in a 2008 draft by the Ministry of Justice.[195] A corollary, the current reform to the law of obligations in French Law, took effect producing the abolition of the doctrine of *cause* altogether.[196] The new Article 1128 CC omits the requirement of *cause* and now provides that a contract will be valid once there is "consent" and there is an "object as to the subject matter".[197] Moreover, the implication of the new Article 1128 CC and the remaining 'object as to the subject matter' is the stipulation of content that is lawful and certain.[198] As a result of the abolition of *causa*, French Law of Contract is now in line with the Principle of European Contract Law (PECEL), the Draft Common Frame of Reference (DCFR), and the other major civil law jurisdictions of major trading economies- Germany (most obviously), Brazil, Japan, Switzerland, China et al.

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[190] Smits, J., Calomme, C. Legal Developments: The Reform of the French Law of Obligations: Les Jeux Sont Faits, www.maastrichtjournal.eu/pdf_file/ITS/MJ_23_06_1040.pdf (19.02.17). *hereon* (Smits and Calomme, Legal Developments): *see also* Smits, J., and Calomme, C, The Reform of the French Law of Obligations: Les Jeux Sont Faits, October 1, 2016). Maastricht European Private Law Institute Working Paper 2016-05 (10.2016), p 1040. *hereon* (Smits and Calomme Working Paper)

[191] Ibid (Smits and Calomme, Legal Developments), *see also* Fauvarque-Cosson, B. Towards an important reform of the French Civil Code. Montesquieu Law Review, 3, 2015, p 67.

[192] World Bank, Doing Business in 2004: Understanding regulations. www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB04-FullReport.pdf (18.02.17); *see also* Smits and Calomme, Legal Developments (2016), *supra* nota 190, p 1042.

[193] Catala, P. Avant-projet de réforme du droit des obligations et de la prescription, La Documentation française, 2006.; *see also* Smits and Calomme, Legal Developments (2016), *supra* nota 190, p 1042.

[194] Beale, Fauvarque-Cosson, Rutgers, Tallon, Vogenauer (2010), *supra* nota 130, p 187.

[195] Smits and Calomme, Legal Developments (2016), *supra* nota 190, p 1042.

[196] *Ibid*

[197] Stoyanov, D. Causa and Consideration – A Comparative Overview. Challenges of the Knowledge Society 2016. www.ssrn.com/abstract=2819799, pp 254-265 (3.2.2017), p 265.

[198] Smits and Calomme Working Paper (2016), *supra* nota 190.

Finally, in terms of contractual variation, it is important to note that under the newly amended Law of Obligations, Article 1134 CC was abolished and swallowed up by the new Article 1104 CC. [199] The new provision provides that, "[c]ontracts must be negotiated, formed, and performed in good faith" in the interest of public policy; however, in paragraph 3 of the provision, it requires agreements to be performed in good faith.[200] As such, the application of the principle of good faith moved away from its historical scrutiny of agreed terms (subjective approach), and move towards looking at the contract as a whole (objective approach). As such, French courts would be better placed to resolve contractual disputes.[201] The abolition of the menacing *causa* - a cousin of consideration- was possible because French jurists and legal academics realised that it obstructed the lawful serious intentions of parties. Therefore, the English model may want to take note of this move in terms of the abolition of a doctrine and moving towards a widely accepted approach.

[199] Soulier, J. Ordinance Of February 10, 2016 For The Reform Of French Contract Law: The Principle Of The Binding Force Of Contracts Is Considerably Undermined By The New Provisions Of The French Civil Code. www.soulier-avocats.com/en/blog/ordinance-of-february-10-2016-for-the-reform-of-french-contract-law-the-principle-of-the-binding-force-of-contracts-is-considerably-undermined-by-the-new-provisions-of-the-french-civil-code/ (22.2.2017).
[200] *Ibid*
[201] *Ibid*

8. The Doctrine of Consideration: Remain, Reform, or Abolish?

This chapter seeks to establish the way forward in terms of the future existence of the doctrine of consideration in English contract law. In relation to this chapter, the doctrine's existence will be examined from the point of the adoption of a particular model that will best suit contractual enforcement in English contract law. There are jurists and academics who see no problem with the doctrine despite its flaws, and as such, it is in their view that the doctrine should conceptually remain. Others argue for a bespoke model where the errors of consideration ought to be eliminated while salvaging the best parts of the doctrine. More progressives views submit that the doctrine should be abolished altogether- in like manner of France- that will push English contract law closer to a harmonised European contract law approach. However, BREXIT will now make that goal a fiction of the imagination. As such, draft models of the PECL, DCFR and International Institute for the Unification of Private Law (UNIDROIT) are seen as the gold standard as to the way forward in abolishing the doctrine of consideration.

8.1 Remain

As it currently stands, the doctrine of consideration is seen by many over the years as having no purpose with no satisfactory justification.[202] Others would go even further to describe the doctrine as a theoretical mess.[203] However, what is constant is that the doctrine is far from perfect as impliedly admitted even by its staunchest defender Professor Treitel.[204] In recent times, the doctrine received judicial endorsement as being a "valuable signal" to the intentions of parties.[205] Thus, there may be special reasons why the doctrine should remain albeit with a few tweaks.

Leading the defence of the doctrine of consideration is the well-respected legal academic and practitioner Mindy Chen-Wishart. In a journal article, Chen-Wishart outlined four (4) justifications as to why the doctrine of consideration should continue to play a pivotal role in the enforcement of contracts.[206] The first reason for maintaining the doctrine is that it aids in

[202] Chloros, A. G. The Doctrine of Consideration and the Reform of the Law of Contract. A Comparative Analysis. International and Comparative Law Quarterly, 1968, 17 (1), pp 137-166, p 140.
[203] The Hamlyn Trust, Atiyah (1987), *supra* nota 80.
[204] Peel and Treitel (2007), *supra* nota 104.
[205] Antons Trawling Co Ltd v Smith [2003] 2 NZLR 23 at [93].
[206] Chen-Wishart, M. In Defence of Consideration. Oxford Commonwealth Law Journal, 2013, 13 (1), pp 209-238, p 215.

the reinforcement of individual autonomy by restricting harm premised on social consensus.[207] Chen-Wishart promoted this view on the premise that the state i.e. the courts have "increased wisdom"[208] that helps to "undo past foolishness".[209] As such, the doctrine of consideration when applied helps to shape autonomy through learning and knowledge. The second justification, following upon the aforementioned, is that consideration provides a contextual approach to contracting thus helping to shape social forms.[210] As such, it allows the court to use consideration to inject social conventions and norms into the contracting process. The third justification is that reciprocity is central to the preservation of social stability.[211] The notion here is that the Court is enabled to set acceptable terms of engagement between parties that will protect the individual's autonomy. The final justification is that consideration enables the Court to administer justice on a case-by-case basis whether through gap filling or the prevention of a flood of claims.[212]

These justifications are inversely reflected in the case law outlined in previous chapters; however, these justifications also embody the problems with the doctrine. The first two justifications say that contracting parties are incapable of forming a lawful serious intention, and as such, they need the intervention of the state i.e. the courts to set the intentions right. The last two justifications essentially endorse the over-regulation and manipulation of the doctrine of considerations to find "good reasons" -whatever they may be- to enforce contractual terms. Thus, the justifications endorse Treitel's view of the abhorrent "invented consideration". Therefore, these justifications only give credence to the movement away from the maintenance of the doctrine of consideration. Hence, Atiyah's School of Thought still stands as the better interpretation of the doctrine.

8.2 Reform: A Bespoke Model

It has been proposed that the law on consideration should be more outward looking to approve other grounds for the enforcement of promises in addition to the bargain and benefit-detriment rationale.[213] By opening up the restrictive hands of consideration, the doctrine would no longer

[207] *Ibid*, pp 215-217.
[208] *Ibid*, p 213.
[209] *Ibid*
[210] *Ibid*, p 217.
[211] *Ibid*, p 219.
[212] *Ibid*, p 220.
[213] Ballantine (1913), *supra* nota 3, p 434.

measure the 'sufficiency' of promises through its mechanical formula.[214] To be more pellucid, the doctrine of consideration ought to be reformed in a manner to give effect to the lawful serious intentions of contracting parties. Therefore, reformation of the doctrine of consideration, in this regard, sought to bridge the divide between the retainers and the abolitionists. Reformation is not a new concept; reform was suggested a Report of the Law Revision Committee (UK) in 1936. This report put forward four (4) solutions to eliminate the flaws from the doctrine to make it workable.[215] Firstly, it was proposed that a rule ought to be introduced which eliminates the need for consideration to move from the promisee. Secondly, it was proposed that the rule concerning past consideration ought to be repealed in its entirety. Thirdly, it was proposed that there should be a rule whereby an existing duty to perform an act will constitute good consideration. Finally, it was proposed that parties should be able to modify an existing contract without the need for new consideration.

In connection with the first rule, the harsh effects of the doctrine are usually borne by third parties. As such, the tensions between the prohibition in *Tweedle v Atkinson* and the third party exception in *Bolton v Madden* were eventually settled in the Contracts (Rights of Third Parties) Act 1999. The second rule was also made right by the common law in *Pao On v Lau Yiu Long* where the court established three conditions to enable its effect. Additionally, Parliament intervened via statutory means by ensuring that antecedent debt or liability constitute good consideration. [216] Added to that statutory intervention is the requirement of written acknowledgement of the accrued debt by the debtor, which circumvents the *Tweedle v Atkinson* rule.[217] Finally, the third and fourth rules currently exist thanks to the practical benefit doctrine in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*. In this regard, it must be noted that the practical benefit doctrine continues to operate parallel to the legal benefit -detriment doctrine in *Stilk v Myrick*. As such, the dual existence of the two sub-doctrines is said to be used by the courts in a mutually exclusive way under the doctrine of consideration as a "technical vitiating factor[s]".[218] This form of usage gives power to the intention of parties one the one hand but can be used against those intentions based on the public's interest on the other hand.[219] Therefore, the doctrine of consideration could, in its own unique way, allow for the socio-judicial regulation of intentions whilst giving power to the lawful serious intentions of parties.

[214] *Ibid*
[215] Chloros (1968), *supra* nota 202, p 144.
[216] Bills of Exchange Act 1882, s 27(1)(b).
[217] Limitation Act 1980, s 27(5); *see also* McKendrick (2011), *supra* nota 1, p 88.
[218] McKendrick (2011), *supra* nota 1, p 104.
[219] *Ibid*

This can only be achieved by cautious judicial intervention in minimising the menacing effects of consideration.

8.3 Abolish: Towards the German and French Models

Thus far, arguments have been put forward for the doctrine of consideration to remain (in this case, an attempt) and arguments were also put forward for the doctrine to be reformed. However, revolutionists call for the doctrine of consideration to be abolished altogether. The result of abolition would bring the contractual enforcement in English contract law into the realms of contractual enforcement in accordance with the German and French models. These models are compatible with the Europeanisation of contract law with global compatibility. Therefore, this section will look at the radical solution of abolition.

The German model equates contractual enforcement to agreements being upheld. This concept of enforcement is realised through the principles of good faith, unjust enrichment, and the interpretation of intentions. This simplistic approach differs drastically from the judicial and legislative mess created by consideration and its rules. As revealed in the previous chapter, the ideal role of consideration today seeks to regulate contracts in a manner that best suits the public interests. That is why English courts have to "invent" consideration, via its many sub-doctrines, as a vitiating factor to rid promises that are not accepted in the eyes of justice. The German approach has the same aim but realises its aim through less confusion. The concept of good faith is the fundamental principle here whereby the court is empowered to measure the rights, legal interests, and others factors between contracting parties (and not promises). Lord Denning endorsed this approach where he submits that an act done on the faith of a promise should be regarded as sufficient consideration.[220] This approach seems much more straightforward and less condescending than measuring the sufficiency of promises and whether a legal or practical benefit was obtained. If English courts wish to examine what might be obtained flowing from the intention of parties, the German model answers this by the principle of unjust enrichment to ensure than no party is disadvantaged. English Law regulates this principle over many statutes to include areas concerning fraud and unfair contractual terms.[221] Therefore, the rules of the German model are most helpful in reaching the same result while consideration would require constant intervention to reach the same result.

[220] Denning, A. T. Recent Developments in the Doctrine of Consideration. Modern Law Review, 1952, 15 (1), pp 1-10, pp 9-10.
[221] Fraud Act 2006; Unfair Terms in Consumer Contracts Regulations 1999

The French model moved away from the doctrine of *causa* and into the light of *Pacta Sunt Servanda*. This move was attributed to interpretative and applicability issues with *causa* itself, which was seen as interfering with the lawful serious intentions of parties. As such, the new approach of the French model is premised upon 1) consent, 2) object as to the subject matter (lawful and certain content), and 3) good faith. The requirements are direct and may yield the same results as the requirements under the German model. The French model, no longer frustrated by a messy doctrine, gives power to the individual and their consent, which is, then subject to lawfulness. The lawfulness scrutiny also seeks to regulate contracts in line with prescribed law. However, unlike the German model, good faith here gives a broader deference to public policy and interests. In relation to consideration, the French model is an example of the abolition of a doctrine unique to a legal system. What is unique about the abolition under the French model is that the doctrine of *causa* was eliminated with its traditional role now subsumed into better fitting principles. As such, the doctrine of consideration could be surgically extracted from English contract law and its tradition "role" will be functionally better under existing and upcoming doctrines. It must be noted however that English contract law will have to be simplified in like manner of the German and French models allowing for doctrines to give impetus to the operability of contractual enforcement. The inspiration for the simplification of the new French model was inspired by PECL[222] and the German model.[223]

Article 2.101 of PECL provides an example upon which English contract law can abolish consideration in one stroke. The said provision provides that a contract be deemed concluded when the parties intend to be legally bound and when they reached a sufficient agreement "without any further requirement".[224] This minimalist approach to the enforcement of promises also covered contractual modifications and the usual contracting while upholding the intention of parties. Similarly, Article 3.2 of the UNIDROIT hold that a contract is concluded, modified, or terminated by the mere agreement of parties, "without further requirement".[225]

[222] Smits and Calomme, Legal Developments (2016), *supra* nota 190, p 1041.
[223] *Ibid*, p 1042.
[224] Principles Of European Contract Law (PECL). Trans-lex.org, 2017. www.trans-lex.org/400200/_/pecl/ (24.04.2017).
[225] UNIDROIT, International Institute For The Unification Of Private Law - Institut International Pour L'unification Du Droit Privè'. www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/395-chapter-3-validity-section-1-general-provisions/912-article-3-1-2-validity-of-mere-agreement (24.04.2017); *see also* Jansen, N., Zimmermann, R. Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules. Oxford Journal of Legal Studies, 2011, 31 (4), pp 625-662, p 633.

These formulas of contractual enforcement will refocus English contract law to the true nature of contractual theory. Moreover, the reciprocity foundation of English contract law -which is rooted in medieval contracts- can no longer be modified and adapted. There comes the point in time when English contract law must let go of certain traditions, which served their purpose, and adopt concepts that are fit for purpose in the scheme of contractual efficacy. For too long, the adaptation of old formulas led to a convoluted doctrine that interfered with the lawful intentions of parties and resulted in unjust outcomes. There comes the point in time when statutory and judicial interventions no longer play a corrosive role, but a regulatory role. Therefore, for English contract law to address the consideration problem, it must first reform consideration and ditch its unnecessary complexities via judicial and legislative means. Afterwards, if the reformed consideration is still causing applicable and functional issues, then abolition must be the inevitable result. In order to start the process of reformation and possible abolition, there must be judicial and legislative intervention to stabilise and concretise contractual enforcement in English contract law.

Conclusion

It has been therefore proven without a doubt that the doctrine of consideration is an institution of English contract law that was built up over time by a patchwork of *ad hoc* rules and doctrines. This patchwork birthed instability, uncertainty, contradictions, and unjust results in the name of regulating contractual enforcement. As a result, the doctrine began to fall into disrepute where constant judicial and legislative intervention had to provide it with life support. The historical development over time saw the elimination of literally handing over the Anglo-Saxon '*wed*' to a rise of the *writ* to enforce a cause of action. During the age of enlightenment and reflection, contract law theory went through a phase of rationalisation that adopted Aristotle's concept of contracting- the truthful individual and keeping his promise. Notions of the pure procedural justice admonish the courts to provide a way for lawful promises to be enforced as agreed and view legal obligations from the idea of keeping one's promise.

Over time, the failure to properly rationalise the doctrine of consideration led it being an anti-contractual doctrine, dysfunctional, incoherent, and being placed under threat. The original French model of *causa* produced similar results due to a form bending, flexing, and stretching archaic Roman concepts of contracts. The German model, on the other hand, did not follow its English and French counterparts; it rationalised its doctrine in a modern manner suited to life in the enlightened role of contract theory. Following the will theory, the German model developed a minimalist approach that is most effective in the enforcement of a contract without generating a flood of legal issues. The French model then decided to follow the German model in recent times to plant the better efficacy of contractual enforcement into their system albeit in nearly identical terms but in a uniquely French manner. English contract law, being afraid to let go of "traditions", allowed the doctrine to run wild in the Common Law. This drew the ire of jurists and legal academics as to the functionality and application of the doctrine in contractual formation and modification. Some argued to keep the doctrine intact; however, their arguments are 'nonsense upon stilts'- especially in the context of the importance of upholding a lawful promise. Therefore, the only reasonable conclusion is that the doctrine of consideration ought to be reformed in a manner to make it fit for purpose, lest it be abolished for failing in its role to enforce contracts lawfully entered into with serious intentions.

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