

**CONSIDERING CONSIDERATION: A CRITICAL AND
COMPARATIVE ANALYSIS OF THE DOCTRINE OF
CONSIDERATION IN THE ANGLO-CANADIAN COMMON LAW**

by

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Abstract

The doctrine of consideration is widely regarded as one of the most problematic contract law doctrines present within the common law. For many years, there had been discussion about its possible removal, but recent times this discussion appears to have come to a virtual halt and little has been done to improve the current situation. It seems that many of the possibilities for the reform of the doctrine of consideration have already been explored by various reform committees and subsequently rejected.

In order to re-open the discussion surrounding the problems caused by consideration, and to present further possibilities, this thesis explores a different approach to the reform of the doctrine; it focuses on the modification of contracts in the Anglo-Canadian common law, an area in which consideration has come to be a particular problem and identifies the ways in which the German civil law might act as an aid to the reform of the law in this area.

In order to do this, the history of the doctrine of consideration and its German civil law equivalents is examined so as to identify common areas in their development. The reasons for the current need for the reform of the doctrine of consideration in the Anglo-Canadian common law, including its complexity, its use as a mask for the real reasons behind judicial decision-making and the common trend towards the harmonization of contracts law, are then identified. The German rules on the modification of contracts are subsequently identified using a modified functional comparative approach. These rules are then examined in order to determine the ways in which they differ from the Anglo-Canadian common law in the absence of a doctrine of consideration-the main difference being that there is no doctrine of consideration, nor anything comparable to it, within the German law. Finally, it is

concluded that the German law would best be used as inspiration for a set of model laws, developed using both the Anglo-Canadian common law and the German civil law.

Preface

This thesis is the unpublished, original and independent work of Charlotte Mary Boardman.

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List of abbreviations

Abs.-Absatz (the German word for paragraph)

AC-Appeal Cases (England)

Am J Legal Hist.-American Journal of Legal History

App Cas- Law reports: appeal cases

APR-Atlantic Provinces Reports (Canada)

B.U. L. Rev-Boston University Law Review

BCCA-British Columbia Court of Appeal

BCLR 2d-British Columbia Law Reports (Second Series) (Canada)

BCSC- British Columbia Supreme Court

BGB-Bürgerliches Gesetzbuch

BGH-Bundesgerichtshof

BGHZ-Bundesgerichtshofs in Zivilsachen

Bing- Bingham's Reports

Burr- Burrow's King's Bench Reports

Can. Bus. L.J.-Canadian Business Law Journal

CCEL- Canadian Cases on Employment Law

CISG- (United Nations Convention) Contracts for the International Sale of Goods

Co Rep- Coke's King's Bench Reports

Colum L Rev.-Columbia Law Review

DLR-Dominion Law Reports (Canada)

ER-English Reports

EWCA Civ-England and Wales Court of Appeal Civil Division

EWHC- High Court of England and Wales

Geo. Mason L. Rev.-George Mason Law Review

Harv LR-Harvard Law Review

Int'l & Comp. L.Q.-International and Comparative Law Quarterly

KB-King's Bench

Law & Pol'y Int'l Bus- Law & Policy in International Business

Loy. L. A. L. Rev.- Loyola of Los Angeles Law Review

Maastricht J. Eur. & Comp. L.- Maastricht Journal of European and Comparative Law

Mem. St. U. L. Rev.-Memphis State University Law Review

Mich. L. Rev.-Michigan Law Review

NBCA-New Brunswick Court of Appeal

NBR- New Brunswick Reports (Canada)

NJW- Neue juristische Wochenschrift

NZLR-New Zealand Law Reports

OLG- Oberlandesgericht

Ont. CA-Ontario Court of Appeal

Ont. SCJ- Ontario Superior Court of Justice

OR-Ontario Reports

PECL-Principles of European Contract Law

PICC-Principles of International Commercial Contracts

QB-Queen's Bench

RFL-Reports of Family Law (Canada)

RSBC- Revised Statutes of British Columbia (Canada)

SCR- Supreme Court Reports (Canada)

Str - Strange's King's Bench Reports (England and Wales)

U. Miami L. Rev.-University of Miami Law Review

U.N.B.L.J.-University of New Brunswick Law Journal

UKHL-United Kingdom House of Lords

UNIDROIT- Institut International Pour L'Unification du Droit Prive (International Institute for the Unification of Private Law)

Unif L Rev-Uniform Law Review

UTLJ-University of Toronto Law Journal

UTCCR-Unfair Terms in Consumer Contracts Regulations

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Dedication

This thesis is dedicated to Jason McColl, without whom I would never have come so far.

Chapter 1: Introduction

1.1 What is the doctrine of consideration?

The doctrine of consideration is one of the most established doctrines within the common law of contract. It began its development in the early stages of the English contract law and it has long been a part of the English legal system. The doctrine is taught in virtually every common law university as an essential requirement for the formation of a valid contract and consideration is often described as the cornerstone of English and Canadian contract law.

Consideration, along with offer and acceptance, is regarded as an essential part of the formation of a legally binding contract in the Anglo-Canadian common law. Thus, without consideration, an agreement is deemed unenforceable, even if there is a valid offer and a valid acceptance of that offer. The traditional definition of consideration is:

some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given suffered or undertaken by the other.¹

In essence, the doctrine of consideration requires that, in order for a promise to be enforceable, the promisee must give or promise something in return for that promise. Thus, consideration at its most basic level is the requirement that a promise be bargained for. The rationale behind the doctrine of consideration therefore appears to be the need for reciprocity in the formation of contractual obligations. Once again, at its most basic level, the doctrine of consideration is used to make a distinction between everyday social agreements and legally enforceable contracts.

¹ *Currie v Misa* (1875) LR 10 Ex 153 162, Lush LJ

As a doctrine rather than one rule or principle, the development of the doctrine of consideration is the result of many decisions made by the courts over a great length of time. Each decision has added yet another facet to the doctrine of consideration and, while this led to a great deal of flexibility as the doctrine developed, it has also meant that the doctrine of consideration has grown to be exceedingly complex.

1.2 A general overview of the present situation surrounding the doctrine of consideration

Though there have always been some critics of consideration², in the last four decades, there has been growing concern that the doctrine has become out-dated, overly-complex and problematic. Many scholars and some judges now argue that it is an unnecessary obstacle to the enforcement of what would otherwise be valid contractual agreements. As a result, some have advocated the complete removal of the doctrine of consideration³ while others have suggested that it should be changed through either judicial or legislative reform⁴.

The difficulties surrounding the doctrine of consideration have long been recognised. Indeed, there is a great deal of literature on the subject of consideration and its place within the common law. Though many different problems have been addressed from many different angles, in many different circumstances, there are several issues commonly addressed by scholars: the first of these issues is the doctrine's apparent lack of purpose and definition⁵. The second of these issues is the over-complexity of the doctrine caused by the many

² Lord Mansfield, for example, was a fierce advocate for the removal of the doctrine of consideration, even in its relatively early stages of development

³ For example, Chloros advocates the complete abolition of the doctrine of consideration in AG Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract" (1968) 17:1 Int'l & Comp. L.Q. 137 at 165

⁴ PS Atiyah, *An Introduction to the Law of Contract*, 5th ed (New York: Oxford University Press Inc. 1995) at 149

⁵ Supra Note 3 at 140

exceptions which have been made to it⁶; these exceptions are, for the most part, the result of judges attempting to avoid outcomes which could be considered unfair, immoral or against public policy. Thirdly, some have argued that the doctrine of consideration is used as a mask for the real reasons for judicial decisions⁷ and finally, others demonstrate the fact that the doctrine does not fit well with the current trend towards the harmonization of contract law, particularly in Europe⁸. This list is by no means exhaustive and it is possible to find a great many more problems which are caused by the doctrine of consideration. These however are the most commonly raised issues and this thesis therefore focuses on finding ways to improve the situation surrounding the doctrine of consideration with regards to these particular problems.

1.3 Previous attempts and suggestions aimed at solving the problems identified

In the past, several attempts have been made to encourage the reform of the doctrine of consideration. These suggestions include those made by the UK law reform committee⁹ and the Ontario Law Reform Commission¹⁰ as well as some scholarly contributions¹¹. However most, if not all, of these suggestions have had little effect in persuading the judges or the legislature to begin the process of reforming the doctrine of consideration.

⁶ Mark B Wessman, "Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration" (1993) 48:1 U. Miami L. Rev. 45 at 86-93

⁷ Ibid

⁸ Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria*, (The Hague: Kluwer Law International 1999) at 145

⁹ The Law Revisions Committee, *Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration: Report by The Law Revision Committee*, (London: His Majesty's Stationary Office, 1945)

¹⁰ Ontario Law Reform Commission, *Report on Amendment of the Law of Contract : Report by Ontario Law Reform Commission*, (Ontario: Ministry of the Attorney General, 1987) Online at <http://archive.org/stream/reportonamendmen00onta#page/14/mode/2up> (Last viewed 22/2/2013)

¹¹ Chloros suggests that the doctrine of consideration should be abolished and replaced with legislation inspired by a mixture of the German, French and Italian civil codes (See note 3 for references)

In recent years, most serious attempts at the reform of the doctrine appear to have been abandoned and there has been little further discussion on the matter¹². However, the problems caused by the doctrine of consideration persist and they will not disappear without further attempts to solve them.

1.4 Cause from the French civil law as a solution to the problems caused by the doctrine of consideration

Lord Mansfield, perhaps one of the most famous early critics of the doctrine of consideration, argued that it should be replaced by French-style rules similar to that of 'cause'¹³. However, his attempts at reform were rejected and the doctrine of consideration as we now know it continued to develop.

Though plausible in theory, at the present time, the idea of replacing the common law doctrine of consideration with the French civil law concept of cause does not seem to be the appropriate solution. When considering today's trend towards globalisation and the harmonisation of contract laws, particularly in the context of commercial dealings, it seems unwise to adopt any rule that is particular to one type of legal system. This attitude towards such requirements as the doctrine of consideration and the requirement of cause is demonstrated by the working group responsible for the drafting of the Principles of International Commercial Contracts which rejected both doctrines.¹⁴

¹² With the exception of the New Brunswick case of *NAV Canada v. Greater Fredericton Airport Authority Inc.*, 2008 NBCA 28, 229 N.B.R. (2d) 238, 290 D.L.R. (4th) 405

¹³ Kevin Teeven, "Mansfield's Reform of Consideration in Light of the Origins of the Doctrine" 21:4 (1991) Mem. St. U. L. Rev. 669 at 702

¹⁴ Klaus Peter Berger, "The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts" (1997) 28:4 Law & Pol'y Int'l Bus 943 at 944

Indeed, much like the doctrine of consideration, ‘cause’ appears to be a requirement that, while helpful in distinguishing those promises which are enforceable and those which are merely gratuitous, is not essential to a well-functioning system of contract law. This is demonstrated by the fact that many other systems, including the German contract law, have no such requirement.

1.5 The lack of consideration requirement in the German contract law-consideration is not necessary for a functional system of contract law

The German civil law, unlike the French Code Civil¹⁵, does not require any form of consideration or cause in return for a promise. In order to form a valid and therefore enforceable contractual agreement under German law, only the presence of an offer and the valid acceptance of that offer is required. Instead of relying on the requirement of consideration, the German contract law uses other mechanisms to ensure that there is an accurate distinction between those promises which are enforceable and those which are gratuitous.

The German contract law is an example of a system which functions effectively without the doctrine of consideration. Not only this, but the German legal system is in fact one of the most influential legal systems in the world. The German law of contract has been used extensively as inspiration for the drafting of new international laws and principles¹⁶ (none of which require the provision of consideration in order to create a binding legal agreement) and it has been chosen by several other jurisdictions as the basis for the drafting

¹⁵ For more information see K. Zweigert and H.Kötz, *An Introduction to Comparative Law*, 3rd ed (New York: Oxford University Press 1998) at 381

¹⁶ The UNIDROIT Principles of International Commercial Contracts for example. Available online at: <http://www.unidroit.org/dynasite.cfm> (Last viewed 21/11/2013)

of their own civil codes¹⁷. Though it is difficult to demonstrate that the German law of contract functions more efficiently than the common law of contracts applied in England and Canada without delving into the depths of law and economics (which is beyond the scope of this work), it seems that the German contract law model is the model favoured by those drafting committees seeking to create laws and principles which are designed to facilitate commercial agreements and smooth business transactions¹⁸. It can therefore be regarded as a highly efficient, modern legal system.

1.6 This study

This study focuses on the problems associated with the doctrine of consideration in the context of the modification of contracts. I have chosen to focus on this particular area of the common law of contracts because it is one that is often affected most negatively by the doctrine of consideration. There are several reasons for this: firstly, the requirement of the doctrine of consideration in the context of the modification of pre-existing contractual agreements appears to be somewhat superfluous. This is because the already formal nature of the previous agreement to enter into a contract suggests that the parties should be aware that any modification subsequently made is equally as binding and serious as the first.

Secondly, it is also an area of contract law which is often used in commercial settings. In such an environment, it is far less likely that an agreement to modify a contract will not be intended to be taken seriously by each of the parties. Finally, for these reasons, it is also in commercial and business situations that the doctrine of consideration most frequently

¹⁷ These codes include China, Japan and Russia. The 1992 reforms of the Civil Code of the Netherlands also drew significant influence from the German civil code, though it is primarily based upon the French Napoleonic Code. Each of these countries has of course modified the German laws to suit their own political and social needs

¹⁸ Such as the UNIDROIT Principles of International Commercial Contracts (for the full text see Note 16)

becomes an obstacle for those attempting to modify agreements. This is particularly problematic when one considers the need for fast transactions and efficiency in order to promote the smooth running of business. Thus, at least in this context, there is little to no need for consideration as a means of determining the seriousness of the intention of the parties.

The area of contract modification also appears to be the one in which reforms are most likely to succeed because judges seem to be more willing to implement changes in the law where there has already been a serious contractual agreement. In cases of contract modification, there have been an increasing number of exceptions made to the doctrine of consideration in an effort to avoid unjust outcomes¹⁹.

The recent case of *NAV Canada v Greater Fredericton Airport Authority Inc.* 2008 NBCA 28, 229 N.B.R. (2d) 238, 290 D.L.R. (4th) 405 [*NAV Canada v Greater Fredericton Airport Authority Inc.*]²⁰ demonstrates that, at least in Canada, the courts are willing to eliminate the doctrine in cases of contract modification where other conditions are satisfied. In this case, it was held that where there was no economic duress, a contract could be legally modified without the requirement of consideration. It should be noted however that this case does not apply all of Canadian contract law. Despite this, it can still be viewed as a step towards the reform of the doctrine of consideration, albeit on rather a small scale.

The decision to focus my research in the area of contract modification has also been greatly influenced by several other sources. These sources include the Report on Amendment

¹⁹ See Chapter three of this study for a more detailed analysis of these exceptions

²⁰ *Supra* Note 12

of the Law of Contract by the Ontario Law Reform Commission²¹ which identifies the doctrine of consideration in the modification of contracts as a key area of concern and the old English case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5 [Williams v Roffey]²² which illustrates the difficulties caused by the doctrine of consideration in contract modification cases.

1.6.1 The aims of this study

The main aim of this study is to explore the possibility of looking to the German civil law for solutions to the problems caused by the doctrine of consideration in the context of the modification of contracts. Since the German law functions well without a doctrine of consideration, or indeed any mechanism like it, I seek to determine how it might be used to improve the Anglo-Canadian common law. I also aim therefore to re-open the discussion surrounding the doctrine of consideration and the problems it now poses and to encourage the reform of the doctrine by suggesting new and alternative solutions to these problems. I also aim to encourage the use of foreign, civil law influences in the reform of the Anglo-Canadian common law as this is an option often over-looked or dismissed by reform committees.

This study does not seek to address the particularly problematic task of defining the doctrine of consideration. This topic has been frequently addressed by many of the most influential contract law scholars across the world. Each has a different theory with regards to the functions performed by the doctrine of consideration and each draws upon a different aspect of the doctrine. Considering both my time constraints and the focus of this thesis

²¹ Supra Note 10 at 13

²² *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1989] EWCA Civ 5

(which is not the deep exploration of the theoretical underpinnings of the doctrine of consideration) it would not be practical to address this issue here.

Having said this, the identification of the function of consideration is essential for the purposes of determining which German rules are functionally equivalent to the doctrine. Thus, while I do not attempt to formulate my own definition of the function of the doctrine of consideration, I have chosen to accept Atiyah's definition of the function of consideration as a reason for the enforcement of promises²³. Chapter three offers further explanation of my reasons for adopting this definition; however, for the purposes of this introduction, a brief explanation is that it is the theory closest to the original civil law doctrine of *causa*, from which some theories suggest the doctrine of consideration arose, it is a general theory which applies not only to contract modification but also to the formation of contracts, and it is therefore also the definition which offers the most flexibility for reform. For the purposes of this study, I also accept that the most basic function of the doctrine of consideration is its use as a mechanism to establish a distinction between promises which are enforceable under the law and those which are not.

This study refrains from addressing, at least in great detail, the reasons for the differences in the development of the Anglo-Canadian and German contract law. Once again, this is a topic which has been analyzed from many different angles in many different contexts. Though a more traditional direct comparison of the Anglo-Canadian and German contract law and an explanation of these difference would no doubt produce some interesting results, it has in many respects, already been done.

²³ PS Atiyah, *Consideration: A restatement, Essays on Contract* , (Oxford: Clarendon Press, 1990) Online <http://www.oxfordscholarship.com.ezproxy.library.ubc.ca/view/10.1093/acprof:oso/9780198254447.001.0001/acprof-9780198254447> (last viewed 19/4/2013)

Though this study does address some of the issues surrounding the transplantation of law from one legal system to another, I do not aim to engage in a lengthy discussion concerning the viability of legal transplants. Once again, this is a subject that has been repeatedly addressed over many years by many different scholars and there is a great deal of literature on the subject. Since the focus of this thesis is the possible use of the German law as an aid to the reform of the Anglo-Canadian common law, and since it would require a great deal of discussion to fully address the issue, I have chosen to limit any arguments concerning the transplantation of legal rules to this context. I do not therefore address the question of whether or not legal transplants are possible in general. Instead, I examine the possibility of transplanting the German law into the Anglo-Canadian common law in this particular situation.

This thesis therefore continues as follows: The second chapter of this paper examines the historical development of the Anglo-Canadian common law and the German civil law. The aim of this chapter is to identify the different stages of development in both the common law and civil law of contracts and to examine the ways in which this development has led to the differences and similarities between the modern laws. This chapter aims to provide some historical context for the discussion of the current contract law.

The third chapter of this paper explains the current common law rules on the modification of contracts in England and Canada. It aims to identify the purpose of the doctrine of consideration (its function) which will enable the use of the functional comparison of the Anglo-Canadian common law and the German civil law of contracts. This chapter also identifies and describes the widely accepted problems surrounding the doctrine

of consideration with a view to advocating its replacement with a new set of rules which are designed to be less problematic, less complex and more modern.

The fourth chapter identifies the German civil law equivalents (if they can indeed be named as such) to the doctrine of consideration using the functional comparative method. Thus, having identified the function of the doctrine of consideration in the preceding chapter, the use of the functional comparative method in this chapter enables the identification of those German laws which perform the same or similar functions to that of the doctrine of consideration in the Anglo-Canadian common law. This chapter also aims to provide a comparison of these German civil law equivalents and an evaluation of their capability to replace the common law doctrine of consideration within the common law.

The fifth chapter of my thesis explores how these rules might be used in order to improve the law on the modification of contracts. It explores the possibility of transplanting the German law rules into the common law whilst identifying the problems that this might cause. It also explores the other ways in which the German law could be used to influence the drafting of a new set of rules designed to replace the doctrine of consideration. In this chapter I conclude that, while the German law equivalents to the doctrine of consideration provide useful guidelines for reform, they cannot be transplanted without significant upheaval and the possible alienation of the modification of contracts from the rest of the common law.

This chapter also aims to provide possible solutions to the problems identified in chapter three using influences from the German law rules identified in chapter four. In this chapter I consider several potential uses of the German civil law on the modification of

contracts. I explore the ways in which the German law might act as an influence upon future legislation aimed at reforming the doctrine of consideration and I determine the ways in which the German law might act as a means of encouragement for the reform of the doctrine of consideration. In this chapter I also provide examples of legislation which might be used to replace the doctrine of consideration as a means of suggesting the ways in which the German law might be implemented in the drafting of new laws.

1.6.2 The methods used in this study

1.6.2.1 The functional comparative method

Though this thesis can be characterized as ‘comparative’ it is important to note that my methods are somewhat different from those most commonly used to complete comparative works. The comparative methodology which I have chosen in order to complete my thesis can loosely be identified as the functional comparative approach. The most popular definition of the functional comparative method was written by Zweigert and Kötz in their “An Introduction to Comparative Law, Third Edition”²⁴.

Zweigert and Kötz list several steps which lead to the proper performance of a functional comparative analysis. The first stage of the process is the identification of which legal systems shall be compared²⁵. As evidenced by my earlier discussion, I have chosen to compare the English and Canadian common law with the German civil law.

According to Zweigert and Kötz’s writings, the second stage of the functional comparative approach is the identification of the rules which are functionally equivalent to the rules which have been chosen for comparison. The equivalent rules can be found by

²⁴ Supra Note 15

²⁵ Ibid at 34

finding a problem common to both legal systems and looking at the ways in which they seek to solve it.²⁶ In the case of this thesis, having identified the doctrine of consideration as the mechanism used to differentiate between enforceable and gratuitous promises (the problem), and having applied Atiyah's theory that consideration makes this distinction by acting as a reason for the enforcement of a promise, I look for those rules in the German law which perform the same (or similar) function. I therefore determine which German rules distinguish those agreements which are enforceable under the law from those which are not and I identify those (if any) which might provide a reason for the enforcement of a promise to modify a contractual agreement.

The third step in the functional comparative method is the completion of 'reports' on each legal system being studied²⁷. According to Zweigert and Kötz:

Separate reports should be offered for each legal system or family of legal systems, and they should be objective, that is, free from any critical evaluation, though containing all significant qualifications or modifications²⁸.

Here, the method I have chosen to use differs from the traditional functional comparative approach. The reason for this is that any reports that I make will in fact be highly critical. This is because, while reporting on the Anglo-Canadian law, I identify the problems with the doctrine of consideration and while reporting on the German law equivalents, I evaluate the possibility of using these rules to solve the problems caused by the doctrine of consideration.

²⁶ Ibid

²⁷ Ibid at 43

²⁸ Ibid

After identifying the rules contained in each legal system, the functional comparative method requires a comparison of each set of rules in order to determine what the similarities and differences in each system are. The method I have used to complete this thesis does not include such a comparison. The reason for this is that the focus of my research is not the comparison of the English, Canadian and German contract law.

Instead of performing a comparison, I evaluate the possibility of using the German contract law to aid the reform of the Anglo-Canadian common law. Thus, as I determine how these rules might be used, I compare the German and Anglo-Canadian rules, but I do not do so with the pure aim of discovering similarities and differences between the two systems. Instead, I use the discovery of any similarities to determine how the German law might fit into the common law and the identification of differences to suggest ways in which the German law functions more efficiently than the common law.

In this thesis, I do not, as many functional comparatists do, attempt to explain the differences and similarities between the English, Canadian and German legal systems²⁹ (with the possible exception of the inclusion of a chapter on the historical development of the doctrine). For the purposes of identifying the ways in which the German law might be used as an aid to the reform of the doctrine of consideration, such an analysis does not provide much useful information. Instead, I look to the ways in which the rules that are different might be integrated into the Anglo-Canadian common law as a method of improving the current situation surrounding the doctrine of consideration.

²⁹Though the reasons for these differences are in fact briefly explained in chapter two of this thesis.

According to Zweigert and Kötz, the final stage of the functional comparative approach is to create a separate ‘fictional’ legal system from the laws studied.³⁰ A comparatist should:

Develop a special syntax and vocabulary, which are also in fact necessary for comparative researches on particular topics. The system must be very flexible, and have concepts large enough to embrace the quite hetero-geneous legal institutions which are functionally comparable.³¹

This step is also not included in this thesis. The aim of this step is to enable the law to be ‘properly studied outside national boundaries’³². However, given that the goal of my thesis is to study how the German law might be applied within the common law, it is essential to look at the German law within the context of common law boundaries. I have therefore chosen not to complete this step for the simple reason that it does not aid me in my goal to improve the Anglo-Canadian common law.

As can be seen from the above explanation, I have chosen to follow the traditional functional comparative approach rather loosely. Some of the steps such as those which aid the identification of those rules which perform the same functions are highly beneficial to my work, while others, such as the explanation of the reasons behind the similarities and differences, are not.

³⁰ Zweigert and Kötz provide the example of the enforcement of promises to illustrate this approach. Supra Note 15 at 44

³¹ Ibid at 45

³² Ibid at 45

1.6.2.2 The translation of German legal texts

For the purposes of this study I will be using German legal texts (including German statute law) to identify the German law on the modification of contracts. Since these texts are predominantly written in German, they must be translated into English before the information contained within them can be included. Because translation involves not only the translation of the text itself, but also the interpretation of the words, it can sometimes have an effect on their meaning. In order to avoid the misinterpretation of the German legal rules and to enable me to provide the best translation possible, I have adopted the approach to translation outlined in Deborah Cao's "Translating Law."³³ Cao states that legal language has:

Linguistic, referential and conceptual dimensions. To ascertain whether a concept in one language can be translated as a concept in another language, we need to consider whether there are equivalent or similar in these three dimensions.³⁴

Thus, where I must translate German legal terms into English, I look firstly to the linguistic dimension (is there a linguistic equivalent to the word), secondly to the referential dimension (is there a meaning already established under the law for this particular word?) and finally, the conceptual dimension (is there a conceptual equivalent?). The use of this method should enable me to translate the German legal rules into English while keeping as close to their original meaning as possible.

³³ Deborah Cao, *Translating Law* (Celvedon: Multilingual Matters Ltd 2007)

³⁴ *Ibid* at 55

Where I have been able to, I have also consulted the official translation provided online by the German Ministry of Justice (Bundesministerium der Justiz)³⁵ as it has been written by professional translators.³⁶

1.7 Definition of key terms

1.7.1 ‘Anglo-Canadian common law’

For the purposes of my thesis, this term refers to the contract law of both the English and Canadian legal systems. As it will be seen from the second chapter, the English law of contracts was inherited by Canada during the British colonisation. Though there are now many differences as well as similarities between the English and Canadian contract law, the doctrine of consideration is central to the contract law of both jurisdictions. The Canadian courts, with the exceptions of, for example, Section 43 of the British Columbia Law and Equity Act³⁷ which states that:

Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation.³⁸

And thus abolishes the pre-existing duty rule established in *Cumber v. Wane* (1721) 1 Str 426 [*Cumber v Wane*]³⁹ which was decided in line with the English case of *Foakes v Beer*[1884]

³⁵ Available at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 21/11/2013)

³⁶ According to the website, the translation is provided by the Langenscheidt Translation Service and it is regularly updated by Neil Mussett.

³⁷ *Law and Equity Act*, RSBC, 1996, c 253

³⁸ *Law and Equity Act*, RSBC (1996), c 253, s 43.

³⁹ *Cumber v. Wane* (1721) 1 Str 426

UKHL 1 [*Foakes v Beer*]⁴⁰. Though of course, this does not apply to the whole of the Canadian law as it is a provincial Act.

The other exception to this is the *NAV Canada v. Greater Fredericton Airport Authority Inc.* case.⁴¹ As previously mentioned, it was in this case that the New Brunswick Court decided that consideration was no longer required in the context of contract modifications. Aside from these exceptions, the Canadian courts appear to have followed the English decisions concerning exceptions to the doctrine of consideration.

1.7.2 ‘Contract modification’

For the purpose of this thesis, it is important to define what is meant by the modification of contracts. There are several ways in which an agreement can be modified under the common law depending on the contents of the original contract. In the case of an alteration of the terms of a contract which contains a variation clause, no fresh consideration is required. This is because the variation clause is an agreement to possibility of the alteration of the existing terms of the contract. Thus, any modification is already agreed upon when the original contract is created and cannot be considered to be a deviation from it. Such agreements are commonly found in commercial contracts for things such as loan agreements and cell-phones.

However, in the case of contract modification where there is no variation clause in the original contract, fresh consideration is required. Where the modification benefits both the contracting parties, there is little issue because consideration is provided on both sides. However, where the modification is unilateral it may benefit only one of the parties. It is in

⁴⁰ *Foakes v Beer* [1884] UKHL 1

⁴¹ Supra Note 12

this situation that issues often arise. Traditionally, under these circumstances, because no consideration is given in return for the contract modification, the alteration of the terms will not be considered to be binding under the common law. The reason for the requirement of new consideration in circumstances such as these is that, without it, a promise to modify the terms of an agreement is not bargained for.⁴²

The focus of this thesis is not the modification of contracts containing variation clauses which does not require fresh consideration. Instead, I direct my attention to those modifications which do require fresh consideration and the difficulties that this can cause.

1.7.3 ‘Legal transplants’

The term legal transplant also requires some explanation. As previously mentioned, the aim of this thesis is to prescribe possible solutions to the problems caused by the doctrine of consideration by replacing the problematic rules with new ones. There are several ways in which this might be achieved but one suggestion is the transfer of civil law rules into the common law as a replacement for the doctrine of consideration. This is commonly referred to as a ‘legal transplant’. The traditional definition of legal transplantation was first given by Professor Alan Watson in his ‘Legal transplants: an approach to comparative law’⁴³.

Watson’s definition describes a legal transplant as ‘the moving of a rule or a system of law from one country to another, or from one people to another’⁴⁴. This definition is sometimes viewed as being overly simple, mainly because Watson does not acknowledge those legal transplants which are imposed on countries when they are defeated in wars or taken over by other governments and because his focus was only on private law. For the purposes of this

⁴² Supra Note 4 at 141

⁴³ A. Watson, *Legal Transplants: An Approach to Comparative Law* (Edinburgh: Scottish Academic Press, 1974)

⁴⁴ Ibid at 21

thesis however, this definition is sufficiently clear. Like Watson, my focus is private law and I will not be looking toward those transplants which are considered to be involuntary.

1.8 Literature review

1.8.1 The history of the doctrine of consideration and its civil law counterparts

Though the history of the doctrine of consideration and the German civil law equivalents does not directly impact the focus of this thesis, it is an important part of the context in which the doctrine is situated. Many scholars including Chloros⁴⁵ include details of the historical development of the doctrine of consideration as a means of identifying the reasons for its presence within the common law. In order to gain as complete a picture as possible of the development of the doctrine of consideration and the equivalent German civil law rules, I have consulted a number of texts written by respected authorities on the matter. These texts include but are not limited to: Sir Frederick Pollock, “The History of English Law before the Time of Edward I”⁴⁶, A.W.B. Simpson, “A History of the Common Law of Contract: The Rise of the Action of Assumpsit”⁴⁷ as well as George Mousourakis, “Fundamentals of Roman Private Law”⁴⁸, W. W. Buckland, “A Text-Book of Roman Law: From Augustus to Justinian”⁴⁹ and Reinhard Zimmermann, “The Law of Obligations: Roman Foundations of

⁴⁵ Supra Note 3

⁴⁶ Sir Frederick Pollock, *The History of English Law before the Time of Edward I. Reprint of 2nd edition*, with a Select Bibliography and Notes by Professor S.F. Milsom. (Indianapolis: Liberty Fund, 2010) Online at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2314&chapter=219588&layout=hTML&Itemid=27#lf1541-02_footnote_nt563 (last viewed 16/06/13)

⁴⁷ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (Oxford: Clarendon Press, 1975)

⁴⁸ George Mousourakis, *Fundamentals of Roman Private Law*, (Heidelberg: Springer-Verlag Berlin, 2012)

⁴⁹ WW Buckland, *A Text-Book of Roman Law: From Augustus to Justinian*, 3rd ed, (New York: Cambridge University Press, 2007)

the Civilian Tradition”⁵⁰. The result of consulting these texts has been a significant amount of confusion and disagreement as it seems there are many differing theories surrounding the development of both legal systems. The main reason for this disagreement seems to be a lack of evidence which is unsurprising given the historical nature of the subject. It seems several theories have emerged and I attempt therefore to address each one. These theories include Holmes’ idea that consideration is originally derived from the Medieval notion of *quid pro quo*⁵¹, Simpson’s notion that consideration in assumpsit was the result of influences from equity⁵² and the theory that the doctrine of consideration is a modified form of the Roman *causa*⁵³.

1.8.2 The need for reform as established by the current literature

The need for the reform of the doctrine of consideration is now widely accepted within academic fields. There is an overwhelming amount of literature concerning the problems with the doctrine of consideration as it currently stands. Early critics include Lord Mansfield as evidenced by his judgement of the case of *Pillans & Rose v Van Mierop & Hopkins* (1765) 3 Burr. 1663 [*Pillans & Rose v Van Mierop & Hopkins*]⁵⁴ in which he suggested that the doctrine of consideration should be eliminated.

Wessman’s ‘Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration’⁵⁵ also examines the various uses of the doctrine of consideration and the problems that it causes in modern law. Though this text is written by an American author, it

⁵⁰ Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (New York: Oxford University Press, 1996)

⁵¹ Oliver Wendell Holmes, *Collected Legal Papers*, (Clark, New Jersey: The Lawbook Exchange Ltd., 1920) at 18

⁵² AWB Simpson, “The Equitable Doctrine of Consideration and the Law of Uses” (1965), 16:1 UTJL 1 at 1

⁵³ Brian H Bix, *Contract Law: Rules, Theory, and Context*, (New York: Cambridge University Press 2012) at 33

⁵⁴ *Pillans & Rose v Van Mierop & Hopkins* (1765) 3 Burr. 1663 at 1669

⁵⁵ Supra Note 6

gives useful insight into the problems caused by the doctrine of consideration within the context of the common law of contracts. Chloros⁵⁶ also highlights the problems caused by the doctrine of consideration but fails to acknowledge the fact that, while problematic, the doctrine of consideration is not totally redundant. Atiyah illustrates this in his “Consideration: A restatement, Essays on Contract”⁵⁷ in which he demonstrates that consideration can be viewed as the reason for the enforcement of a promise in the modern English contract law⁵⁸. This is not the only theory put forward by academics in the field; there are in fact several other theories of consideration such as those provided by Fuller⁵⁹ and Benson⁶⁰ which suggest that, though the doctrine of consideration does not perform the same tasks that it did two-hundred years ago, is far from useless. This body of literature does seem to have one common thread: the idea that the doctrine of consideration cannot simply be removed ‘root and branch’⁶¹ from the common law of contracts. Instead, something more subtle must be done.

In the last 5 years, the focus of reform efforts, at least in Canada has been consideration in the modification of contracts. Though there is little academic writing on the subject of the role of consideration in the modification of contracts, the 2008 *NAV Canada v Greater Fredericton Airport Authority Inc.*⁶² case demonstrates the court’s willingness to remove the requirement of consideration in the context of the modification of contracts. The decision in this case was to replace consideration with the requirement that an agreement could not have been the result of economic duress. This decision, though it may be seen as a

⁵⁶ Supra Note 3

⁵⁷ Supra Note 23

⁵⁸ Ibid

⁵⁹ Lon L Fuller, “Consideration and Form” (1941) 41:5 Colum. L. Rev. 799 at 800

⁶⁰ Peter Benson, “The Idea of Consideration”, (2011) 61:2 UTLJ 241

⁶¹ Supra Note 9 at 101

⁶² Supra Note 12

positive step towards the reform of the requirement of consideration, the notion that economic duress can serve to fill the gap created by the removal of consideration appears to be somewhat misguided. As a result of this decision, the New Brunswick court was also forced to broaden the doctrine of economic duress in order to offer increased protection to the parties. Thus, it seems that the removal of consideration and its replacement with other common law rules is possible, but it remains to be seen whether this might result in the complication of the doctrine of economic duress.

This particular problem is therefore my motivation for focussing on the modification of contracts. Not only this, but the modification of contracts is the ideal context in which to begin the reform of the doctrine of consideration. As previously mentioned, the main reason for this is that, unlike in the formation of contracts, a contractual relationship already exists. This means that the doctrine of consideration is not needed to perform any of the evidentiary functions which are often assigned to it.⁶³ Contract modifications also occur most often in commercial contracts where there less chance that an agreement will not be intended to be legally enforceable.

While much of the literature on the doctrine of consideration advocates its total removal from the common law or at the very least its reform⁶⁴, very few of the sources provide solutions to the problems caused by the doctrine of consideration and even fewer look to the civil law for these solutions.

There are some authors, though relatively few and far between, who argue that the problems identified by scholars are in fact exaggerated and overblown. These authors include

⁶³ Supra Note 59

⁶⁴ Supra Note 3

(among others) Lord Steyn⁶⁵, Patterson in his “An apology for consideration”⁶⁶ and Rick in his “The sophisticated doctrine of consideration”⁶⁷. Many of the arguments put forward by authors and scholars such as these are based on the idea that the doctrine of consideration continues to have a purpose within the common law of contracts and it cannot therefore be abolished. Patterson, for example, argues that the doctrine of consideration:

Is superior to any of the formal tests of enforceability such as seal, a signed writing, or an express statement of intention to be legally bound, any of which may be unnoticed by the signer.⁶⁸

While this is somewhat true, Patterson concludes that:

Consideration is not here defended as a perfect legal device in the best of all possible worlds. Its excrescences should be removed by legislation or judicial decision, and its principal alternative, promissory estoppel, should be expanded slowly by careful judicial empiricism.⁶⁹

Thus, despite the fact that Patterson seeks to defend the doctrine of consideration against arguments that it should be eliminated from the common law entirely, he acknowledges the fact that the doctrine is in need of some reform and does not deny that consideration can be problematic.

⁶⁵ Mindy Chen-Wishart, *Contract Law*, 4th ed, (Oxford: Oxford University Press, 2012) at 137

⁶⁶ Edwin W Patterson, “An Apology for Consideration”, (1958), 58:7, Colum L Rev. 929

⁶⁷ Val D Ricks, “The Sophisticated Doctrine of Consideration”, (2001) 9:1 Geo. Mason L. Rev. 99

⁶⁸ Supra Note 66

⁶⁹ Ibid

Despite his apparent support (or at least more positive attitude towards consideration) Ricks also concedes that while the doctrine of consideration continues to have a purpose within the common law:

It is one sufficient, but not necessary, ground for an action on a promise. It is not the only ground, nor has it ever been. Numerous others have existed and will continue to develop. No consideration doctrine should bar that progress⁷⁰

Thus, many of those arguments which appear at first to support the doctrine of consideration do not suggest that it is a perfect legal mechanism. Quite the contrary, they simply argue against the notion that the doctrine should not be completely abolished.

In some ways, my thesis follows a similar line of argument: while the doctrine of consideration does indeed continue to perform a significant function within the contract law of England and Canada, that function could easily and more efficiently be performed by a number of other legal instruments including those ‘borrowed’ from other jurisdictions such as Germany.

1.8.3 Defining consideration

The true definition of consideration has long been debated by a great many scholars. There are a great number of varying theories on the matter, so many in fact, that it would be impossible to discuss each and every one of them here. Instead, I have chosen to analyse several of the most influential theories written by the most well-respected of scholars. Many of these theories, including Fuller’s, link the doctrine of consideration to the formalities of

⁷⁰ Supra Note 67 at 143

creating a contractual agreement⁷¹. In these cases, consideration is viewed as a mechanism to ensure that the parties are aware that the agreement they are making is intended to be legally binding. It is also viewed as an evidentiary tool which acts as means of identifying the fact that an agreement was made.

Given its focus on the modification of contracts, this particular theory does not appear to be particularly relevant to this thesis. The reason for this is that many of the evidentiary functions associated with these types of theory of consideration are less appropriate where a contractual agreement has already been made. In this situation, a contractual relationship has already been established and it is therefore less necessary to prove that the parties intended to be bound by their agreement.

Other theories such as that given by Treitel⁷² suggest that consideration has been invented by the courts on numerous occasions in order to provide the outcome they see fit. Though in some cases this does appear to be true, it does not really provide a definition of consideration. Instead, it appears to be the identification of another of the issues surrounding the doctrine of consideration.

In short, there are many theories of consideration and not one has been universally agreed upon. Each of the scholars who have devised these theories makes an excellent point and it is quite possible that, at one time or another, each of these theories has been correct. The purpose of this thesis is not to discuss the merits of each of these theories, though that would surely make for an interesting project. Instead, for the purposes of completing this

⁷¹ Supra Note 59

⁷² GH Treitel, *The Law of Contract*, 10th ed, (London: Sweet and Maxwell, 1999) at 67

work, I have chosen to follow the theory of consideration presented by Atiyah⁷³. My reasons for choosing this particular theory and the theory itself are explained in greater detail in the third chapter of this thesis.

1.8.4 The German law model

The German law of contracts never developed a doctrine of consideration and thus it is an excellent model for the examination of a legal system which appears to function very well without the doctrine of consideration or anything which vaguely resembles it. Though it would be very difficult to evaluate the German law of contract in terms of efficiency without resorting to economic analysis⁷⁴ it does seem that the German model is often regarded as being one of the most modern and innovative legal systems in the world. Indeed the UNIDROIT Principles of International Commercial Contracts⁷⁵ which were developed using the functional comparative method⁷⁶ demonstrate the fact that the German law, in particular the German law of the modification of contracts, is widely thought of as being the most efficient of the world's legal systems. Much like the German model of contract law, the UNIDROIT Principles of International Commercial Contracts do not require consideration in either the formation or the modification of contracts. Instead, again, much like the German law, a contract may be formed and modified through the mere agreement of the parties. Thus, though it is not possible, within the confines of this thesis, to demonstrate without a doubt that the German law in the area of the modification of contracts functions without any significant issues, it is possible to demonstrate that the German law appears to be a strong

⁷³ Supra Note 23

⁷⁴ The economic analysis of the German law of contracts, though highly interesting is not a part of this thesis. The main reasons for this are the time constraints imposed upon me as well as a general lack of expertise in the law and economics field.

⁷⁵ Supra Note 16

⁷⁶ The same method used in this thesis

influence upon those international laws which are currently being drafted. This implies that there is a trend towards the elimination of the doctrine of consideration in modern laws and a general leaning towards the German law when it comes to the drafting of new legislation.

1.8.5 Accessing the German law

In order to complete this thesis I have read a great deal of literature on the German law itself. However, the identification of those laws which can be compared with the Anglo-Canadian doctrine of consideration is somewhat problematic. For this reason, I have chosen to adopt the popular functional comparative method in order to identify those rules in the German law which perform the same function as the doctrine of consideration (though perhaps rather loosely as explained above).

The functional comparative method as outlined in Zweigert and Kötz's 'An Introduction to Comparative Law'⁷⁷ allows for the identification of those laws from a different jurisdiction which perform the same function as those laws selected for study. The process of completing a functional comparison is somewhat complex and there are various stages which should be followed. The ideal method varies according to different authors but according to Zweigert and Kötz there are several essential steps to the functional comparative method. As stated in the introduction to this thesis, I have chosen to follow some, but not all of these steps owing to the fact that some are beneficial to my work, whereas others, such as for example, the explanation of the differences contained in each legal system, are not. I have chosen to compare the English and Canadian legal systems with the German legal system because of the fact that they do not have a rule which is directly equivalent to that of the doctrine of consideration.

⁷⁷ Supra note 15

The primary source of German civil law is the Bürgerliches Gesetzbuch, or the German Civil Code. The Bürgerliches Gesetzbuch contains all of the rules which govern the German law of contracts. However, it does not contain any explanation as to how these rules are likely to be interpreted by the courts. Since the German law does not rely on a system of precedent, German judges are not bound by the decisions of previous courts⁷⁸ so the judgements given by them do not serve as accurate indicators of the way in which legislation is likely to be interpreted. Instead, the German law relies on commentaries such as those written by Palandt⁷⁹ to determine how legislation should be interpreted. These commentaries hold a great deal of status within the German legal community and are regarded not as sources of law but as the next best thing. For this reason I have turned to these commentaries where the practical application of a legal rule may seem unclear.

Though I have also used some German case law to illustrate how the rules contained in the Bürgerliches Gesetzbuch have been applied, it is important to note that, as previously mentioned, these decisions are not binding upon the other courts and the outcome of similar cases may not therefore be the same and these examples should not be considered to be accurate illustrations of the law but illustrations of how that law may be applied.

Much of the secondary literature on the German law of contracts that I have read consists of German textbooks which have been written with the law student in mind. Though these texts offer fairly little in the way of criticism, they do offer a clear and detailed

⁷⁸ Though in practice, and out of respect for their learned colleagues, many judges do in fact consider the decisions of previous courts when issuing judgments in cases before them.

⁷⁹ Otto Palandt, Peter Bassenge & Gerd Brudermüller et al eds, *Bürgerliches Gesetzbuch (BGB) Kommentar*, 71st ed (Munich: Beck, 2012)

description of the ways in which the law contained in the German Civil Code should be applied⁸⁰.

1.8.6 The possibility of transplantation

For the purposes of evaluating the possibility of using the German law concerning the modification of contracts into the common law as a replacement for the doctrine of consideration I have chosen to consult various authoritative sources on the subject of legal transplantation.

According to much of the literature on the subject, there are two main schools of thought surrounding the transplantation of legal rules from one jurisdiction to another. These two schools are often referred to as the ‘transferists’ and the ‘culturalists’. The transferists in support of the theory laid out by Watson⁸¹ who coined the term ‘legal transplant’ in his “Legal transplants: an approach to comparative law”⁸², argue that the transplantation of legal rules is entirely possible and has occurred throughout history. Indeed Watson states that “the phenomenon of transplantation is not restricted to the modern world”⁸³ and gives both recent and ancient examples of legal transplantation.

Watson argues that a successful legal transplant should “grow in its new body, and become part of that body just as the rule or institution would have continued to develop in its parent system”⁸⁴. Thus, according to Watson’s definition, the transplantation of legal rules from one country to another does not require that those rules remain the same; instead, they

⁸⁰ Hans Joachim Musielak, *Grundkurs BGB*, 11th ed, (Munich: C.H.Beck, 2009) for example offers a simple explanation of some of the basic principles of German contract law in German.

⁸¹ Watson’s theory of transplantation has subsequently influenced many other transferists and culturalists alike and it is for this reason that I have chosen to focus upon his writings for the purpose of this thesis.

⁸² Supra Note 43

⁸³ Ibid at 22

⁸⁴ Ibid at 27

can be subject to change within the new legal system. He also argues that “the transplanting of legal rules is socially easy”⁸⁵.

On the other side of the debate lie the ‘culturalists’. Montesquieu developed the theory that law and culture are inextricably connected⁸⁶ and this theory was adopted by the culturalists. Since Pierre Legrand is considered to be one of the greatest critics of Watson, I have paid particular attention to his work in order to gain a clear picture of both sides of the transferist/culturalist debate⁸⁷. Pierre Legrand contests the idea that laws can be taken from one jurisdiction and moved to another without causing problems on various different levels. He provides an interesting counter-argument to the very positive views of Alan Watson.

His main objections to Watson’s arguments appear to be rooted in the idea that legal rules gather their meaning from the context in which they are situated. He states that:

If one agrees that, in significant ways, a rule receives its meaning from without and if one accepts that such investment of meaning by an interpretive community effectively partakes in the ruleness of the rule, indeed, of the nucleus of ruleness, it must follow that there could only occur a meaningful 'legal transplant' when both the propositional statement as such and its invested meaning - which jointly constitute the rule – are transported from one culture to another. Given that the meaning invested

⁸⁵ Ibid at 95

⁸⁶ Charles de Secondat baron de Montesquieu, *Esprit des Lois*, (Paris: Firmin Didot frères, fils et cie, 1860) at 8

⁸⁷ Pierre Legrand & RJC Munday ed, *Comparative Legal Studies: Traditions and Transitions*, (Cambridge: Cambridge University Press, 2003) and Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4:2 *Maastricht J. Eur. & Comp. L.* 111- though there are many critics of Watson’s theory including: Kahn-Freund who states that: “We cannot take for granted that rules or institutions are transplantable. The criteria answering the question whether or how far they are, have changed since Montesquieu’s day, but any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection. The consciousness of this risk will not, I hope, deter legislators in this or any other country from using the comparative method.” in O Kahn-Freund, “On Uses and Misuses of Comparative Law” (1974) 37: 1 *MLR* 1 at 27

into the rule is itself culture-specific, it is difficult to conceive, however, how this could ever happen.⁸⁸

Legrand therefore states that legal transplants are possible but not in the “meaningful sense of the term”⁸⁹ as Watson describes it.

This study recognises both the advantages and disadvantages of legal transplantation and the difficulties involved in the implementation of foreign legal rules. Though, as explained in the introduction, it does not attempt to fully address the transferist/culturalist debate, this thesis does seek to determine whether or not the transplantation of the German civil law rules into the Anglo-Canadian common law is in fact possible in the particular context of contract modification. It is therefore highly important to consider both sides of the debate. With this debate in mind, this thesis also explores other methods which can be used to facilitate the reform of rules in one jurisdiction using the influence of rules from another.

In order to determine how the German law might be used to influence the drafting of new laws to replace the doctrine of consideration I have looked towards those techniques used by the drafters of the UNIDROIT Principles of International Commercial Contracts. The working group charged with the task of drafting the Principles used the functional comparative method in order to create a new set of principles which could be harmonized with the laws of many different jurisdictions. The Principles have been highly successful⁹⁰

⁸⁸ Pierre Legrand, “The Impossibility of ‘Legal Transplants’” (1997) 4:2 J. Eur. & Comp. L. 111 Available online at <http://www.pierre-legrand.com/transplants.pdf> (last viewed 21/11/2013) at 117

⁸⁹ Ibid

⁹⁰ Though according to Sarah Lake in her “An Empirical Study of the UNIDROIT Principles – International and British Responses”, (2011) 16:3 Unif L Rev 669 Online <http://www.unidroit.org/english/publications/review/contents/2011-3.pdf> (last viewed 21/11/13) they are not particularly popular in the United Kingdom

1.8.7 Proposals for reform

As stated earlier, the final chapter of this thesis aims to provide solutions to the problem of the doctrine of consideration in the Anglo-Canadian common law. These proposals are not meant to be proposals that could simply be implemented without further thought or development, they are suggestions aimed at providing a starting point for further discussion and a basis from which to begin the drafting of new legislation. Having said this, I have attempted to create suggestions which are more practically set-out than those previously given by other authors and I have tried to remain as close as possible to those styles most commonly presented in the papers which have been published by the law reform committees.⁹¹

⁹¹ Supra Notes 9 and 10

Chapter 2: The history of the English and German law on the enforcement of promises

2.1 General comments

In order to understand the differences between the German and Anglo-Canadian laws of the present day, it is important to examine the historical development of the contract law in each country. This chapter is not intended to act as an exhaustive account of the historical development of the doctrine of consideration and its German civil law counterparts: It is intended however, to highlight the areas of convergence and divergence in the development of the doctrine of consideration and its civil law counterparts for the purposes of establishing which developments caused the present-day Anglo-Canadian and the German law of contracts to be so different.

2.2 The history of the development of the Anglo-Canadian contract law-why does the Anglo-Canadian law require consideration in the modification of contracts?

Consideration is a product of its development. Indeed:

The test of consideration is referred to as a doctrine rather than simply a rule because of the variety of principles that courts have, over the centuries, attributed to this fundamental test for contract formation and liability.⁹²

2.2.1 Medieval law-a contractual world based on formality

Before the Middle Ages, there was little recognisable law (at least as we know it today).

Before the Norman Conquest, the law of contracts was ‘rudimentary’⁹³. Indeed, the ‘Anglo-

⁹² Supra Note 13 at 669

Saxon society barely knew what credit was, and had no occasion for much regulation of contracts⁹⁴. Unlike many other European countries, England was only part of the Roman Empire for a relatively short period of time. Because of this, the influence of Roman law was not felt as strongly in England as it was in the rest of the Roman Empire. After the Norman Conquest, England began to develop its own legal system and thus:

(It) remained beyond that influence when Roman or Civil law (from the ‘civilians’ or citizens of Rome) was rediscovered in the Middle Ages-and even in the great era of Continental law reform in the nineteenth century.⁹⁵

However, there appears to be at least some influence from the Roman law. Indeed, the idea that a bare promise should not be enforceable is in fact a civil law concept adopted from the ancient Roman law. According to Holdsworth:

This idea was adopted into the common law of the thirteenth century, and took shape in the principles that only those agreements which were actionable which could be brought within the competence of some one of the older personal actions. But as soon as the older personal actions began to be employed for the purpose of enforcing certain kinds of agreements it began to be obvious that some word or expression was needed to differentiate the agreements which could be enforced by them from the agreements which could not.⁹⁶

⁹³Supra Note 46

⁹⁴Ibid

⁹⁵ Michael H Whincup, *Contract Law and Practice: The English System with Scottish, Commonwealth and Continental Comparisons*, 5th Revised ed, (Alphen aan den Rijn: Kluwer Law International, 2006) at 1

⁹⁶ WS Holdsworth, “Modern History of the Doctrine of Consideration” (1922) 2:2 B.U. L. Rev. 87 at 88

2.2.2 The writ of debt

In Medieval England, the common law was still very much a developing legal system and, once again, no contract law as we know it today existed. The action most commonly used at the beginning of the Middle Ages as remedy for breach of contract was the writ of debt. A writ could be brought for any cause and it was a means enabling the creditor to apply to the court for an order against the debtor to pay a specific sum of money owed to them. As evidence that a debt was due, the creditor could provide witnesses to the agreement or a sealed charter⁹⁷. Therefore, unlike the action of covenant which developed later, the action of debt did not require the presentation of a written agreement made under seal otherwise known as a ‘speciality’ so long as an agreement which bound the debtor to pay a definite sum of money could be proven to have existed.⁹⁸

However, where an agreement was not supported by witnesses or documentary evidence, no claim could be brought before the King’s court, “mere breaches of the faith of the parties falling instead within the jurisdiction of the ecclesiastical courts.”⁹⁹ The claimant also had to specify a certain amount when bringing an action. That sum had to be “at least forty shillings.”¹⁰⁰

In order to get the case into the royal court it seems to have been common practice to claim precisely this sum. In his count or declaration-which corresponds to the modern statement of claim-he must show the ground for his claim, and he was allowed to

⁹⁷ Martin Hogg, *Promises and Contract Law-Comparative Perspectives*, (Cambridge: University Press Cambridge, 2011) at 120

⁹⁸ *Supra* Note 47 at 53

⁹⁹ *Supra* Note 97

¹⁰⁰ *Supra* note 47 at 61

claim in one action a total sum made up of a number of smaller sums due on different grounds.¹⁰¹

Where there was no definite sum of money owed, a writ of debt could not be used to bring an action and, where the sum claimed did not match the amount actually due, the claim would fail and the claimant would then have to make a new claim. Not only this, but there were also other constraints which applied to the action of debt, namely:

The defendant could escape liability by ‘waging his law,’ i.e. denying the debt on his oath, supported by that of eleven compurgators. If a debtor died before the debt was paid, no action lay against heirs or executors¹⁰²

Under Medieval law, the action of debt was not the result of a contract. Instead, the obligation arose from the fact that the debtor had received some form of benefit from the other party. For this reason, the concept of *quid-pro-quo* and debt are closely linked. *Quid-pro-quo* (meaning ‘something for something’) in medieval law was the notion that the defendant would only be liable where he or she had received some kind of benefit in return for the promise to pay a sum of money. The link to the bargain theory of consideration can clearly be seen here as no liability could be claimed where there was no reciprocity.

Thus, the notion of reciprocity has been present in the English common law of contract since the Middle Ages but the idea that an obligation arises from a promise is comparably more recent. Still, the action of debt did not offer a remedy for informal contracts not made in writing unless a witness to an oral agreement which had given rise to a

¹⁰¹ Ibid

¹⁰² William M McGovern, “Contract in Medieval England: The Necessity for Quid pro Quo and a Sum Certain”(1969) 13:3 Am J Legal Hist 173 at 173

debt could be provided. Thus, before the Fifteenth Century, in its early stages of development, the common law provided only limited protection for contractual agreements.

Adequate protection was only available when the contract could be proved by a written instrument. If one did not exist, or had been lost, the party injured by a breach of contract had to resort to other jurisdictions for a remedy, namely the Court of Chancery, the local courts or the ecclesiastical courts.¹⁰³

Medieval lawyers were unfamiliar with the terms consideration, offer and acceptance¹⁰⁴ and thus, though there was a law of contracts, it was highly dissimilar to the law of contracts we know in today's English law.

2.2.3 The action of covenant

Medieval lawyers were also concerned with agreements known as covenants. The action of covenant “became available *de cursu* (as a matter of course) in the thirteenth century”¹⁰⁵. The word ‘covenant’ in the context of medieval law carries, in effect, a meaning very similar to that of the word ‘contract’. A covenant was:

normally an action for unliquidated damages [and] lay to provide a remedy for the tort or wrong of breaking an agreement to do something other than to pay a debt¹⁰⁶

As late as the beginning of the 13th Century, oral agreements were regarded as actionable under the action of covenant. Indeed:

¹⁰³ Javier Martínez-Torrón, *Anglo-American Law and Canon Law: Canonical Roots of the Common Law Tradition: Comparative Studies in Continental and Anglo-American Legal History*, Vol 18, (Berlin: Duncker & Humblot 1998) at 126

¹⁰⁴ Supra Note 97 at 5

¹⁰⁵ Ibid at 9

¹⁰⁶ Ibid at 6

The courts might still have been willing to allow actions of covenant to be brought for the mis-performance of oral agreements, for causing loss by doing the job badly rather than for not doing it at all¹⁰⁷

This had changed by the 1340's however with the introduction of the requirement that any claim made must be supported by a document containing a formal agreement which had been made under seal.

According to Ibbetson, the requirement that an agreement must have been made under seal was the result of the fact that it had become common within the royal courts for claims to be based upon sealed documents. Thus it is likely that the requirement that a claim be made using a document under seal gradually became the law through the generalization of practice rather than as a result of a deliberate decision of the legislature.¹⁰⁸

The consequence of this requirement was that those agreements which were not evidenced in a document, which were also (and rather confusingly) named covenants, were rarely held to be enforceable under medieval law. Thus, where an agreement was 'informal', no remedy could be given under the action of covenant. This requirement, rather than moving the medieval contract law forward, hindered the development of what could have been a general law of contract and lead to "even greater fragmentation of the remedies available for breaches of contract".¹⁰⁹ Thus, in the earliest stages of its development the common law of contract did not have a requirement of consideration. Instead, Medieval judges looked to the presence of a sealed document as evidence that the agreement was considered to be binding.

¹⁰⁷David J Ibbetson, *A Historical Introduction to the Law of Obligations*, (New York: Oxford University Press, 2001) at 27

¹⁰⁸ Ibid at 24

¹⁰⁹ Ibid

2.2.4 The action of assumpsit and the beginning of consideration

During the Fifteenth Century, the common law began to develop to provide more protection for contracting parties. This happened through the development of assumpsit. Assumpsit was a form of action for the recovery of damages for the breach or non-performance of a contract and it is often linked to the development of consideration.

Unlike the action of covenant, an action of assumpsit could be applied to contracts which had been made orally and there was no requirement of a sealed document. The action of assumpsit also allowed for the recognition of liability where there was no debt involved¹¹⁰. For example ‘promises to marry...to build houses or to return dogs do not involve any obligation to pay a fixed sum of money¹¹¹, were enforceable under the action of assumpsit. The action of assumpsit ‘grew out of the older action of trespass on the case’¹¹² and in order to bring an action, the claimant had to ‘allege that the defendant had assumed and faithfully promised (*assumpsit et fideliter promisit*) to do something for the plaintiff, but had failed to do so’¹¹³. Thus, any claim under the action of assumpsit was based on a promise made in earnest. The promissory nature of claims made under the action of assumpsit marks a significant step towards the contract law we know today. However, at least in its early development unlike consideration, the action of assumpsit did not require the presence of any agreement on the part of the promisee and could therefore be applied to unilateral promises.

It was not until later on in the mid sixteenth century that the action of assumpsit ‘had become fairly clearly established as contractual in substance and merely promissory in

¹¹⁰ Supra Note 47 at 316

¹¹¹ Ibid

¹¹² Supra Note 97 at 124

¹¹³ Ibid

form'¹¹⁴. According to Simpson¹¹⁵, the first reported case that documents the presence of consideration in assumpsit is *Joscelin v Shelton* (1557) 3 Leon 4, Benl 57, Moo KB 51[*Joscelin v Shelton*]¹¹⁶. Consideration in the action of assumpsit was defined as the motivation behind the giving of a promise. Thus, consideration could be:

Some occurrence which was over and done with before the promise was made; this was called 'past' or 'executed' consideration, since the consideration was past or executed at the time of the promise. Alternatively a promise might be motivated by some continuous state of affairs, which had come into existence before the promise, but which still existed when the promise was made. A third alternative was that a promise might be given because of some act or occurrence which was contemporaneous with the promise; this was called present consideration. The fourth possibility was that a promise might be given in consideration of some future act or occurrence.¹¹⁷

It should be noted however, that in the case of *Hunt v Bate* (1568) 73 ER 605¹¹⁸ it was decided that past or executed consideration was insufficient motivation and therefore did not give rise to an action of assumpsit.

Consideration was required for each and every action of assumpsit. The decision in Pinnel's case [1602] 5 Co. Rep. 117a [*Pinnel's case*]¹¹⁹ is key to the development of the law in this area. In this case, it was decided that the doctrine of consideration was to be the test,

¹¹⁴ Ibid

¹¹⁵ AWB Simpson, "The Equitable Doctrine of Consideration and the Law of Uses" (1965), 16:1 UTJL 1 at 1

¹¹⁶ *Joscelin v Shelton* (1557) 3 Leon 4, Benl 57, Moo KB 51

¹¹⁷ Supra Note 47 at 452

¹¹⁸ *Hunt v Bate* (1568) 73 ER 605

¹¹⁹ *Pinnel's Case* [1602] 5 Co. Rep. 117a

not only for the valid formation of a contract, but also for deciding whether or not a modification to a pre-existing agreement was legally binding. Therefore, consideration was required for both actions for the enforcement of obligations which arose from the formation of a contract, but also, from the obligations which arose from the modification of a pre-existing agreement. This requirement, though much contested,¹²⁰ is still a part of the modification of contracts today.

2.2.5 The origins of consideration in assumpsit

One problem that has long puzzled legal historians however is how the consideration became a part of assumpsit. Still, what is evident is that the doctrine of consideration was a mechanism used to widen the scope of promissory liability. There are several theories as to why the doctrine of consideration developed in the common law. The first of these theories is the idea that consideration is the result of the modification of the common law concept of *quid-pro-quo*. As previously stated, the concept of *quid-pro-quo* led to the idea that a defendant to a claim could be held liable where he or she had received some form of benefit in return for the promise to pay a certain amount of money. Holmes argues that “consideration in all parol contracts is simply a modified generalization of the requirement of *quid pro quo* to raise debt by parol”¹²¹. He also argued that this *quid-pro-quo* requirement acted as evidence that an agreement had been made “since witnesses could testify only to the facts within their personal knowledge, they could testify that the performance on one side was in exchange for performance on the other in action for debt”¹²²

¹²⁰ For further information on the controversy surrounding the requirement of consideration in the modification of contracts see the third chapter of this study.

¹²¹ Supra Note 51 at 18

¹²² John Edward Murray Jr., *Murray on Contracts*, 5th ed, (New Providence: LexisNexis, 2011) at §§55

Though the reciprocal aspect of the doctrine of consideration does appear to share some similarities with the requirement of *quid pro quo*, there are also some differences which indicate that other influences may have been at play. According to Hogg:

The doctrine of consideration was subtly different to the older common law idea of *quid pro quo*. Consideration was conceived of as the thing which motivated the giving of a promise, whereas such motivational criterion was not present in the idea of *quid pro quo*. Consideration moreover, might be constituted not merely by a benefit to the other party, or the incurrence could include a benefit conferred upon a third party, or the incurrence by the other party of a detriment.¹²³

2.2.5.1 A modification of the Roman concept of *causa*?

One argument is that the ‘canonist theory of ‘*causa*’ was adopted into the English law:

The civil law influence on the common law doctrine of consideration can clearly be seen in the sixteenth century contract law of England. Indeed in some of the case law of the sixteenth-century English courts shows the use of the terms ‘*causa*’ and ‘consideration’ being used to mean the same thing.¹²⁴

Under the influence of the canonist ‘*causa*’, the doctrine of consideration was developed as a method of ensuring that ‘the expansion of the law of contract remained under control.’¹²⁵

According to Holdsworth:

Possibly it might have acquired the same technical meaning as the canonists had given the word ‘*causa*’ if the Court of Chancery had been able to gain control over the

¹²³ Supra Note 97 at 127

¹²⁴ Supra Note 53 at 33

¹²⁵ Supra Note 50 at 554

development of the law of contract. But the common law rejected so a wide test of the enforceability of contracts; and the theory of contract evolved in the sphere of common law jurisdiction became the theory of English law.¹²⁶

Thus, despite the fact that it was highly influential in the development of the doctrine of consideration, *causa* was never adopted by the common law.

Simpson on the other hand argues that the doctrine of consideration in assumpsit was the result of influences from equity:

The equitable doctrine of consideration must surely have a strong claim upon the attention of anyone who sets out to investigate the history of the contractual doctrine for it was fully and elaborately developed before there was any doctrine of consideration in assumpsit.¹²⁷

Thus, the equitable doctrine of consideration was the source of the doctrine of consideration in assumpsit. Indeed:

The close connection between the doctrine of consideration in assumpsit and the doctrine of consideration as applied to law of uses is clear enough, and the relative chronology of the two doctrines, or the two aspects of the same doctrine, justifies the conclusion that the equitable doctrine was in a sense the direct source of the contractual doctrine.¹²⁸

¹²⁶ Supra Note 96

¹²⁷ Supra Note 47 at 327

¹²⁸ Supra Note 47 at 375

Whichever theory is deemed to be correct, it is apparent that, from the very beginning of its life, the doctrine of consideration was ‘the practical answer to an urgent problem’¹²⁹. It was:

Designed to delimit the actionability of informal promises by reference to the circumstances in which the promise in question was made. The consideration for a promise originally meant the factors which the promisor considered when he promised, the circumstances which motivated his promising.¹³⁰

2.2.6 The development of the doctrine of consideration as we know it today

By the Eighteenth century, the doctrine of consideration was more firmly established within the common law and “the structure of informal contract law established in the Elizabethan period was essentially simple; as it was said in *Golding’s case* (1586): in every action upon the case upon a promise there are three things considerable, consideration, promise and breach of promise”¹³¹. Indeed, it was not until the Nineteenth century that the doctrine of consideration was significantly altered.

The Nineteenth century is commonly labeled as the “classical age of English contract law.”¹³² It was during this time that the notion of contract as a separate concept rather than a part of the various actions available under the law was also recognised and the “unilateral concept of an actionable promise [found in *assumpsit*] was supplanted by the more complex concept of an actionable contract, a bilateral transaction.”¹³³.

¹²⁹ *Supra* Note 50 at 554

¹³⁰ *Ibid*

¹³¹ MP Furmston, Geoffrey Chevalier Cheshire & Cecil Herbert Stuart Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (New York: Oxford University Press, 2007) at 10

¹³² *Ibid* at 13

¹³³ *Ibid*

As a result of this theoretical shift, the doctrine of consideration, rather than being an indication of motive as it was in connection with the action of assumpsit, became an indication that the promise had been bargained for. As a result, the modern definition of consideration was born and, as previously stated, in the case of *Currie v Misa*¹³⁴ the court said that:

A valuable consideration, in 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.¹³⁵

The doctrines of offer, acceptance and intention to create legal relations became a part of the English law of contracts in the Nineteenth century and, rather than acting as replacements for the doctrine of consideration, they were:

Superimposed on the 16th Century requirement of consideration and made to perform some of the same functions, consideration lost this primacy and should have been pruned when the new doctrines were imported. English law did not throw out the requirement of consideration.¹³⁶

The doctrine of consideration was and is therefore an essential part of the modern contract law, despite the fact that other doctrines were ‘imported’ to perform similar functions.

Unfortunately, this is not the end of the story of the development of the doctrine of consideration in the Anglo-Canadian common law. Indeed, even at the height of its development, the doctrine was contested by many judges and scholars. Perhaps the most

¹³⁴ Supra Note 1

¹³⁵ Ibid

¹³⁶ Mindy Chen-Wishart, *Contract Law*, 2nd ed, (Oxford: Oxford University Press, 2007) at 161

famous objection to the doctrine of consideration was that put forward by Lord Mansfield in the case of *Pillans & Rose v Van Mierop & Hopkins*¹³⁷ in 1765. Mansfield argued that the doctrine of consideration was unnecessary in mercantile transactions and described it as an obstacle to trading. The doctrine of consideration has since come under frequent attack and, as we shall see from the next chapter of this study, it seems that the use of the doctrine may be coming to a gradual end. Still, these early criticisms at the height of the development of the doctrine of consideration did not stop its presence from becoming a key part of not only into the English law of time but also the law of those countries within the British Empire, including Canada.

2.3 The adoption of the English law of contracts in Canada

The doctrine of consideration is also present in the Canadian law because it was adopted from the English law of contracts during the time in which Canada was colonised by the British. Rather than adopting the English law of contracts, Canada inherited it as its main source of contract law.

Indeed, even after the English legislature ceased to be the source of private law legislation and the provincial colonial legislatures took over, appeals to the Privy Council meant that Canadian case law rarely strayed from the English contract law and the contract law of the Canadian provinces remained close to that of England. However, appeals to the Privy Council came to an end in 1948 and since then there has been some divergence between the English and Canadian law. As previously mentioned, some statutory modifications have been made to the rules surrounding the doctrine of consideration in

¹³⁷ Supra Note 54

British Columbia. For example Section 44 of the British Columbia Law and Equity Act¹³⁸ abolishes the pre-existing duty rule established in *Cumber v Wane*¹³⁹ which had previously been decided with the English case of *Foakes v Beer*¹⁴⁰. The requirement of consideration in the modification of contracts does however remain largely similar to the requirement of consideration in the English law of contracts.

It is hardly surprising, considering Canada's legal past, that influences from English law still play a significant part in many of the developments within the Canadian legal system. Nor is it surprising that developments within the Canadian law have the power to influence the decision of the English courts.

It is also important to note that Quebec is a civil law jurisdiction making Canada a country with dual legal systems. Unlike the other provinces, Quebec does not have a common law of contract but a law of obligations which can be found in the Quebec Civil Code. Thus, as explained above, when I refer to the 'Anglo-Canadian' contract law, I am referring not to the civil law of Quebec but to the common law of the other Canadian jurisdictions which has its roots in the English common law. This is not to say however, that I do not take into account the possible influence that the civil law of Quebec might have upon the judgements of the courts in the remaining common law provinces. After all, given the fact that the influence of civil law is already present in Canada, it may be easier to convince such an audience that the common law could benefit from looking towards the German civil law.

¹³⁸ Supra Note 37

¹³⁹ Supra Note 39

¹⁴⁰ Supra Note 40

2.4 The Roman law origins of the German civil law of contracts

The Roman legal system and the laws of ancient Rome were significantly well-developed for their time. Many of the principles as documented by jurists such as Ulpian and Justinian in his famous digests¹⁴¹ have been highly influential in the creation and development of the German civil law.

In classical ancient Rome no general law of contract existed and there was ‘precious little contract theory’¹⁴². The Romans did however distinguish between certain types of claims. The claims included actions arising ‘*ex contractu* (from a contract), *ex delicto* (from a delict), *quasi ex contractu* (as if from a contract) or *quasi ex delicto* (as if from a delict)’¹⁴³.

Though there does not appear to be any single definition of contract in the Roman legal texts, these texts do contain descriptions of the ways in which contractual obligations could be created.

It appears that when the Romans spoke of obligations arising from contract, they meant obligations arising from agreement (consensus). However, the principle that any agreement is legally binding which satisfies certain requirements was the outcome of a long process of legal development. In fact, at the beginning of this process agreement as such was not considered to be a cause of action.¹⁴⁴

Indeed, in the early Roman law, an agreement was not considered to be the source of any action.

¹⁴¹ For more information on Justinian’s Digests please see: Alan Watson, *The Digest of Justinian*, Vol 4 (Philadelphia: University of Pennsylvania Press, 2011)

¹⁴² Supra Note 97 at 110

¹⁴³ Ibid

¹⁴⁴ Supra Note 48 at 187

2.4.1 *Causa* in Roman law-the reason for enforcement

The legal phrase “*Ex nudo pacto non oritur actio*” or “no action arises from a naked agreement” was of great importance in the ancient Roman contract law. This rule meant that the mere agreement of the parties was not enough to create a legally binding contract. Instead a contract became legally binding only when it was supported by *causa*. *Causa* acted as a reason for the enforcement of a promise and could usually be found as the “underlying purpose of the promise which could, but did not have to be, mentioned in the stipulation.”¹⁴⁵ According to Zimmermann, *Causa* usually appears in connection with formal contracts such as *Stipulatio*. Thus, the ancient Roman law required that, in order for an agreement to become legally binding, it had to be classified under one of the types or ‘categories’ of contracts deemed to give rise to an action.

There were two types of contract which were considered to be formal agreements. These agreements included oral agreements which were the result of the use of specific words in order to create a legally binding contract, the *Stipulatio*; and *contractus litteris* or literal contracts which were contracts ‘constituted by agreement and a certain form of writing’¹⁴⁶.

2.4.2 The formal contract: *stipulatio*

As previously stated, formal contracts were those contracts which were required to be created in accordance with a specific set of formalities. These formalities involved the use of specific words either in writing or in a verbal agreement. It is not difficult for a modern lawyer to comprehend the idea that a formal contract in writing was considered to be legally binding.

¹⁴⁵ Supra Note 50 at 91

¹⁴⁶ Supra Note 48 at 218

Indeed, this is something familiar to anyone who has sold their house or been employed. The *Stipulatio* on the other hand, is highly unique to the ancient Roman law.

Unlike many of the other types of contract, *stipulatio* was not restricted to a particular type of transaction and could be used to make all kinds of agreements legally binding. It was a unilateral contract which, in order to be considered valid, was required to include a formal question and an equally formal answer. According to Mousourakis:

The contract required a brief and simple ceremony: a question by the creditor/promisee (*stipulator*) containing the terms of the proposed promise and a positive reply by the debtor/promisor (*promissor*) accepting them. The same verb had to be used in both the question and the answer, such as “*spondesne centum dare?*” (“do you solemnly promise to pay one hundred?”)—“*spondeo*” (“I promise”)¹⁴⁷

So long as the promise had been made in the correct fashion and according to the formal requirements of the *stipulatio* any duty could be made enforceable. Unlike many of the early contract agreements in the common law, no witnesses or documentary evidence was needed.

A *stipulatio* could be formulated in a causal or abstract manner and where no *causa* was present, it could be “taken into consideration automatically or only if the promisee raised an *exceptio (doli)*.”¹⁴⁸ According to Zimmermann:

The latter was the case in Ulp. D. 44, 4, 2, 3 (“*si quis sine causa ab aliquo fuerit stipulatus, deinde ex ea stipulatione experiatur, exceptio utique doli mali ei nocebit*”): the parties had entered into a stipulation, but there had probably been a

¹⁴⁷ Ibid at 214

¹⁴⁸ Supra Note 50 at 550

misunderstanding as to what the promise was all about; and since the stipulation had been abstractly drafted, this lack of *causa* could be raised only on the basis of an *exceptio doli*.¹⁴⁹

However, this did not mean that the *causa* had to be expressly stated in order for the *stipulatio* to be considered legally binding. In other words, the reason for enforcement had to exist but need not be pointed out.

2.4.3 Informal contracts

In addition to the formal *stipulatio* and *contractus litteris*, informal contracts could also give rise to obligations under the ancient Roman contract law. Unlike the formal contracts, informal contracts did not require a specific form in order to be enforceable.

Informal contracts included two categories. The first of these two categories was ‘consensual contracts’ which were the result of a simple agreement between the parties of the contract. As previously stated, there were several different types of consensual contracts including: *Emptio Venditio*, *Locatio Conductio*, *Societas*, and *Mandatum*¹⁵⁰. In the second of these two categories were ‘real contracts’ known as *Pignus*, *Depositum*, *Commodatum* and *Mutuum* which became effective when an object was transferred from one party to the other¹⁵¹. These contracts required no particular form but were unenforceable if they did not meet “the precise legal definition for that particular contract”¹⁵².

¹⁴⁹ Ibid

¹⁵⁰ Supra Note 48 at 220

¹⁵¹ Ibid at 207

¹⁵² David Johnston, *Roman Law in Context*, (New York: Cambridge University Press, 1999) at 78

2.4.4 Consensual contracts

The category of consensual contracts is the most important for the purposes of the study of the development of the Ancient Roman contract law. The reason for this is that the consensual contracts were the contracts most similar to those which are now seen in the modern German law and they are the basis of many of the contracts used today.

Consensual contracts were considered to be binding as soon as the agreement was made as long as the essential components of the contract were present. The essential components of the contract were details such as the action to be performed or the object to be transferred and the price to be paid. The essential components or ‘*essentialia negotii*’ are an element of the Roman contract law which has been passed on to the modern German law and they are still a requirement for the creation of a valid contract. The four types of consensual contracts were contracts for sale or *emptio venditio*, contracts for leases and the hiring of workers or *locatio conductio*, contracts for partnerships or *societas* and finally mandate or *mandatum*.¹⁵³ Each of these types of contracts had its own *essentialia negotii* and without these essential components, a contract did not exist.

Unlike the stipulatio, consensual contracts were not required to have any particular form. This poses the question ‘if no specific form was required, what was the *causa* for consensual contracts?’ The answer to this seems somewhat unclear. The most convincing of these theories is the notion that the *causa* lay “not in the individual transaction, but in the importance of such transactions as a class”¹⁵⁴. Thus, because these particular transactions

¹⁵³ Supra Note 48 at 220

¹⁵⁴ Supra Note 49 at 429

were deemed essential to the smooth running of everyday transactions, no *causa* in the stricter sense of the word was required.

Therefore, the Roman contract law differentiated between legally enforceable promises and gratuitous promises by looking either to the form in which they were made or the importance of the transaction itself.

2.4.5 The modification of contracts under the Roman law

There were several methods which could be used to modify a contract under the Ancient Roman law, at least in the later stages of its development. One such method was in fact the use of a *Stipulatio*. A *Stipulatio* could be used to modify an already existing informal agreement which was particularly useful for adding terms specific to the needs of the parties.

Though less reliable, another method of modifying a contract was the *Pactum Adiectum*. *Pacta Adiecta* were bare agreements linked to the original agreement which belonged to one of the categories of enforceable contracts. It could be used to modify the obligations arising from the original contract and it could be made “at the time of the principal contract (*pacta in continenti*) or subsequent to it (*pacta ex intervallo*)”¹⁵⁵. In the earlier stages of the development of the Roman law of contracts, the *Pactum Adiectum* was not recognised as being legally enforceable because it was a bare pact and therefore unsupported by *causa*. Instead of being a cause of action, a *Pactum Adiectum* could be “raised as a defence against the creditor’s action”¹⁵⁶. However, in the later stages of the development of the Roman law, the *Pactum Adiectum* did become actionable and could therefore be used as a cause of action in their own right.

¹⁵⁵ Supra Note 48 at 245

¹⁵⁶ Ibid at 246

Contracts could therefore be modified relatively easily under the Ancient Roman law of contracts. As the law developed, it became easier to change the terms of a contract and fewer conditions were required to make an agreement to modify legally actionable. It seems that the Roman jurists realized that the easier it was to form legally binding agreements, the easier it was to maintain efficient business practices and therefore a developing economy. However, despite its highly developed nature, the rule of Ancient Roman law did not last and, after the collapse of the Roman Empire, the Roman law was abandoned and all but forgotten across Europe until many centuries later.

2.5 Contract law in Medieval Germany

Over 600 years after Roman Empire fell, the laws of ancient Rome were rediscovered by the jurists of the Middle Ages. The reception of the Roman law began in the universities.

According to Lobinger:

At first, the emphasis was placed on Canon law, but chairs of Roman law were established at Heidelberg in 1387, at Basel in 1460, at Ingolstadt in 1472 at Tübingen in 1477, at Freiburg in 1479, at Vienna in 1493 and at Griefswald in 1498, and were filled by Italian, French and Spanish doctors¹⁵⁷

These chairs created ‘a strong connection’¹⁵⁸ between the Ancient Roman law and the most influential legal minds of the time. After some time, this connection could also be seen among those in the legal professions themselves.

¹⁵⁷ Charles Sumner Lobingier, “Reception of the Roman Law in Germany” (1916) 14: 7 Mich. L. Rev. 562 at 562

¹⁵⁸ Ibid

The Medieval teachers of the Roman law did not simply apply it as it stood. Instead, they added their own interpretations and thoughts to the original texts. This was a process known as ‘glossing’ and those who carried out this practice became known as the ‘Glossators’. One of the key developments, for which the Glossators are commonly held responsible, was the expansion of the more general principles found in the various ancient texts. The Glossators also interpreted *causa* differently. According to the interpretations of the Glossators a *Stipulatio* without *causa* meant:

An instrument which testified to the conclusion of a stipulation without, however, mentioning the cause. If, according to D. 44, 4, 2, 3, the exceptio doli was available in such a case, this meant that the document (and with it: the stipulation) was rendered invalid. Or, to put the same idea positively: there had to be a *causa* for a valid stipulation, and this *causa* had to be expressly stated in the written document.¹⁵⁹

Thus, the Glossators determined that, rather than giving rise to the possibility of a defence against a claim by the promisor, a lack of *causa* meant that no contract existed at all¹⁶⁰.

Therefore, *causa* became an essential part of the formation of contracts.

The Glossators were followed by the Post-Glossators. The Post-Glossators took a different approach to the study of the Ancient Roman laws. Instead of examining each text as an individual document, they studied the texts in the context of one-another. By doing this, they were able to gain insights into the rationales behind many of the principles contained in the documents which then facilitated the further development of a more sophisticated system of contract law.

¹⁵⁹ Supra Note 50 at 551

¹⁶⁰ Supra Note 97 at 117

The reading of the Ancient Roman texts in context meant that new insights could also be made with regards to the requirement of *causa*. Bartolus, one of the most famous of the Post-Glossators, studied many of the works written by Aristotle and was able to use what he learned from them to establish the idea that:

Under the Roman law, a *Stipulatio* might be binding even if made gratuitously, but also that it required a *causa*. Bartolus therefore, applying an Aristotelian approach to the idea of *causa*, explained that *causa* must mean either the receipt of something in return for what was promised or the undertaking of the promise out of liberality.¹⁶¹

Thus, Bartolus took the notion of *causa* and moved it one step further to towards the modern concept of *cause*. Unlike the Roman concept of *causa* which, as previously mentioned, defined it as a reason deemed sufficient by law for the enforcement of a promise, the modern concept “is really a psychologic [Sic] enquiry into the motif of the obligor, an effort to determine why he entered into the obligation.”¹⁶² It is this modern definition which continues to be present in many of today’s continental legal systems. The German law however, is not one of these legal systems.

2.6 The fall of causa in the German law

Despite its origins in the laws of ancient Rome, the German law of contracts abandoned *causa*. It was decided during the 17th and 18th centuries, in the time of the drafting of the first civil codes, that *causa* was no longer needed as a means of determining which agreements were enforceable and which were bare promises which should not be enforced under the law.

¹⁶¹ Ibid

¹⁶² William Livesey Burdick, *The Principles of Roman Law: And Their Relation to Modern Law*, (Clark: The Lawbook Exchange Ltd., 2004) at 412

Instead, the drafters of the Bürgerliches Gesetzbuch assigned other mechanisms to the duty of ensuring that promises which were seriously intended to result in enforceable agreements were enforced and those which were not were considered to be gratuitous. The reasoning behind the abandonment of the doctrine of *causa* was the idea that the same goals could be performed just as easily using other mechanisms which were less abstract and complicated than the Roman *causa*.

According to Zimmermann:

That a contract, in order to be valid, must have been seriously intended by the parties is a matter of course. One does not really need *causa* as an independent requirement to call attention to this trivial point. Thus, amongst the German authors of the 17th and 18th centuries, both the term and the idea of a *causa* disappeared from the definition of contract, and the problem of whether the parties had indeed seriously and deliberately entered legal relations was shifted into the field of procedure and evidence¹⁶³

This move away from the doctrine of *causa* resulted in the idea that a contract was a “declaration of the will of the parties to the contract and as a type of juristic act”¹⁶⁴. This notion has since prevailed and is now the basis for the modern law of contracts found in the Bürgerliches Gesetzbuch. Thus, though the German law once required *causa* for the enforcement of a contractual obligation, it now relies upon “procedure and evidence”¹⁶⁵ to identify those promises which are enforceable and those which are not.

¹⁶³Supra Note 50 at 553

¹⁶⁴ Supra Note 97 at 152

¹⁶⁵ Supra Note 50 at 553

2.7 How the old laws have shaped the new

From this brief analysis of the development of the Anglo-Canadian common law and the German civil law, it is possible to see that both systems, had the circumstances been right, could have ended up with the requirement of *causa* as an essential part of an enforceable agreement. However, the German realization that the functions performed by the doctrine of *causa* could be performed equally, if not more, efficiently by other mechanisms, resulted in the abandonment of the requirement and the formation of procedural and evidential requirements in its place. This method of distinguishing between enforceable and non-enforceable promises has now been used for over one-hundred years and it is commonly regarded as highly efficient. In contrast, the English doctrine of consideration, though arguably a modified version of the doctrine of *causa*, has a long and complicated history. The many decisions made by various judges during the development of the doctrine have resulted in a complicated mass of rules which are now proving to be a serious problem for a variety of reasons.

Chapter 3: The present state of the law

3.1 General comments

Having analyzed the development of the common law doctrine of consideration and the German rules which govern the same area, it is apparent that, though the two legal systems share some similar influences from the Ancient Roman law of contracts they have since developed very differently. As will be seen in the fourth chapter of this thesis, the German law with its focus on the intention of the parties to be bound has developed a highly procedural approach to the formation of contracts and is widely regarded as unproblematic.

The English and Canadian legal systems with their focus on the presence of a bargain on the other hand, continue to use the doctrine of consideration as a means of distinguishing those promises which are enforceable by law and those which are considered to be gratuitous. Though the doctrine of consideration has long been established within the common law, it is widely considered to be problematic and it is now seen as an obstacle to the formation of what would otherwise be valid agreements.

As mentioned in the introduction to this thesis, consideration poses a particular problem in the context of the modification of pre-existing contracts because it is often in this situation that the parties seek to alter the obligations of just one of the parties. The Anglo-Canadian common law has developed in such a way that the requirement of consideration extends not only to the formation of the original contract but also to any subsequent modifications and it is therefore essential that consideration is provided by both parties even though only the obligations of one of the parties have been altered. It is this unfortunate situation that will be discussed in the following pages.

3.2 The modification of contracts in the Anglo-Canadian common law and the problems caused by the requirement of consideration

As the law stands today, contracts can be relatively easily modified under English and Canadian law. The case of *Fenner v Blake* [1900] 1 Q. B. 426¹⁶⁶ demonstrates the court's realisation that there is often a need for contracts to be modified, especially where the circumstances surrounding an agreement are susceptible to change. It is therefore in the interest of the law to provide a straightforward process for the modification of contracts. This is usually the case, and relatively few problems with contract modifications, in comparison with other matters of the law, are brought before the court. However, there is also a need to distinguish those promises which are made gratuitously and those which are intended to be bound

As stated above, the Anglo-Canadian common law differentiates between promises which are enforceable under the law and gratuitous promises using the requirement of consideration. Thus any promise made in order to modify the terms of a contract under English and Canadian Law, like the original promises made when the contract was created, must be supported by consideration. It is this requirement which causes many of the problems faced by those seeking to modify their original agreements. The requirement that an agreement to modify a contract must be supported by consideration means that where there is no "right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other"¹⁶⁷ any agreement will be held invalid and the modification will have no effect. This is especially

¹⁶⁶ *Fenner v. Blake* [1900] 1 Q. B. 426

¹⁶⁷ Supra Note 1

problematic in cases where one party seeks to modify his or her obligation but the other party seeks to have his or her obligations remain the same.¹⁶⁸

The example most commonly referred to when discussing problems caused by the doctrine of consideration in the modification of a pre-existing agreement is the case of *Stilk v Myrick* [1809] EWHC KB J58 [*Stilk v Myrick*]¹⁶⁹. In this case, Stilk was contracted to work for Myrick on a ship which he owned for £5 per month. In return for his wages Stilk agreed to perform any task aboard the ship, including duties which were the result of an emergency situation. Shortly after Stilk began his employment, two of the men aboard the ship deserted and the captain was unable to find replacement crew members. As a solution to this problem, he offered the remaining crew members the wages he would have paid to the two who deserted (divided between them) as well as the wages already promised if they agreed and performed the duties which would have been performed by them as well as their own. The remaining crew members naturally agreed to this and performed the additional duties but, when they returned home, the captain refused to pay them the additional wages. The court held that the modification of the original agreement was invalid because no fresh consideration had been given in return for the promise of the additional wages. In other words, the promise pledged more for the same. As a result of this, the original agreement still stood and Myrick was only required to pay the wages originally agreed upon to the sailors. Though this case would likely be decided differently under today's contract law because of

¹⁶⁸ As demonstrated by the cases of *Stilk v Myrick* [1809] EWHC KB J58 and *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1

¹⁶⁹ *Stilk v Myrick* [1809] EWHC KB J58

the doctrine of economic duress and the practical benefit rule¹⁷⁰, it is an excellent example of the problems that can be caused by the doctrine of consideration.

In order to fully understand the implications that the doctrine of consideration may have in the modification of contracts, it is important to examine the doctrine more closely. In the following pages I therefore examine the elements of good consideration (though somewhat briefly) and the basis of the doctrine of consideration (including its function within the common law), the theory behind the doctrine and its problematic aspects.

3.3 Good consideration

3.3.1 The basic requirement of good consideration in English and Canadian law

As previously stated, in order for an agreement to modify a pre-existing contract to be considered valid under the Anglo-Canadian common law, the presence of good consideration is required.

3.3.1.1 Consideration must be executory or executed and not past

Consideration must either be a promise to carry out an action in the future, or it must be actually done in exchange for another's promise. Under English and Canadian law past consideration is no consideration¹⁷¹. Therefore, any action which has already been taken cannot be valid consideration. For example, if A rescues B from a burning building and B then promises a reward but does not pay, A cannot sue B for the reward money because the

¹⁷⁰ Supra Note 22

¹⁷¹ See *Roscorla v Thomas* (1842) 3 QB 234

act of rescue is past consideration and thus, no consideration has been given in return for the promise of the reward.¹⁷²

3.3.1.2 Consideration must move from the promisee

In order to enforce a promise, the promisee must promise to do or give something of value to the promisor in return for that promise. For example, if A promises to mow B's lawn and B promises to pay him \$20 to do so, valid consideration has been given because B's promise to pay \$20 is a promise to give something valuable in return for A's promise to do something valuable. If consideration is given by someone other than the promisee, the promisee is unable to enforce the agreement because the consideration has not moved from them. This is evidenced in the case of *Tweddle v Atkinson* [1861] EWHC QB J57¹⁷³. This case concerned a married couple. The father of the bride and the father of the groom made an agreement between themselves to pay the couple a certain amount of money. Unfortunately, father of the bride passed away and so the groom made a claim against his estate. It was held that the agreement could not be enforced by the groom because no consideration was given by him.

3.3.1.3 Consideration must be sufficient but need not be adequate

Consideration must be of some value but it need not be of the same market value as the promise for which it is given in exchange. Thus the consideration given in exchange can be a simple token (providing of course that the promisor agrees) such as a peppercorn¹⁷⁴ or a small amount of money. For example, if A agrees to sell his house to B for a mere \$10, this would be considered a bad bargain as the market value of a house would be significantly

¹⁷² Supra Note 95 at 74

¹⁷³ *Tweddle v Atkinson* [1861] EWHC QB J57

¹⁷⁴ See *Chappell & Co Ltd v. Nestle Co Ltd* [1960] AC 87 in which it was held that the wrappers from chocolate bars were good consideration in light of the fact that they had been given value because they were part of a sales promotion.

higher, but , for the purpose of providing consideration, this amount is adequate and the agreement would be enforceable. The ‘peppercorn’ rule which was developed by Lord Somervell in the case of *Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87 [*Chappell v Nestlé*]¹⁷⁵. This rule states that “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 pepper and will throw away the corn”¹⁷⁶.

The Canadian law of contracts follows this decision as demonstrated by the case of *Hubbs v Black* (1918), 44 O.L.R. 545 (Ont. C.A.)¹⁷⁷ in which it was held that the act of not buying a burial plot could amount to good consideration, and in the case of *Bank of Nova Scotia v MacLellan* (1980) 70 APR 596 (N.B.C.A.)¹⁷⁸ in which it was held that a woman`s promise to help locate her husband with whom she jointly owed a debt to the bank could be counted as good consideration for the promise to release her from that debt.

3.3.1.4 A promise to perform a pre-existing duty is not good consideration

As a general rule, where the party already has a public or contractual duty to act, a promise to perform that duty cannot be considered good consideration for a new promise. This is demonstrated in the case of *Collins v Godefroy* [1831] EWHC 02 (KB) [*Collins v Godefroy*]¹⁷⁹ in which it was held that an attorney could not use his attendance in court as consideration for a promise of payment made by one of his clients because he already had a public duty to attend court. There are however some exceptions to this rule which will be discussed later in this chapter.

¹⁷⁵ Supra Note 174

¹⁷⁶ Ibid

¹⁷⁷ *Hubbs v Black* (1918), 44 O.L.R. 545 (Ont. C.A.)

¹⁷⁸ *Bank of Nova Scotia v MacLellan* (1980) 70 APR 596 (N.B.C.A.)

¹⁷⁹ *Collins v Godefroy* [1831] EWHC 02 (KB)

3.3.1.5 Part payment of debt is not good consideration for a promise to waive the remaining sum owed

The rule that part payment of debt cannot be good consideration for a promise to forgive the remaining amount owed was established in *Pinnel's case*.¹⁸⁰ In this case, it was held that part payment of a debt could not be good consideration except where the promisor requests it and where it is made before the date on which the payment of the original sum is due, where payment is made with a chattel, or where the payment is made to someone or somewhere other than originally specified.

3.4 The purpose of consideration

3.4.1 Why distinguish between legally binding and non-legally binding promises?

As we have seen from the previous chapter, the doctrine of consideration within the modification of contracts, as it was first recognised in 1875, has long been a part of the English legal system and a key element of the formation of contracts within many of the Common Law jurisdictions including Canada. We have also seen that, for many years, the doctrine acted as a 'gatekeeper' in the enforcement of promises and it has provided a means through which judges are able to identify those promises which are to be considered gratuitous and those which are enforceable. According to Posner:

Now courts might resist enforcing such promises because of the difficulty of proving them. Probably they resisted enforcement in the past because they feared that if they did enforce such promises, it would be too easy for people to make a fraudulent claim in front of the court that someone had made a promise that never in fact

¹⁸⁰ Supra Note 119

occurred...But it is also possible that the courts understood that for complex and indefinite contracts, parties could deter opportunism through non-logical mechanisms more effectively than the courts could through legal mechanisms. Doctrines that prevent judicial enforcement are justified on the grounds that judicial enforcement would interfere with trust relationships.¹⁸¹

In its original form, the doctrine of consideration was founded upon the principle of reciprocity and the idea that a promise should not be enforceable if nothing has been given in return¹⁸².

Over the course of the last one hundred and forty years however, the world has changed considerably, and with it, the doctrine of consideration has developed, evolved and eroded. In more recent years, there has been much discussion about the theories of the doctrine of consideration. The case law appears to reflect a shift away from the reciprocal ‘benefit/detriment theory’ of consideration towards other, more modern theories. Though the focus of this paper is not the in-depth discussion of these theories, in order to ascertain the function of the doctrine of consideration as a means of enabling a comparison between the German and Anglo-Canadian laws on the modification of contracts, it is necessary to examine in some detail the theories of consideration.

According to most legal textbooks, the main function of the doctrine of consideration is to ‘play the principal role in selecting those agreements to be given the badge of enforceability’¹⁸³. The doctrine of consideration acts as a gatekeeper which stands in the way of the enforcement of promises which are not intended to have legal consequences. Defining

¹⁸¹ Eric A. Posner, *Law and Social Norms*, (Cambridge, Mass: Harvard University Press, 2002) at 64

¹⁸² Ewan McKendrick, *Contract Law*, 8th ed, (London: Palgrave Macmillan, 2009) at 67

¹⁸³ Ibid

the doctrine more specifically however, has proven extremely difficult. There are many different theories surrounding the doctrine of consideration and it is important to recognise that there is no universally accepted definition. Here I attempt to discuss the major theories as presented by some of the leading contract law scholars.

3.4.2 The fall of the classical benefit/detriment theory of consideration and the rise of the more modern bargain theory

The previous chapter on the history of the doctrine of consideration in the modification of contracts identified the benefit/detriment theory of consideration as the most popular theory of consideration before the late nineteenth century. This theory has now largely been replaced by the bargain theory of consideration. The more modern bargain theory of consideration takes the view a valid contract is the result of an exchange between the contracting parties. The doctrine of consideration therefore ‘identifies as enforceable those promises which have been given or made as part of a bargain or exchange’¹⁸⁴. This concept is derived from the idea that consideration is the price for which a promise is bought and thus it can be defined as “the act or forbearance or promise thereof given in return for the promise that one wishes to enforce. A promise for which no consideration is given in return may be said to be gratuitous. Such promises are often referred to as “bare” or “naked””.¹⁸⁵ Without consideration, an agreement is considered to be lacking in mutuality and is thus judged to be invalid. The bargain theory has largely been accepted in most common law jurisdictions, including England and Canada, but there are some scholars who have developed other yet more progressive theories. From the arguments and definitions below, it is evident that there are a great deal of conflicting theories as to the purpose of the doctrine of consideration.

¹⁸⁴ John McCamus, *The Law of Contracts*, (Toronto: Irwin Law, 2005) at 218

¹⁸⁵ Ibid

Many of these theories are controversial and the examples I have given are by no means exhaustive.

3.4.3 Fuller and the formal approach to consideration

Fuller identifies both formal and substantive aspects of the doctrine of consideration. He argues that we do not enforce promises lacking consideration because of their informal nature. In other words, promises without consideration are not legal contracts but social ones.

His analysis of the substantive aspects of the doctrine of consideration shows that the doctrine can be used to promote reasonable reliance on promises, protect private autonomy and prevent unjust enrichment¹⁸⁶

Fuller identifies three purposes of formalities within the common law¹⁸⁷; these functions can also be applied to the doctrine of consideration. The first of these functions is the evidentiary function which states that formalities act as evidence that a contract has in fact been formed. The presence of consideration acts as evidence that the parties intended their agreement to be a legally binding contract and demonstrates that the promises were bargained for. Second is the cautionary function which states that the use of formalities acts as a method of ensuring that the parties consider their actions before entering into a contract. The idea being that the parties are more likely to regard their agreement as legally binding where they must perform a specific act or adhere to a certain formality. The doctrine of consideration acts in a similar manner by adding a further aspect of the contract which distinguishes it from a gratuitous promise. The final function is a channelling function which allows the parties to define the terms of the contract clearly and enables the parties to rely on

¹⁸⁶ Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007) at 73

¹⁸⁷ Supra Note 59 at 800

a specific model which ensures that their agreement will be considered legally binding. The provision of consideration once again performs this function by ensuring that the contract is the result of a bargain and not a one-sided promise.

Thus, according to Lon Fuller, the doctrine of consideration, at its most basic level, acts as a method of ensuring that contracts are not entered into lightly and a means of differentiating between everyday agreements and legally binding contracts.

When one considers however, that, in the context of the modification of contracts, a legal relationship already exists between the parties there appears to be very little need for the cautionary function described above, nor the channelling function, and, especially where an agreement has been made in writing, there is little need for consideration as evidence of an agreement. It seems then, that Fuller's description of the purpose of the doctrine of consideration does not sit particularly well in the context of contract modification.

3.4.4 Benson

Benson argues against Fuller's thesis that the doctrine of consideration performs a similar function to that of a formality. He argues that the doctrine of consideration "establishes a form and content of relation that is irreducibly different from those entailed by either estoppel or a seal"¹⁸⁸. Instead he argues that:

Consideration is not a control device that, for various policy reasons, negatively excludes certain prima facie enforceable promises, however seriously and freely made or welfare enhancing they may be. Rather, it specifies in positive terms and, indeed, is constitutive of a kind of interaction on the basis of which parties may

¹⁸⁸ Supra Note 60 at 278

reasonably be held to have undertaken fully contractual obligations enforceable by expectation remedies.¹⁸⁹

In other words, it defines the kind of action that gives rise to a legal obligation rather than serving a similar purpose to a seal or document as Fuller suggests. Though interesting, this theory is also problematic because it does not explain why some contracts, though they appear in all other respects to be enforceable fail because of a lack of consideration. It suggests that only in those cases where good consideration is present can the parties be deemed to have created an obligation.

3.4.5 Treitel and ‘invented’ consideration

Treitel reverts back to the bargain theory of consideration. He argues instead that the courts have begun to ‘invent consideration’¹⁹⁰ and suggests that this happens where the courts ‘regard an act or forbearance as the consideration for a promise even though it may not have been the object of the promisor to secure it’¹⁹¹ and where they ‘regard the possibility of some prejudice to the promisee as a detriment without regard to the question of whether it has in fact been suffered’¹⁹²

Though this argument raises the issue of the court’s ability to interpret the law in ways which give rise to results that may not otherwise have been expected, and is convincing in its attempt to reconcile the exceptions made by the courts to the classical doctrine of consideration, it leaves many questions unanswered. For example, as Professor Atiyah says:

¹⁸⁹ Ibid at 247

¹⁹⁰ Supra Note 72

¹⁹¹ Ibid

¹⁹² Ibid

Is an ‘invented’ consideration something different from a ‘real’ consideration or is it the same thing? If it is the same thing, then it is hard to see in what sense it is invented; and if it is not the same thing, then it either violates the rules of law, or it modifies them. Presumably Professor Treitel does not mean to suggest that when judges invent consideration they are defying the law and violating their judicial oaths, but if an invented consideration modifies the rules governing ordinary consideration, then an invented consideration becomes again an ordinary consideration, though the legal significance of the doctrine has now changed.¹⁹³

3.4.6 Atiyah and consideration as a reason for enforcement

Atiyah argues that, in its present state, consideration cannot be reduced to a single set of rules. Instead he posits that it is more accurate to describe the doctrine of consideration, not as a single entity but as a collection of rules which fall under the heading of consideration¹⁹⁴.

He writes that:

The truth is that the courts 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

¹⁹³ Supra Note 23 at 183

¹⁹⁴ Ibid

‘reason’ for the enforcement of a promise. If the consideration was ‘good’, this meant that the court found sufficient reason for enforcing the promise¹⁹⁵

Thus, Professor Atiyah moves away from the traditional idea of reciprocity and this concept offers a different insight into the doctrine of consideration.

The idea that the doctrine of consideration should be regarded as a reason for the enforcement of a promise broadens the scope of the doctrine and suggests that the doctrine does not exist merely to establish that the contract was bargained for. This theory appears to reflect the older thoughts surrounding the doctrine of consideration and its cousin, ‘*cause*’. As established in the previous chapter, *Cause* acts as the reason for the enforcement of a promise within the French law of contracts and it is derived from the Roman doctrine of *causa*. Atiyah’s theory that the doctrine of consideration acts as the reason for the enforcement of promises under the Anglo-Canadian common law opens up one particularly interesting possibility; the doctrine of consideration need not be the *only* reason for the enforcement of a promise.

Though the doctrine of consideration is indeed a useful tool which can be used to determine the seriousness of the intentions of the parties to be bound, there are other ways to demonstrate that a contract was intended to be legally binding. I support the idea that consideration need not be the *only* reason for the enforcement of a contract. Thus, I am in favour of Atiyah’s theory that, where it could be shown through other means that the parties intended to be legally bound by their agreement, a contract could still be held valid without the presence of good consideration.

¹⁹⁵ Ibid

It is for this reason that, for the purpose of this thesis, I accept the view that the doctrine of consideration acts as a reason for the enforcement of a promise and, as such, demonstrates the seriousness of the parties' intention to be legally bound.

3.5 The current need for reform

Since the 1970's there has been much discussion regarding the continued 'usefulness' of the doctrine of consideration and many academics have advocated its complete removal from the common law¹⁹⁶. There are various reasons given by these academic writers for the removal of the doctrine of consideration. Many have argued that the original purpose of the doctrine of consideration has been eroded by adaptations such as promissory estoppel. Some have argued that the gatekeeping function provided by the doctrine can in fact be performed by other, more newly developed doctrines such as economic duress and intention to create legal relations and thus, it no longer serves a useful purpose within the Common Law¹⁹⁷. Others have demonstrated that the doctrine can be used to disguise the fact that a decision has been made on the basis of policy¹⁹⁸, fairness or morality¹⁹⁹ and that it is used as a justification for a finding in favour of a certain party²⁰⁰. Finally, it can also be argued that the use of the doctrine of consideration is out-dated and does not reflect a growing trend towards the global harmonization of contract law. In this chapter I address each of these issues in turn.

¹⁹⁶ See AG Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract-A Comparative Analysis" (1968) 17:1 Int'l & Comp. L.Q. 137 and Sixth Interim Report, Statute of Frauds and the Doctrine of Consideration, Report by The Law Revision Committee (London: His Majesty's Stationary Office 1945) for examples of such works.

¹⁹⁷ Supra Note 3

¹⁹⁸ Supra Note 6 at 86

¹⁹⁹ Ibid at 93

²⁰⁰ Supra Note 72

Though many of these problems relate to the doctrine of consideration as a whole and therefore apply in cases of contract formation, many of these issues have a particularly serious effect on the modification of pre-existing contracts.

3.5.1 The doctrine of consideration is overly complex

As stated throughout this thesis, the doctrine of consideration in its classical form was originally defined as ‘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’²⁰¹ Its function was thus, reciprocal and the main function of the doctrine of consideration was to distinguish between promises which are binding and those which are not. One of the arguments often raised by critics of the doctrine is that many exceptions have been made to the doctrine and that, as a result of these exceptions, the doctrine has become a complex web of rules which scarcely have any real meaning, especially as far as the modification of contracts is concerned. Here I address the main exceptions which affect the modification of contracts though there are several others.

3.5.1.1 The practical benefit rule

The practical benefit rule is particularly relevant to the modification of contracts. The original rule as stated in *Pinnel’s Case*²⁰² was that an undertaking in the form of something which the promisee was already legally obliged to do would not be considered good consideration because, since the duty was pre-existing, there was no added benefit to the promisor. However, this rule was reconsidered in the case of *Williams v Roffey*²⁰³ and the current position of courts, at least in the United Kingdom, is that where there is a practical

²⁰¹ Supra Note 1

²⁰² Supra Note 119

²⁰³ Supra Note 22

benefit to the performance of an existing duty, that practical benefit may act as good consideration (providing there is no economic duress and the variation was freely negotiated by both parties), thus making the variation of the original contract valid and enforceable.

In Canada, this rule had been largely ignored by the courts until very recently in the case of *NAV Canada v Greater Fredericton Airport Authority Inc.*²⁰⁴ though there is one other employment law case in which the practical benefit rule appears to have been applied²⁰⁵.

The reasons for the absence of the rule in Canadian law are examined in great detail by M.H. Ogilvie's "Of what practical benefit is practical benefit to consideration?"²⁰⁶ Ogilvie suggests that:

While there have been few cases since *Roffey* in England, probably because this has never been a frequently litigated corner of contract law, a subsequent acceptance of the principle of practical benefit by the Court of Appeal in *Selectmove* and in the textbooks suggests that it has found a place in the law although the content and scope of application remain uncertain. That uncertainty may well have spilled over to Canada until the decision of the New Brunswick Court of Appeal in *NAV Canada*.²⁰⁷

However, it now seems that the Canadian courts have begun to accept the practical benefit rule and it can therefore be considered to be an exception to the requirement of doctrine of consideration in both England and Canada.

²⁰⁴ *Supra* Note 12

²⁰⁵ *Chahal v Khalsa Community School* (2000), 2 CCEL (3d) 120 (Ont. S.C.J.) (though this case was an employment law case)

²⁰⁶ MH Ogilvie, "Of What Practical Benefit is Practical Benefit to Consideration?" (2011) 62:1 U.N.B.L.J. 131

²⁰⁷ *Ibid* at 136

3.5.1.2 Part payments of debts already owed by the promisor and promissory estoppel

Once again, the part payment of debt is an exception to the doctrine of consideration which is particularly relevant to the modification of contracts because it involves a variation of the original contract terms. As stated above, the original rule on part payment of debt can be found in *Pinnel's Case*²⁰⁸ in which it was held that part payment alone did not amount to good consideration. This decision was affirmed by the court in *Foakes v Beer*²⁰⁹ but an exception was made in the famous decision made by Lord Denning in *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 13 [*Central London Property Trust Ltd v High Trees House Ltd*]²¹⁰. This case was the beginning of the equitable doctrine of promissory estoppel. Denning LJ held that if a promisor makes a promise, which the promisee relies upon, the promisor is estopped from going back on that promise despite the fact that no fresh consideration has been given. Thus, if one party agrees to accept a lower amount for a service rendered and the other relies on that promise, the agreement will be valid even if there has been no added consideration given.

In Canada the rule set out in *Foakes v Beer*²¹¹ was overruled in many provinces by legislation²¹² but the doctrine of Promissory Estoppel was accepted in Canada and has subsequently been used in a range of cases including that of *Saskatchewan River Bungalows v Maritime Life Assurance* [1994] 2 S.C.R. 490²¹³, *International Knitwear Architects Inc. v*

²⁰⁸ Supra Note 119

²⁰⁹ Supra Note 40

²¹⁰ *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 13

²¹¹ Supra Note 40

²¹² For example, BC by s. 43 of *Law and Equity Act* which states that: "Part performance of an obligation either before or after a breach of it, when expressly accepted by the creditor in satisfaction or rendered under an agreement for that purpose, though without any new consideration, must be held to extinguish the obligation."

²¹³ *Saskatchewan River Bungalows v. Maritime Life Assurance Co.* [1994] 2 S.C.R. 490

Kabob Investments Ltd (1995), 17 BCLR ²¹⁴ and *Petridis v Shabinsky* (1982) 132 DLR (3d) 430 (Ont. H.C.)²¹⁵

From these few examples it is clear that the original doctrine of consideration is now subject to several important exceptions. These exceptions have created a complex set of rules which, although necessary developments, go far beyond the original scope of the doctrine of consideration. The modification of existing contractual agreements appears to be the area in which these exceptions are most frequently made. This suggests that the doctrine of consideration is particularly problematic, not only for those seeking to modify agreements which they have already entered into, but also for the courts attempting to decide on these cases.

3.5.2 Consideration is used to disguise the true reasons surrounding judicial decision-making

3.5.2.1 Consideration as a mask to hide the real reasons for decisions

One of the biggest concerns raised by the critics of consideration is the use of the doctrine as a way of disguising decisions made on the basis of policy, morality or fairness. Indeed, Atiyah argues that the English courts will endeavour to find consideration where “the moral appeal of the plaintiff’s case would be so great that any court would surely strive to uphold his claim”²¹⁶ Professor Treitel argues that the courts have begun to ‘invent’ good consideration where they see fit despite the fact that neither party may have actually intended to provide it. Thus the actions of the parties are being interpreted by the courts to mean something that they arguably do not. This problem is particularly prevalent in cases

²¹⁴ *International Knitwear Architects Inc. v. Kabob Investments Ltd.* (1995), 17 BCLR

²¹⁵ *Petridis v. Shabinsky* (1982) 132 DLR (3d) 430 (Ont. H.C.)

²¹⁶ *Supra* Note 4 at 125

concerning the modification of pre-existing contracts as such agreements often involve economic hardship and changing circumstances.

The root of the concern expressed by the critics of the doctrine of consideration is the idea that judges are not wholly transparent in their decision-making and that the doctrine of consideration facilitates the non-disclosure of the true reasons for certain judgements. The use of the doctrine of consideration in this manner often means that it is applied unevenly which can in turn create uncertainties within the law. The idea that the invention of consideration may not in fact reflect the intentions of the parties is also somewhat worrying, especially when one considers that one of the main theories surrounding the doctrine of consideration is that it functions as a cautionary device²¹⁷ which aims to deter the parties of a contract from entering into agreements lightly²¹⁸.

3.5.2.1.1 Decisions based on fairness

Some have argued that the doctrine of consideration has been used to disguise the fact that some decisions have been made on the basis of fairness rather than as a result of legal analysis. This argument may have little weight nowadays given that many rules have now been enacted to protect contracting parties from agreements which are unjust²¹⁹ I do however wish to include them because they illustrate the ways in which the doctrine of consideration can be used to hide the true reasoning behind the decisions of the court. One case which demonstrates the use of the doctrine of consideration as a way of “policing the fairness of a

²¹⁷ Supra Note 59

²¹⁸ Though I cannot say I am fully in support of Fuller’s theory of the purpose of the doctrine of consideration in the context of contract modification because of the serious legal relationship which already exists between contracting parties.

²¹⁹ These rules and doctrines include but are not limited to: economic duress, the equitable doctrine of unjust enrichment and promissory estoppel.

contract”²²⁰ is *Harding v Harding* (1972), 28 DLR (3d) 358 (B.C.S.C.)²²¹ (though it should be noted that this case is not one that involves the modification of a contract). In this case, the British Columbia Supreme Court held that an agreement concluded between a husband and wife for the purchase of the wife’s share in the matrimonial home for \$1 was invalid because the husband had only provided ‘nominal’ consideration. This particular bargain was also unfair because the husband was taking advantage of the wife’s disadvantageous position. The wife, who had previously left her husband for another man was seeking to return to their home in the hopes of saving her marriage. The husband, knowing that the wife was desperate to return, took advantage of his stronger position within the relationship and used his advantage to gain his wife’s share of the house. When looking at the facts of this case, it is unsurprising that the court chose to interpret the law so as to avoid the enforcement of such a promise.

In contrast to this is the English case of *Thomas v Thomas* (1842), 2 QB 851, 114 E.R. 330²²² in which it was held that a widow’s contribution of £1 per year in rent was good consideration for the promise that she could continue to reside in the home she had shared with her husband while she was still alive. This case demonstrates the court’s willingness to allow what could be considered to be nominal consideration to be good consideration for a promise, which, if held to be invalid, would result in the homelessness of a widow.

Both of these cases demonstrate that the courts are able to apply the doctrine of consideration to various cases in different ways to enable a fair outcome. Though one could argue that this is advantageous, the application of the doctrine of consideration to produce

²²⁰ Supra note 6 at 86

²²¹ *Harding v Harding* (1972), 28 DLR (3d) 358 (B.C.S.C.).

²²² *Thomas v Thomas* (1842), 2 QB 851, 114 E.R. 330.

“fair” outcomes is problematic because it creates a lack of transparency and uncertainty within the law.

3.5.2.1.2 For decisions based on policy

Wessman gives several examples of U.S. case-law which supports this theory but there are also many examples in English and Canadian law. The use of consideration as a disguise for the enforcement, or non-enforcement of promises on policy can be seen in even the earliest of cases. For example, the famous English contract modification case of *Stilk v Myrick*²²³ demonstrates that the court may be willing to ignore what could be interpreted as valid consideration in the interest of the preservation of policy. In this case it was held that a captain’s promise to divide the remaining wages between 9 crew members after the rest of the ship’s crew deserted was not supported by consideration because the enforcement of the promise would be contrary to public policy. In this case the public policy ground was the avoidance subsequent cases in which sailors refused to perform the duties to which they had already agreed unless they were given extra pay.

The same principle applies in the case of *Vanbergen v St. Edmunds Properties Ltd.* [1933] 2 K.B. 223 [*Vanbergen v St. Edmunds Properties Ltd.*]²²⁴ which demonstrates that “where a debt is already due in full, a promise by the debtor to pay it in stated installments is no consideration for the creditor’s promise not to take bankruptcy proceedings of the debt”²²⁵. It appears then that, particularly where the performance of an existing duty or the part payment of a debt is concerned, the courts will not consider this to be good consideration because, if they were to allow it, it could result in an opening of the floodgates and a surge of

²²³ Supra Note 169

²²⁴ *Vanbergen v St. Edmunds Properties Ltd* [1933] 2 K.B. 223

²²⁵ Joseph Chitty, H.G. Beale ed, *Chitty on Contracts*, 31st ed (London: Sweet and Maxwell, 2012) at 333

contracting parties attempting to escape their contractual duties and take advantage of the other contracting party.

The case of *Collins v Godefroy*²²⁶ mentioned earlier (though once again not a case which concerns the modification of a pre-existing contract) concerned an attorney who was legally required to attend court in order to give evidence. The defendant agreed to pay the attorney for each day he had to spend in court while giving evidence in order to compensate him for the time lost from his work. The court held that the attorney was unable to claim the payment promised to him because he was required by law to give evidence in court and a promise to perform a public duty could not be considered good consideration.²²⁷ Though the court gave lack of consideration as its reason for refusing to enforce the promise made by the defendant, the decision in this case could just as easily be justified on the grounds that the enforcement of such a promise could result in the unfair extortion of the defendant.

It should also be noted that such cases are “hard to reconcile”²²⁸ with some of the cases in which it has been held that “promises of rewards for information leading to the arrest of criminals could be enforced”²²⁹ at a time when a person who possessed such knowledge was bound to share it.²³⁰

3.5.3 Trends of harmonization in contract law

In recent years, there has been a trend towards the global harmonization of contract law, particularly with regards to commercial contracts. There have been several attempts to create a system of contract law which harmonizes the laws in various different countries. The

²²⁶ Supra Note 179

²²⁷ Ibid

²²⁸ Supra Note 225 at 330

²²⁹ Ibid

²³⁰ Ibid

Principles of European Contract Law (PECL)²³¹ are an example of such an attempt. The PECL are a set of general rules which aim to clarify the rules of contract which the majority of member states follow. Though these principles do not carry the full weight of law, they are intended to act as a model law for both the reform of national civil codes and the eventual enactment of a common European contract law. There are other projects similar to the PECL including the United Nations Convention on Contracts for the International Sale of Goods (CISG)²³² (of which Canada is a member but England is not) and the UNIDROIT Principles of International Commercial Contracts²³³ which can be chosen by the parties of a contract as the law which governs that agreement.

It is important to note that none of these ‘model rules’ have included the doctrine of consideration. Instead they have provided other rules which aim to protect the parties from the enforcement of gratuitous promises. The exclusion of the doctrine of consideration, and any rules that resemble it, suggests that the doctrine itself is regarded as an undesirable addition to the requirements of offer and acceptance and indicates a general reluctance, at least within the international community, to continue or adopt its use. Indeed, the UNIDROIT Principles of Commercial Contracts were developed through the process of determining and analyzing the laws of many different countries and selecting those laws which would create the ‘ideal’ model for an international commercial code and it was decided that the doctrine of consideration should not feature in this ideal model. And that

²³¹ See Commission on European Contract Law, eds Ole Lando & Hugh Beale, *Principles of European Contract Law. Parts I and II* (The Hague: Kluwer Law International, 2000) and Commission on European Contract Law, eds Ole Lando & Hugh Beale, *Principles of European Contract Law. Part III* (The Hague: Kluwer Law International, 2003) for the full text of the Principles of European Contract Law.

²³² *United Nations Convention on Contracts for the International Sale of Goods* (1980) for the full text see <http://www.osgoode.yorku.ca/cisg/full-text-english> (Last viewed 17/11/2013)

²³³ *Supra* Note 16

Article 29(1) of the CISG allows for the modification and termination of a pre-existing agreement by ‘the mere agreement of the parties’²³⁴.

It is also important to consider the complications which might arise when attempting to conduct business transaction on an international level between common law countries and civil law countries. The doctrine of consideration is so peculiar to the common law that it barely makes sense to those trained in civil law jurisdictions and it can easily be regarded as an unwelcome obstacle to what would otherwise be valid agreements. The doctrine of consideration thus appears to be regarded as somewhat outmoded and it is generally unpopular with the drafters of ‘model codes’.

3.5.4 Problems in the modification of contracts caused by the doctrine of consideration as identified by law revision committees

There have been some, unsuccessful attempts at suggestions for the wholesale reform of the doctrine of consideration in England and in Canada and many attempts at partial reform with differing degrees of success. The 1937 proposals made the Law Revision Committee²³⁵ provide some interesting suggestions with regards to the need for written confirmation of agreements and the 1987 Report on the Amendment of the Law of Contract by the Ontario Law Reform Commission²³⁶ provides some insight into the areas most in need of reform but neither was able to establish an appropriate direction for reform.

The need for reform has thus been acknowledged by the review committees in the United Kingdom and Canada but no substantial results have appeared as a result of their proposals.

²³⁴ Supra Note 232 Article 29(1)

²³⁵ Supra Note 9

²³⁶ Supra Note 10

In 1937 the Law Revision Committee stated in their Sixth Interim Report²³⁷ that:

The purpose of the doctrine of consideration cannot be to distinguish between onerous and gratuitous agreements because of adequacy of consideration is wholly immaterial, and some promises which are technically held to be supported by consideration are, in fact, nothing more or less than purely gratuitous promises²³⁸

This statement is a clear recognition of the fact that the courts are often willing to uphold agreements which ought be considered gratuitous and it demonstrates that, even as early as 1937, the courts had been using the doctrine of consideration to enforce those promise which they deemed suitable to be enforced.

The report also states that:

It has been necessary in the interest of elementary justice to allow exceptions from the doctrine which cannot be justified on the grounds of logic. For instance, although past consideration is no consideration, it has been held that a promise to pay a statute-barred debt is binding²³⁹

This indicates that the review committee recognised that the many exceptions made to the doctrine of consideration were, at least to some extent, illogical. It also demonstrates that the committee had identified the fact that the doctrine of consideration could act as a barrier to those promises which should be enforceable if justice was to be done and that the doctrine of consideration causes problems and inconvenience for the parties.

²³⁷ Supra Note 9

²³⁸ Ibid at 14

²³⁹ Ibid at 15

Despite all the reasons for reform which were highlighted in the report and the suggestion of alternative provisions, the recommendations made by the Law Revision Committee in 1937 were not adopted by the English legislature and there has been little serious discussion of the reform of the doctrine of consideration in England, at least outside of academic circles, since.

More recently in 1987, the Ontario Law Reform Commission published a “Report on the Amendment of Contract”²⁴⁰. The report, specifically targets the doctrine of consideration as an area of the law which is in serious need of reform and notes that:

As almost invariably happens when a legal doctrine stands in the way of results generally thought to be just, courts have developed devices to circumvent the doctrine of consideration, and legislatures have intervened to alter it in particular circumstances...the courts have constructed an exchange element even where the facts do not readily suggest one.²⁴¹

This statement once again shows a recognition of the problem of the construction, or as Treitel put it, the ‘invention’²⁴² of consideration within the Canadian courts.

The report also specifically identifies the modification of contracts as a particularly problematic area of the law. It states that:

Asserting that...consideration is an absolute prerequisite to enforceability has given rise to difficulties. The cases that have generated serious difficulties fall into at least four classes: first, one-sided modifications of existing obligations; secondly promises

²⁴⁰ Supra Note 10

²⁴¹ Ibid at 7

²⁴² Supra Note 72

made in return for benefits previously received by the promisor or by a third party;
thirdly firm offers; and fourthly, cases of subsequent reliance.²⁴³

3.5.5 The gatekeeping function of the doctrine of consideration can be performed by other doctrine as successfully

The doctrine of consideration acts as a barrier against the enforceability of gratuitous promises. The term ‘Gatekeeper’ was coined by Mark B. Wessman in his “Should we Fire the Gatekeeper: An Examination of the Doctrine of Consideration”²⁴⁴ in which he discusses many of the issues raised by the critics of the doctrine. One of the key points of this article is the idea that the functions performed by the doctrine of consideration can be successful performed by other doctrines. The doctrines most often used as a substitute for the doctrine of consideration include: the doctrine of economic duress and intention to create legal relations.

3.5.5.1 Economic duress as a substitute gatekeeper

The most popular suggestion for a replacement of the doctrine of consideration in the past ten years has been the more recently developed doctrine of economic duress. In the New Brunswick Court of Appeal case *NAV Canada v. Greater Fredericton Airport Authority Inc.*²⁴⁵ it was decided that where there was agreement between the parties and no economic duress, a contract could be modified without consideration. This decision is an unusual one and it marks a departure from the traditional rule adopted by the Canadian courts which came from the English case of *Williams v Roffey*²⁴⁶. Whether or not this decision will be followed by the rest of the Canadian courts remains to be seen but there seem to be both advantages

²⁴³ Supra Note 10 at 6

²⁴⁴ Supra Note 6

²⁴⁵ Supra Note 12

²⁴⁶ Supra Note 22

and disadvantages to the adoption of such a replacement for the doctrine of consideration. This case will be discussed in further detail in chapter five of my thesis and I therefore do not wish to analyse it in any great detail here. Suffice to say that, while the adoption of economic duress as a replacement gatekeeper to the enforcement of promises in the modification of contracts does provide a way out of using the much criticized doctrine of consideration, its use in such a role means that the doctrine of economic duress itself would also have to be reformed (as was the case in *NAV Canada v Greater Fredericton Airport Authority Inc.*) and there is some argument as to how this might best be done.

3.5.5.2 Intention to create legal relations

The doctrine of intention to create legal relations serves the function of determining which agreements are intended to have legal consequences and which are not. In agreements that are made within a commercial setting are generally regarded as agreements which were intended to have legal consequences and there is a ‘rebuttable presumption’ that the parties intended to create legal relations. However, agreements such as those between a husband and wife are often regarded by the courts as social agreements which do not have any legal consequences. It has often been suggested that this doctrine could serve as a replacement for the doctrine of consideration at least in its evidentiary function. Indeed, in his judgement of the case of *Williams v Roffey*²⁴⁷, Lord Justice Russell said:

I do not believe that the rigid approach to the concept of consideration to be found in *Stilk v Myrick* is either necessary or desirable. Consideration there must still be but in my judgment the courts nowadays should be more ready to find its existence so as to reflect the intention of the parties to the contract where the bargaining powers are not

²⁴⁷ Ibid

unequal and where the finding of consideration reflects the true intention of the parties.

And in the New Zealand case of *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23²⁴⁸

Justice Baragwanath stated that:

The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary, they should be bound by their agreement.²⁴⁹

It seems then that there is some support within the common law courts for the replacement of the doctrine of consideration with the doctrine of intention to create legal relations. The view that the purpose of the doctrine of consideration is merely evidentiary does indeed suggest that it could be replaced by intention to create legal relations. But this view is somewhat problematic; as seen from the above sections, the doctrine of consideration performs other functions as well as an evidentiary one and replacing it with the doctrine of intention to create legal relations could leave gaps in the law. Not only this, but, though the replacement of consideration with intention to create legal relations “would be relatively easy to operate in the commercial context, it is not at all obvious that the question whether the parties had an intention to contract will be any easier to answer than the question whether or not there was

²⁴⁸ *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23

²⁴⁹ Ibid

consideration (in the bargain sense) to support the agreement”²⁵⁰ This is therefore something that must be considered when advocating the implementation of such a reform.

Thus, the case for the reform of the doctrine of consideration in both the English and Canadian law is very strong and there is much evidence to suggest that both legal systems would benefit from its abolition. However, it is also apparent given the fact that the doctrine of consideration continues to be applied by the courts, that the suggestions for reform put forward by the various law reform committees and the criticisms raised by the academics have made little difference to the actions of the judges in the courtrooms. Though on some occasions, these law revision committees and academics have considered looking to other legal systems for inspiration, few have looked towards the German system which offers some interesting possibilities for the reform of the doctrine of consideration.

²⁵⁰ Supra Note 182 at 101

Chapter 4: The current German law on contract modification

4.1 General comments

As a result of differences in the historical development of the law at the end of the 18th Century discussed in chapter two of this thesis, the present German rules which govern the modification of contracts are very different to the Anglo-Canadian rules.

Like the English courts, the German legislature recognized the need to differentiate between those promises which are enforceable by law and those which are considered to be gratuitous or social arrangements. The decision of the drafters of the German Civil Code or “Bürgerliches Gesetzbuch” to exclude the requirement of *causa* from the formation and modification of contracts resulted in the need to create other rules to distinguish between those promises which are enforceable under the law and those which are considered to be gratuitous. Therefore, though there is no requirement of consideration, there are various other requirements which must be satisfied in order for a variation of a contract to be held valid.

According to Atiyah’s theory²⁵¹, the doctrine of consideration is used to distinguish between those promises which are enforceable and those which are gratuitous. It does so by acting as the reason for the enforcement of a promise. Where consideration is present, there is good reason for enforcing the promise, where it is not present, there is no good reason. Thus, according to the functional comparative approach, the German law equivalent or equivalents to the doctrine of consideration are those rules which distinguish enforceable and non-enforceable promises by providing a reason for that enforcement. This chapter reveals however, that though the German law does not enforce every agreement and does therefore

²⁵¹ Supra Note 23

distinguish between those agreements intended to have legal effect and those which are merely gratuitous, it does not do so by providing consideration as a reason for the enforcement of a promise and it is this particular aspect of the German law which should be of interest to those seeking guidance for the reform of the Anglo-Canadian common law.

The most obvious difference between the German and the Anglo-Canadian contract law is the fact that the German contract law is codified and the Anglo-Canadian common law, particularly the doctrine of consideration, is rooted in case law. The main source of German contract law is the Bürgerliches Gesetzbuch (BGB)²⁵² which came into effect on the 1st January 1900 after several decades of drafting and preparation by its authors. The BGB contains several ‘books’; these books are the ‘General Part’, which contains those rules which apply to all the other sections, the ‘Law of Obligations’ and a description of the various different obligations between persons, including contract and tort law; ‘Property Law’ which describes the rights to do with property and how these rights can be transferred; ‘Family Law’ which contains rules on the relationships between family members such as marriage; and finally ‘The Law of Succession’ which includes rules concerning property of deceased persons such as wills²⁵³.

The German courts do not have the power to ‘make law’ and, because of this, doctrines such as the doctrine of consideration cannot develop in the way that they do in common law jurisdictions. Instead, judges are required to apply the law written in the statutes to the cases which come before them and they must interpret the statute in accordance with

²⁵² For the a more recent edition see: Bürgerliches Gesetzbuch BGB: mit Allgemeinem Gleichbehandlungsgesetz, Beurkundungs G, BGB-Informationspflichten-Verordnung, Einführungsgesetz, Auflage: 70 (Deutscher Taschenbuch Verlag 7 2012)

²⁵³ Ibid

the intention of the legislature. Whether or not this is in fact possible is another very interesting topic for discussion, but not one which I wish to raise here.

4.2 The basis of the German law of contracts

Unlike the Anglo-Canadian common law, contract law in Germany is based upon the will theory of contract. According to the will theory, the justification for the binding nature of contractual agreements can be found in the will of the contracting parties. The German law therefore focuses on establishing the content of the will of the contracting parties rather than finding a reason for the enforcement of a promise in the fact that it has been bargained for. The binding force of an agreement made under the German law is the fact that the parties intended at the time that it was made, to be bound by it.

Following this rationale, the creation of a valid agreement is reached on the basis of declarations of intent made by the contracting parties. In other words:

A legal transaction is a private declaration of intention aiming at a legal consequence which the law sanctions because it was intended.²⁵⁴

Thus, it is the fact that an agreement was intended which is key to the German law. Unlike the Anglo-Canadian common law, which, as shall be remembered from the previous chapters, requires “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”²⁵⁵, the German law simply requires that the parties demonstrate that they intend to enter into a legally binding agreement with one-another. Therefore the German law does not demand that a promise must be bargained for. Because of this, a modification which only affects one side

²⁵⁴ Supra Note 97 at 157

²⁵⁵ Supra Note 1

of the agreement can be made, providing both parties can be shown to have agreed upon that modification without the need to give something in return for that promise. The reason for enforceability therefore lies not in the fact that an exchange has taken place, as with the doctrine of consideration, but in the fact that the parties intended for the agreement to be legally enforceable.

4.2.1 Sanctity of contracts (*pacta sunt servanda*)

The German law gives special sanctity to contracts. The principle of ‘*pacta sunt servanda*’ (in English, ‘agreements must be kept’) is derived from the principle established by Samuel Von Pufendorf and was developed as a replacement for the “restrictive Roman rule of *ex nudo pacto non oritur actio*”²⁵⁶. This principle is now central to German contract law and it means that, once a contract is concluded in a valid manner, it is held to be binding upon both the parties. In other words, any validly formed contract is to be regarded as sacred under the German law. Thus, if one party fails to fulfill his or her obligations, they will be considered to be in breach of the agreement and remedies will be available to the other. The ability to rely upon agreements which have been made is essential to the smooth running of business, after all, if no-one was bound by their agreements there would be virtually no legal certainty.

As a result of the principle of *pacta sunt servanda*, the general attitude towards contracts under the German law is that agreements are to be respected unless it can be shown that there is a reason they should be held to be unenforceable. The difference therefore, between the Anglo-Canadian contract law and the German contract law is that the German law presupposes that a contract, so long as it has been properly agreed upon by the parties,

²⁵⁶ Supra Note 97 at 151

was intended to be legally binding whereas the Anglo-Canadian law requires consideration as a reason for regarding that agreement as enforceable.

4.3 The modification of contracts in German law-what are the requirements?

When one considers the principle of *pacta sunt servanda*, the idea of terminating or modifying an agreement which has already been made seems to fly in the face of the principle. However, in order to promote efficient business dealings there must also be a way to vary the terms of an agreement. The result of this the idea is that contracts can be modified through the agreement of all the parties to the contract but not by just one. In other words, under the German law, the unilateral modification of contracts is generally prohibited²⁵⁷.

The German focus on the intention and agreement of the parties in the creation of contractual obligations is reflected in the requirement of consensus, but not bargain, in the modification of pre-existing contracts.

Thus, in order to terminate a contract, amend the terms of it, or replace it with another, there must be an agreement between both of the contracting parties. In order to amend a valid contract, 'it is commonly agreed that the parties to a contract may affect a variation of their contract by amending or modifying the terms by a consensual agreement',²⁵⁸.

4.3.1 Consensual contractual changes (einvernehmliche Vertragsänderungen)

The German Civil Code provides that where both parties agree, a valid contract can be terminated, substituted for another, or amended. Thus, where the parties are no longer satisfied with the terms of an agreement, or both parties no longer wish to be bound by that

²⁵⁷ Except in specific circumstances discussed later in this chapter

²⁵⁸ Ronny Jänig, *Commercial Law: Selected Essays on the Law of Obligation, Insolvency and Arbitration*, (Göttingen: Universitätsverlag Göttingen, 2012) at 43

agreement, they are able to amend their situation simply by agreeing to those alterations.

§311 Abs.1 of the Bürgerliches Gesetzbuch states that:

Unless otherwise prescribed by law, a contract between parties is required in order to create an obligation through a legal act as well as to change the contents of an obligation.²⁵⁹

In order to do this, they must create an ‘Änderungsvertrag’, in English, a ‘contract of amendment’. This contract of amendment can be used to make changes to the main obligations of the contract, the terms surrounding the main obligations and even details of performance. In general, contracts of amendment must be made in the same form as the original contract and the contract must be concluded in accordance with the rules which govern the formation of contracts²⁶⁰. Therefore, a contract which was originally made in writing should be amended in writing and cannot normally be amended by a verbal agreement. Where the original agreement was ‘form bedürftig’ (required by law to be made in a certain form) the contract of amendment must be made in that same form in order for the agreement to be considered valid.

In contrast to the Anglo-Canadian common law, it is possible to alter the terms relating to the obligations of only one party without the altering those of the other party because there is no requirement that the promise must be bargained for. So long as both parties agree any amendment can be made.²⁶¹

²⁵⁹ §311 Abs.1 BGB An alternative but similar English translation can be found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 17/11/2013)

²⁶⁰ Michael Wendler, Bernd Tremml & Bernard John Buecker, *Key Aspects of German Business Law: A Practical Manual*, (Heidelberg: Springer Verlag 2006) at 75

²⁶¹ And the agreement was not the result of duress (economic or otherwise), does not go against public policy or good morals, and was not a sham or joke transaction.

4.3.2 The formation of an Änderungsvertrag

Like any other contract formed under German contract law, an Änderungsvertrag must include an Angebot or offer and Annahme or acceptance and it is subject to vitiating factors such as duress (economic and physical), breach of good morals and lack of seriousness. It does not however require consideration or indeed anything that resembles the doctrine in order to be held valid. The way in which contracts (including contracts for amendment) are formed under the German law is one of the ways in which enforceable agreements are distinguished from non-enforceable agreements.

4.3.2.1 The Willenserklärung (declaration of intent)

According to the German law, a contract consists of two or more declarations of intent which correspond with one another and which are aimed at bringing about a certain legal effect²⁶². Though there is in fact no provision which expressly states that this is a requirement of a legally binding contract in the Bürgerliches Gesetzbuch, it is an accepted principle within the German law.

A declaration of intent is a 'statement or action which is aimed to achieve a distinct legal outcome'²⁶³. There are several elements to a declaration of intent which serve as a method of distinguishing between those promises which are enforceable under the law and those which are considered gratuitous. Once again, this is highly different to the Anglo-Canadian common law. Though German law, like the Anglo-Canadian contract law, does create a requirement that certain necessary steps must be fulfilled in order to create a legally binding contract, it uses the formation of agreement itself to ensure that the parties intend to

²⁶² Nigel Foster & Satish Sule, *German Legal Systems and Laws*, 3rd ed, (New York: Oxford University Press 2008) at 383

²⁶³ Ibid

be legally bound by their agreement instead of a supporting mechanism such as consideration. Once again, the reason for the enforcement of a German promise is the fact that it was given with the intention of creating a legal obligation. The declaration of intent and its various requirements are used as means of determining whether or not this was in fact the case.

4.3.2.1.1 The elements of a declaration of intent

The elements of a declaration of intent are separated into two aspects. The first of these aspects is the objective ‘manifestation of the will’²⁶⁴. This is the method through which the declaration of intent is communicated. A declaration of intent can be expressed verbally, in written form or through the actions of the parties. The second of these aspects is subjective and includes three different elements.

4.3.2.1.1.1 Handlungswille (intention to act)

Much like the Anglo-Canadian common law, a person entering into a contract must be aware that his or her actions will lead to a legally binding contract. In the common law, this is regulated by the doctrine of intention to create legal relations, and, arguably, the doctrine of consideration.

The first element of a declaration of intent is the intention to perform the action of declaring the intention itself (Handlungswille). This rule states that where the physical action which was interpreted as a declaration of intent was unintended, no contract has been made. Thus, a declaration of intent given by someone who is sleep-talking would not be considered a valid declaration of intent because there was no intention to give the declaration of intent in

²⁶⁴ Supra Note 262 at 379

the first place. The same applies where a person drunkenly signs a contract. The Handlungswille element is usually unproblematic given the infrequency of unintended actions but the others are less easily satisfied.

4.3.2.1.1.2 Erklärungsbewusstsein (consciousness of legal consequences)

The second element is Erklärungsbewusstsein or conscious declaration of intent²⁶⁵. In order for a declaration of intent to be held valid, the person making the declaration of intent must realise that his or her actions will result in an obligation. In other words, the party making the declaration must understand that his or her actions will have legal effect.

The classic example which is often found in German legal textbooks is the case of the ‘Trier Weinversteigerung’ (The Trier wine auction). The case is fictional but it illustrates the need for the realization that one’s actions will result in a legal obligation in the formation of a contract. In this case, a man (A) waves to his friend at an auction while bids are being taken. The auctioneer mistakes this wave as a signal indicating that he wishes to make a bid. The auctioneer therefore accepts the bid. There is however no contract because, though A intended to act and therefore fulfills the ‘Handlungswille’ element of the declaration of intent, he acted without being conscious that his action would result in a legal obligation²⁶⁶

It is this element is however considered problematic within the formation of a declaration of intent. There is a strong difference of opinion within the judicial and academic communities with regards to the level of awareness needed to constitute a valid conscious declaration of intent. While some take the more traditional view that the person making a

²⁶⁵ Supra Note 262 at 380

²⁶⁶ The original version of this case was written by Hermann Isay in „Die Willenserklärung im Tatbestande des Rechtsgeschäfts” in 1899 but it continues to be reproduced and included in most German legal textbooks. The source of this particular example is Nigel Foster and Satish Sule, *German Legal Systems and Laws*, 3rd Ed, (New York: Oxford University Press Inc., New York 2008) at 380

declaration of intent must be fully aware of the consequences of their actions, others argue that, if a person ought to be aware that his or her actions might result in a legal consequence, they should be bound by it. In other words, if the A ought to have known that waving in an auction room might result in his actions being mistaken for a bid, and where a reasonable third party would have interpreted the actions of A as being a declaration of intent, he should be bound by that action. If however, he was completely unfamiliar with the practices of auction houses and had no way of knowing that his action could be mistaken for a bid, he should not be bound by that action²⁶⁷. It seems that the current stance taken by the courts is the more modern interpretation of the rule.

4.3.2.1.1.3 Geschäftswille (business intent)

The third element is Geschäftswille or business intent. Business intent is the intention to create a certain agreement for a specific purpose. Thus if one party is mistaken as to the effect of the agreement, there will be a lack of business intent and the declaration of intent will be invalid. He or she may be aware that his or her actions will have legal consequences but they are unaware of their actual effect.

Table 4.1 The elements of a valid declaration of intent

This table shows the elements of a valid declaration of intent under the German contract law:

²⁶⁷ Ibid see also the German case of BGZ 91, 324

<u>Objective Elements</u>	<u>Subjective Elements</u>
<p>1. The manifestation of will (the means used to express the declaration of intent)</p> <p>This can be:</p> <ul style="list-style-type: none"> • Written • Spoken • Implied through behaviour 	<p>1. Handlungswille-An intention to act</p> <p>2. Erklärungsbewusstsein-consciousness of the intention</p> <p>3. Geschäftswille-Business intention</p>

In order for a valid contract to be formed, there must be two or more declarations of intent containing all of these elements. If one of the elements is absent, the contract is invalid. The German focus upon the will of the parties is therefore evident in the requirements for a valid declaration of intent. Each party must have intended to act, be aware that his or her actions will result in a legally binding contract and they must understand the purpose of that legally binding contract. In English and Canadian law, these requirements are also present, but it does not seem to matter whether or not the parties were in agreement, or if they intended to be legally bound by their actions, if a promise has not been bargained for.

As previously stated, in order to modify a pre-existing contract there must be agreement between both parties and thus, it is essential that a valid agreement is formed²⁶⁸.

The two declarations of intent which must be present in order to form a valid contract under

²⁶⁸ Supra Note 79 at 159

the German law are Offer (Angebot) and Acceptance (Annahme). It should be noted that these elements of a legally binding contract are also present in the Anglo-Canadian common law. The reason for this, as discussed in the previous chapters, is that the doctrines of offer and acceptance were adopted by the common law from the civil law in the Nineteenth Century, but, unlike the German law, further requirements such as the doctrine of consideration are required by the Anglo-Canadian common law. Though there is no specific Article in the German Civil Code which explicitly requires the presence of Offer and Acceptance for the valid formation of a contract, it has long been accepted that without them, a contract cannot exist and it is alluded to in §§116-145 BGB²⁶⁹

4.3.2.2 Offer (Angebot)

In German contract law an offer is a valid declaration of intent given by one party and which is received by another²⁷⁰. An offer must contain all the central aspects of the final agreement. For instance, a contract of sale must, at the very least, contain details of the sale price and the item being sold. In German law, these terms are called the ‘essentialia negotii’ or essentials of business. The offer must be structured in such a way that offeree is able to accept the offer simply by saying ‘yes’. If any of these central aspects are missing the declaration will not be considered to be a valid offer.

Unlike the Anglo-Canadian common law, §145 BGB states that ‘any person who offers to another to enter into a contract is bound by the offer, unless he has excluded being bound by it’²⁷¹ Therefore, the German law binds the offeror to his or her offer until the time

²⁶⁹ §116-§145 BGB

²⁷⁰ Supra Note 262 at 383

²⁷¹ §145 BGB Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437
(Last viewed 25/06/2013)

specified in the offer elapses or, if no time has been given, he or she is bound to leave the offer open for a 'reasonable' time²⁷².

Having said this, an offeror can avoid being bound by his or her offer, a party may include certain conditions in the offer which state that it is subject to change, without obligation or revocable.²⁷³ The fact that offers are considered binding under the German law of contracts therefore increases the likelihood that entering into an agreement will be taken seriously.

4.3.2.3 Acceptance (Annahme)

The acceptance of an offer under German Law is also a declaration of intent. An acceptance must be consistent with the offer. Much like the Canadian law, any alterations to the original terms result in the declaration of intent being considered to be new offer rather than the acceptance of the original offer. Though acceptance is normally communicated orally, in writing, it may also be communicated through certain behaviour such as parking a car in parking lot.²⁷⁴

The table below shows a comparison of the requirements for the formation of a valid contract in both the Anglo-Canadian common law and the German Civil law. It should be noted that the German law has fewer requirements than the Anglo-Canadian law.

²⁷² § 147 Abs. 2 BGB

²⁷³ Supra Note 262 at 384

²⁷⁴ BGHZ 21 319 (The Hamburger Parkplatz case)

Table 4.2 A comparison of the requirements of a valid contractual agreement in the Anglo-Canadian common law and the German civil law

The table below shows a comparison of the requirements for the formation of a valid contract in both the Anglo-Canadian common law and the German Civil law. It should be noted that the German law has fewer requirements than the Anglo-Canadian law.

	Offer	Acceptance	Intention to create legal relations	Consideration
Anglo-Canadian law requirements for a valid contractual agreement	Required	Required	Required	Required
German law requirements for a valid contractual agreement	Required	Required	Incorporated into the formation of a declaration of intent	Not required

4.4 Gatekeepers to the enforcement of promises in German law

Providing all of these elements are present, the parties to an already valid contract can alter the terms of that contract successfully without the need for the provision of consideration.

The reason for the enforcement of such agreements is the presence of a solid agreement between the parties. The German law finds it unnecessary to determine whether or not the promise has been ‘bargained for’ and relies instead upon consensus.

Having said this, from a common law perspective, it still seems that without the doctrine of consideration, there is more of a risk that some contracts which were not intended to be legally binding may be held to be enforceable at law.

However, like the Anglo-Canadian common law with its doctrines of economic duress and intention to create legal relations, the German Law has developed other legal principles which perform similar functions to those of the doctrine of consideration. Many of these principles and rules share similarities with the Anglo-Canadian doctrines but, as it shall be seen from the next few paragraphs, in the absence of consideration, the German rules tend to offer greater protection than those found in the common law of contracts. Some of the German legal rules and principles are inherent in the formation of the contracts in German law, others have developed separately.

4.4.1 Rules within the formation of contracts

4.4.1.1 The subjective elements of the declaration of intent

The different subjective elements which make up a declaration of intent ensure that, where a party enters into a contract of amendment, he or she must be aware of the implications of his or her actions. The inclusion of the subjective elements of a declaration of intent ensures that a party entering into a contract is aware of the legal consequences of his or her actions. The requirement of *Handlungswille* or intention to act, ensures that there is no possibility of entering into a contract accidentally. The requirement of *Erklärungsbewusstsein* ensures that the contracting parties must be aware that their actions will have legal consequences, and the need for *Geschäftswille* means that effect of the legal obligations resulting from a contract

must be clear. These three components ensure that the likelihood of a person being held liable for a gratuitous promise is fairly slim.

Having said this, any reservations which are not expressed by either party are disregarded according to §116 Abs. 1 BGB²⁷⁵ so as to protect the other party when they rely on the declaration given to them. If, however, the other party knew about the reservation, this section no longer applies and, according to §116 Abs. 2 BGB²⁷⁶ the contract is no longer considered to be valid.

The presence of the will to enter into a contract is enough to satisfy the German courts that the contract should be held to be legally binding. Thus, once again, unlike the common law, the German law does not require the presence of consideration to provide a reason for the enforcement of a contract. It is enough that the parties wanted to be bound by their agreement and behaved in such a manner as to suggest that this was their intention.

4.4.1.2 The requirement of the ‘essentialia negotii’

The German law of contracts requires that a contract contains all the essential terms necessary for its valid formation. These essential terms vary depending on the type of contract being made. The German Civil Code contains descriptions of twenty-two different types of contract and details the *essentialia negotii* required for each one. A contract of sale for example, must include the sale price and the subject matter of the contract otherwise it cannot be held to be a valid contract under the German law.

The requirement to include the essential terms of the contract under the German civil law means that both parties must have thought, at least in some detail about the content of the

²⁷⁵ §116 Abs.1 BGB

²⁷⁶ Ibid at Abs.2

agreement. The *essentialia negotii* requirement thus has a similar channelling effect to that of the doctrine of consideration because it encourages both parties to consider at least the basic content of their agreement more closely. One of the functions of the requirement of *essentialia negotii* is therefore evidentiary as it acts as a means of determining whether or not the parties intended to enter into a contractual agreement.

4.4.1.3 Joke transactions

According to §118 BGB²⁷⁷ a false declaration of intent, often known as a joke declaration can also be considered grounds for the nullity of a contract. There are two elements to the joke declaration. The first of these elements is that the declaration of intent must have been regarded by the other party as a genuine declaration. The second of these elements is that the person making the declaration must have expected the other party to take the declaration as a joke. The person making the declaration has a duty to, ‘set the other party straight’ and explain that they did not mean for the declaration to be taken seriously. Where this is the case, the contract will be held to be void. However, if the other party has relied upon the joke declaration, under §122²⁷⁸ they may be entitled to compensation for any loss resulting from that reliance.

Thus, if a proposal for the modification of a contract was not intended to be taken seriously, it is not an agreement and what would otherwise be considered to be a valid contract of amendment is null and void. This protects those who do not intend to enter into an agreement from becoming a part of one. This is a reflection of the principle of freedom of contract, or in this case, freedom from contract which is central to the German civil law and

²⁷⁷ §118 BGB

²⁷⁸ §122 BGB

the fact that the German model relies upon the will of the parties. In this case, the ‘joker’ had no will or intention to enter into a binding agreement.

4.4.1.4 Sham transactions

§117 BGB reads:

(1) If a declaration of intent that is to be made to another person is, with his consent, only made for the sake of appearance, it is void.

(2) If a sham transaction hides another legal transaction, the provisions applicable to the hidden transaction apply.²⁷⁹

This concept is not one recognised in the common law of contracts. A sham transaction exists when a contract is formed with the intention of creating the illusion that it is for one purpose but it is in fact made for an entirely different one. Usually, sham transactions are not intended to have any real legal effect; they are created to hide the true nature of the transaction. The BGB states that where the sham transaction is held to be void, the actual transaction is then subject to the provisions in the Code. Thus, once again it becomes apparent that it is the actual will of the parties which is important under the German law of contract rather than their apparent will.

4.4.1.5 Breach of a law or good morals

According to §138 BGB, any contract which is in breach of a law or good morals may be held to be invalid. The section states that:

The Article states that:

²⁷⁹ §117 BGB Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437
(Last viewed 17/11/2013)

(1) A legal transaction which is contrary to public policy is void.

(2) In particular, a legal transaction is void by which a person, by exploiting the predicament, inexperience, lack of sound judgement or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.²⁸⁰

This section is particularly important with regards to those situations in which the parties are of unequal bargaining power and it is often invoked in circumstances where one party seeks to pressure the other into agreeing to a variation of the contract terms but where this pressure does not amount to duress (economic or otherwise).

The rules in this Section are often compared to the English equitable doctrine of undue influence but there are in fact some large differences between the two sets of principles²⁸¹. It might be more accurate however, to compare this Section to the Canadian doctrine of unconscionable transaction which has gone considerably further than the English law of undue influence.

The doctrine of unconscionable transaction allows the courts to set aside agreements where “even in the context of bargaining by complete strangers, unfair agreements resulted from an inequality of bargaining power”²⁸² In *Waters v. Donnelly* (1884), 9 O.R. 391²⁸³ an unconscionable transaction was described as a situation where:

²⁸⁰ § 138 BGB Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 17/11/2013)

²⁸¹ For further information see http://ouclf.iuscomp.org/articles/hadjiani.shtml#IV_A (Last viewed 25/06/2013)

²⁸² Supra Note 184 at 424

²⁸³ *Waters v. Donnelly* (1884), 9 O.R. 391

two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts show that one party has taken undue advantage of the other by reason of the circumstances I have mentioned, a transaction resting upon such unconscionable dealing will not be allowed to stand.²⁸⁴

The difference between the doctrine of unconscionable transaction and undue influence is somewhat subtle, but the two doctrines are by no means one and the same. The doctrine of unconscionable transaction does not challenge the consent of the weaker party, instead, it challenges “the unfair advantage gained by an unconscientious use of power by a stronger party against a weaker”²⁸⁵. The doctrine of unconscionable transaction is therefore highly similar to the German rules held in Section 2 of §138 BGB²⁸⁶.

The successful use of this §138 BGB renders the agreement void and allows the claimant to avoid any obligations associated with that particular contract.

One particularly interesting and relevant aspect of this particular Section of the BGB is the use of the term public policy, though this should perhaps be translated as ‘public morals’ if we are to keep within the true meaning of the statute. According to case law, the ‘Bundesgerichtshof’ or German Federal Supreme Court interprets §138 (1) BGB²⁸⁷ to mean any legal transaction which “contravenes the sense of decency of all right and proper

²⁸⁴ Ibid

²⁸⁵ *Morrison v. Coast Finance Ltd* (1965), 54 WWR 257, 55 DLR (2d) 710

²⁸⁶ Supra Note 280

²⁸⁷ Ibid at Abs.1

thinking persons”.²⁸⁸ According to many scholars, the generality of this particular clause makes it very hard to apply and “can only be done by reference to the different categories of cases developed by the BGH.”²⁸⁹ These cases include:

Contracts concerning the provision of services related to sexual activities such as telephone sex....A contract for surrogate motherhood contravenes good morals if it renders the child a mere commercial object of the legal transaction. Equally void are oppressive contracts restricting one party’s economic freedom because of the other’s powerful position.²⁹⁰

The fact that a contract can be deemed void for being considered contrary to public morals allows judges to overtly decide cases on the basis of policy and fairness as well as ensuring that weaker parties cannot be taken advantage of. This is not currently a feature of the English or Canadian law and, as we have seen from the previous chapter, one of the key issues surrounding the doctrine of consideration is its use by the judges as a method of hiding the fact that decisions have been made on the basis of public policy or fairness.

As seen from chapter 3 of this thesis, it seems that the judges within the common law sometimes make their decisions based on entirely different factors and use consideration as a means of barring or facilitating claims as they see fit. Where they decide a contract should be enforced, they find consideration, where they decide that a contract should not be held binding, they do not find consideration. If the Anglo-Canadian common law were to include a provision such as this, judges would no longer have to use consideration in such a manner. Instead, they could base their decision on whether or not the transaction was contrary to

²⁸⁸ Supra Note 262 at 391

²⁸⁹ Ibid

²⁹⁰ Ibid

public morals or ‘policy’. This would prevent the doctrine of consideration being used as a ‘cover-up’ for decisions which are not in fact based on the finding of valid consideration thus leading to greater transparency.

This Section also increases the possibility of avoiding the enforcement of promises where the bargaining power of the parties is unequal. The fact that the exploitation of such things as a ‘lack of sound judgement’ and ‘inexperience’ and can be invoked as a reason for holding a promise to be unenforceable under the German law demonstrates the wide scope of this particular Article. Though it may be possible through the Canadian doctrine of unconscionable transaction to render an agreement void on grounds similar to these, it is not currently possible under the English law of contracts.

4.4.1.6 Duress and deceit

As with the Anglo-Canadian common law, the German law has developed a set of rules which prevent those agreements which have been induced through physical or economic duress and deceit from being held valid. Section 123 BGB²⁹¹ allows for the voidability of a contract on the grounds of deceit or duress. It states that:

(1) A person who has been induced to make a declaration of intent by deceit or unlawfully by duress may avoid his declaration.

(2) If a third party committed this deceit, a declaration that had to be made to another may be avoided only if the latter knew of the deceit or ought to have known it. If a person other than the person to whom the declaration was to be made acquired a right

²⁹¹ §123 BGB

as a direct result of the declaration, the declaration made to him may be avoided if he knew or ought to have known of the deceit.²⁹²

Once again, this aspect of the German law touches upon the morality of a contract. It prevents those contracts which may have been induced through immoral means from being enforced by the law. This is particularly relevant to the modification of contracts because it is often in situations where one party wishes to alter the terms of a contract that such instances occur. The German on duress is similar to the Anglo-Canadian common law, and ‘deceit’ can be loosely likened to actions for misrepresentation in English law. The German law defines deceit as “the creation of a false impression or mistake in the mind of the other causing them to make the declaration in the form expressed.”²⁹³ Deceit in German law must be intentional and “gross negligence would not satisfy.”²⁹⁴

In the case of duress, the scope of ‘threat’ in the German law is much wider than that of the Anglo-Canadian common law. Indeed, a threat under German law “need not even come from the other party to the contract. The requirement of unlawfulness can be satisfied in a variety of ways and it need not be criminal unlawfulness. Threat of an irrelevant prosecution would suffice.”²⁹⁵ The fact that a contractual agreement can be rescinded on these grounds demonstrates the importance placed upon the will of the parties. The idea that the will of the parties could be tainted by deceit or duress is obvious cause for concern, especially where the reason for the enforcement of a promise lies within the intention of the parties to be bound.

²⁹² Ibid Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 17/11/2013)

²⁹³ Supra Note 262 at 396

²⁹⁴ Ibid

²⁹⁵ Raymond Youngs, *Sourcebook on German Law*, (Portland: Cavendish Publishing, 2002) at 281

In order for the presence of economic duress to be found under the German law, several conditions must be satisfied. Firstly the threatened party must be “induced illegitimately”²⁹⁶ into entering into the contract. In order for this to occur, there must be an illegitimate threat. Under the German law, the definition of an illegitimate threat is considerably wider than the definition under the common law:

First, and most usually, because of the illegitimacy of the means (nature of the pressure) which are used to induce the other person. Secondly, it is because of illegitimacy of the intended purpose (demand) pursued by the threatening person. Thirdly, and most arguably, because the used means are themselves legitimate but socially inadequate compared the intended legitimate purpose. Social inadequacy is established if the threat fails the good faith test.²⁹⁷

Once it has been established that an illegitimate threat was made, it must be determined as stated in §123 BGB²⁹⁸ whether or not this threat caused the threatened person to enter into the agreement in question. It has been accepted by the German courts that one party will have been considered to have been induced by another into entering an agreement where, but for the threat, he would not have entered into said agreement, or where he would have entered into the agreement but under different terms.²⁹⁹ The threat need not be the only reason for entering into an agreement, but it must be a contributory cause and the test for inducement is subjective and is therefore decided from the perspective of the threatened person.³⁰⁰

²⁹⁶ Supra Note 258 at 51

²⁹⁷ Ibid

²⁹⁸ Supra Note 291

²⁹⁹ BGH NJW 1964, 811

³⁰⁰ Supra Note 258 at 51

4.5 Einseitige Vertragsänderungen (unilateral amendments to contracts)

Though, under normal circumstances, it is not possible to legally vary the terms of a contract unilaterally under the German law, even where one party is unhappy with the terms of the contract, it remains valid and enforceable. It is possible however, for a contract to be unilaterally amended under certain specific situations. Vertragsanpassung or contractual adjustment is possible. These circumstances are cases in which one party has the right to an adjustment. An example of this is §593 BGB³⁰¹ which allows for the amendment of farm leases. The section states that:

- (1) If, after the usufructuary lease is entered into, the circumstances that were decisive for the determination of the performance under the lease change with lasting effect in such a way that the mutual duties are in a gross disparity to each other, then each party to the contract may demand an amendment of the lease, with the exception of the duration of the lease...³⁰²

A contract may also be unilaterally amended in the case of ‘interference with the basis of the transaction’. In this case, §313 BGB³⁰³ states that:

- (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory

³⁰¹ §593 BGB Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 17/11/2013)

³⁰² Ibid

³⁰³ §313 BGB Translation found at: http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437 (Last viewed 17/11/2013)

distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.

(2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

(3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.³⁰⁴

Section 1 of this Article is a particularly important exception to the rule that no unilateral contractual modifications are valid under the German law. §133 Abs. 1 is the result of the codification of long established case-law and it allows for the adaptation of contracts where the circumstances surrounding the formation of the contract (the basis of the contract) have changed and the purpose of the contract has become void³⁰⁵. An example of this is a case in which a hall was booked for the purpose of hosting a music recital. When the performer fell ill and was unable to attend, the parties were able to abandon the contract for the hiring of the hall because the purpose of the agreement was to have a venue for the recital. Since the recital was no longer going to take place, the basis of the contract no longer existed and the contract was avoidable. This case would now fall under §313 BGB³⁰⁶ as would the case in which a person rented out a boat house on a lake and, not long after the parties signed the contract, the local authorities banned sailing on that particular lake.³⁰⁷

³⁰⁴ Ibid

³⁰⁵ Matthias Reimann & Joachim Zekoll eds, *Introduction to German Law* (The Hague: Kluwer Law International, 2005) at 196

³⁰⁶ OLG Bremen NJW 1953, 1393

³⁰⁷ BGH WM 1971, 1300

4.5.1 Contractual ‘forgiveness’

Unusually, the German law allows for the unilateral release of one party by the other from a contractual agreement. §397 BGB³⁰⁸ states that:

(1) The obligation expires if the obligee forgives the obligor the debt by contract.

(2) The same applies if the obligee acknowledges by contract with the obligor that there is no obligation³⁰⁹

The wording in this particular section makes it clear that a contract is required in order for one party to ‘forgive’ the other for his contractual debt. However:

though this section ‘seems as a general principle to require a contractual route, for the creation and variation of obligations, if the purpose of that provision is considered (it being designed to encapsulate freedom from contract) then it is consistent with that purpose to recognise unilateral renunciations, if that is the form which the renouncing party wishes to give the renunciation’.³¹⁰

Kleinschmidt argues that, in practice, the German courts tend to disregard this provision and will allow unilateral release from contractual obligations. Kleinschmidt’s argument with regards to the validity of contractual forgiveness is not universally accepted and thus, the matter is still open for debate but many have accepted that it is convincing. Should his position be fully accepted, unilateral release from contractual obligations would be considered valid under German law without the need for a contract³¹¹.

³⁰⁸ §397 BGB

³⁰⁹ Ibid

³¹⁰ Supra Note 97 at 439

³¹¹ Ibid

4.6 Are there problems with the German law on the modification of contracts?

Though the German law rules on the modification of contracts are generally considered to be less problematic than those of the English and Canadian common law systems, they are some unresolved issues with regards to the interpretation of certain provisions. The two most obvious examples are that of Erklärungsbewusstsein requirement in the formation of a declaration of intent and the validity of a unilateral renunciation of a contract without a contract. The German contract law has however been highly influential in the development of the various international model codes and it appears to be an excellent source of inspiration for the drafting of new laws.

4.7 Conclusions from this chapter

The German law civil law does not require consideration to support an agreement for the modification of a contract, nor does it have any requirement similar to that of the doctrine of consideration. Instead, it relies upon the presence of consensus between the contracting parties and their intention to be bound by their agreement. The German law recognises the agreement of the parties as the reason for the enforcement of the promise. It seems therefore that there is no need for an added reason to enforce the promise.

In the absence of the doctrine, other mechanisms have been developed in order to aid the further distinction between those promises which should be considered to be enforceable and those which should not. Though many of these mechanisms are similar to those found in the Anglo-Canadian common law, the German laws which concern such matters as duress have a much wider scope than those present in the common law. The German law also offers

several reasons for the non-enforcement of a promise that the common law does not. §138³¹² of the Bürgerliches Gesetzbuch for example, allows the courts to refuse to enforce a promise on the grounds that it is against public policy or good morals, a mechanism which is currently completely unavailable to the common law judges. Thus, though the German law does not require as many reasons *to* enforce promises, it has many more reasons *not* to enforce promises. Thus, the distinction between gratuitous and legally enforceable promises is easily made without the doctrine of consideration.

There are two main aspects of the German law which might be particularly useful if it is to be used as an aid in the reform of the doctrine of consideration in the Anglo-Canadian common law. These aspects are 1) the fact that the German law recognises the intention of the parties to be legally bound by their agreement as a valid reason for the enforcement of a promise and 2) Though the German law does not require requires fewer reasons *to* enforce a promise, it offers more reasons *not* to enforce promises. Many of these reasons are also present in the Anglo-Canadian common law. Duress for example, has long been present in the English and Canadian law, but the German law rules on duress have a much wider scope than those found in the common law. The German law therefore appears to be more inclined towards the presumption that promises are enforceable but it also affords better protection against exploitation and unfairness.

In the next chapter, I seek to determine how the German civil law rules on the modification of contracts might be used to reform the doctrine of consideration in the Anglo-Canadian common law. I also examine the extent to which these rules can be transferred from the German law into the English and Canadian common law.

³¹² Supra Note 280

Chapter 5: How might the German civil law be used to modify the Anglo-Canadian law of contracts?

5.1 General comments

There are several ways in which the Anglo-Canadian common law might be reformed. It can be reformed through judicial decision-making, through legislation and through a restatement of the law, similar to that published in the US. Each of these methods has its merits and its disadvantages and it is here that I intend to discuss each of them. It is also important, when deciding how best the reform of the doctrine of consideration might be approached, to consider previous attempts at reform and the reasons for which they were unsuccessful, and I therefore also take these into account. I also make suggestions as to what extent the German law might be used in the preferred method of reform and which German rules might be helpful in that capacity. Though I do include examples of what the reformed law might look like, my intention is to create a basis from which future reform committees might work rather than to draft laws which might be adopted without further discussion and analysis. My objective here is to suggest how and in what direction the law might be reformed rather than to create a set of rules which I believe to be the best possible outcome.

5.2 Previous attempts at the reform of the doctrine of consideration

As previously stated, there have been several attempts to encourage the reform of the doctrine of consideration in both Canada and the United Kingdom, but none of these have resulted in the removal of the doctrine of consideration or significant levels of reform. In order to make viable suggestions of my own, it is important to acknowledge and address the flaws in these original proposals for the reform of the doctrine of consideration so as to avoid repeating the mistakes already made.

The first real attempt at the reform of the doctrine of consideration appears to be the 1937 Sixth Interim Report on the statute of frauds and the doctrine of consideration by the Law Revision Committee³¹³. This report suggested that the doctrine of consideration had become a problem. It states that:

the doctrine of consideration is a mere technicality, which irreconcilable either with business expediency or common sense, and that it frequently affords a man a loophole for escape from a promise which he has deliberately given with intent to create a binding obligation in reliance on which the promisee may have acted.³¹⁴

Thus, those composing this report recognised, even in 1937, that the doctrine of consideration was especially problematic in the context of business transactions.

This report suggested, among other things, that the requirement of consideration could be removed where promises were made in writing. The idea being that the formal act of writing and signing a contract would perform the necessary evidentiary functions to establish the intention of the parties. Indeed, the report said that:

Intention ought to be provable by other by other and equally persuasive evidence such as, e.g., the fact that the promisor has put his promise in writing.³¹⁵

It was also suggested that the rule that states that a promise to perform a pre-existing duty is not good consideration should be abolished. It states that:

In our opinion...a promise made by A to B in consideration of B doing or promising to do something which he is already bound to do should be enforced by the law,

³¹³ Supra Note 9 at 17

³¹⁴ Ibid

³¹⁵ Ibid at 18

provided that in other respects such as legality and compatibility with public policy it is free from objection³¹⁶

Though several plausible and insightful suggestions were made by the Law Revision Committee in this report, none of their suggestions were ever implemented.

Though there may be many reasons for the failure of these suggestions for reform, commentators have highlighted several key aspects which may have contributed to the fact that they were never adopted. Sutton states that:

Having declared that consideration and writing were persuasive evidence (whatever that might mean) of the parties' intention to be bound, the Committee adopted the view that it would still be necessary for the plaintiff to prove, as a separate and essential part of his case, that his intention to create a binding obligation existed. In other words, this recommendation of the Committee substituted for consideration the formality of writing, which served the purpose of proving that the promise had been made, but which still left open the question whether or not the parties intended to be bound. Further, even if an intention to be bound were clearly established, the plaintiff could not succeed in the absence of both writing and consideration.³¹⁷

Thus, the first major flaw in the 1937 Committee's proposals for reform was the fact that its recommendations were 'confused'³¹⁸. Not only did the Committee fail to remove the problematic requirement of consideration, but it did not establish the purpose of the doctrine, nor did it offer any real solution to the problems it was trying to address.

³¹⁶ Ibid at 22

³¹⁷ KCT Sutton, *Consideration Reconsidered* (Queensland: University of Queensland Press, 1974) at 224

³¹⁸ Ibid at 225

According to Sutton, the general opinion of many of the critics is that where an agreement is made in writing, the requirement of consideration *and* intention to create legal relations should be removed because, if the “formality of writing is to be prescribed, it should carry with it by necessary implication, the existence of an intention to be legally bound”.³¹⁹ Sutton then argues that:

The ideal solution would be to restrict the elements of contract to two-agreement and intention to affect legal relations-and to let the existence of consideration or writing serve as one but not the only means of establishing the second of these two elements.³²⁰

There were also further problems surrounding the acceptance of the other recommendations made in the Sixth Interim Report. For example:

There was a diversity of opinion on the desirability of reforming the doctrine of consideration along the lines indicated. There was almost universal agreement on the need for *some* reform of the doctrine, but much less agreement on how far this reform should extend.³²¹

Because of this disagreement, the various proposals received mixed reactions. Some proposals such as the removal of the rule that a promise to perform a pre-existing contractual duty is not good consideration were met with considerable support, whereas others, such as

³¹⁹ Ibid at 224

³²⁰ Ibid

³²¹ Ibid

the removal of the rule that past consideration is no consideration, were widely regarded as unwise.³²²

It is not surprising then, especially when one considers the controversy and criticisms surrounding them, that the Committee's recommendations were never adopted. While drafting proposals for reform, it is therefore important to consider how such problems might be avoided. Now at least, it seems that the demand for the reformation of the doctrine of consideration has been strengthened and there is less likely to be as much opposition (especially in Canada) to more radical proposals. Nevertheless, it is important to consider the attitudes of the judges, academics and lawyers when attempting to create plausible suggestions. One thing in particular which should be noted about the failure of these recommendations is that the Committee's attempt to please both the critics and the supporters of the doctrine of consideration meant that the changes made to it were minimal and failed to please either side.

The Ontario Law Reform Committee took a different approach to the encouragement of the reform of the doctrine of consideration but, once again none of its proposals were implemented. The recommendations of the committee suggested that:

- a) an agreement in good faith modifying a contract should not require consideration in order to be binding:
- b) an agreement that excludes modification or rescission except by a signed writing should not be otherwise subject to modification or rescission but, except as between parties acting in the course of business, such a requirement on a form

³²² Ibid

supplied by a party acting in the course of a business should be required to be signed separately by the other party:

- c) an attempt at modification or rescission that does not satisfy the requirements of the preceding paragraph or that does not satisfy any statutory requirement of writing or corroboration should be capable of operating as a waiver or equitable estoppel: and
- d) where paragraph (c) applies, a party who has waived compliance with an executory portion of a contract should be able to retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived unless it would be unjust in view of a material change in position in reliance on the waiver to allow the waiver to be retracted. In the case of an equitable estoppel, a similar principle should apply.³²³

There may be many reasons for the fact that this report was never implemented but there do appear to be some merits to the suggested reforms. The recommendation that an agreement to modify a contract made in good faith should not require consideration in order to be binding is one that would bring the common law of Ontario in line with some of the more modern legislation (such as the UNIDROIT Principles of International Commercial Contracts) and is also more similar to the German civil law. Expressly stating that there is a requirement of good faith is somewhat uncharacteristic of the Canadian contract law. Thus the inclusion of a good faith requirement might prove somewhat difficult as there is no definition of good faith within the Canadian law, having said this, it is once again, in line with European law. Aside from this it does not appear that, at least as far as the recommendations for the reform of the

³²³ Supra Note 10 at 33

doctrine of consideration are concerned, that the problem lies within the substantive suggestions.

Jacob S. Ziegel makes some interesting observations in his “OLRC's Law of Contract Amendment Report: A Brief Introduction”³²⁴. Though he does not comment directly on the suggestions for the reform of the substantive rules relating to the doctrine of considerations, Ziegel does highlight some other problems with the report. For example, he states that:

The perceptive reader will detect some apparent inconsistencies in the Report: sometimes, as in the case of minors' contracts and unconscionable terms, the recommendations are spelled out in considerable detail and accompanied by shopping lists of illustrative criteria for the exercise of discretionary powers. In other cases, notably those involving the statutory adoptions of a doctrine of good faith and recognition of third party contracts, the report limits itself to a bare bones statement of principle.³²⁵

Thus the way in which the recommendations are explained may be one of the reasons the proposals were never implemented. More likely though, is the fact that the implementation of these rules proved difficult. The main reason for this is also highlighted by Ziegel. He states that:

Given the fact that, in Canada, the regulation of contractual relations is primarily a provincial responsibility, we need to give some thought too, to the best means of maintaining substantial uniformity of contract principles among the common

³²⁴ Jacob S Ziegel “OLRC's Law of Contract Amendment Report: A Brief Introduction” (1988) 14:1 Can Bus LJ 1 at 10

³²⁵ Ibid at 9

provinces. There is, I fear, a very real danger that unless the provinces co-operate more successfully to promote uniform legislation than they have up to now, we may before long have as many contract law regimes as there are provinces.³²⁶

Thus, one of the major problems with the implementation of the recommendations made by the Ontario Law Reform Commission seems to have been the prospect of creating further division between the Canadian provincial contract law regimes.

Ziegel goes on to ask “if uniform contract law amendment is an unrealistic prospect, should we aim instead for a Canadian-style restatement?”³²⁷ His answer to this question is no on the grounds that the situation facing Canada is not similar enough to that facing the U.S. and that it therefore does not merit a restatement. He also argues that:

Our problem by and large, is not so much the difficulty of determining what the current rules are but how to persuade the courts to adopt better rules where the existing ones are perceived to be defective. A Canadian restatement of contract law would have to be as much a blueprint for desirable changes as a statement of existing principles and would therefore be much more difficult to sell.³²⁸

The question then, is what options are there for the implementation of any proposals for reform which could be made as a result of looking to the German law.

³²⁶ Ibid at 11

³²⁷ Ibid

³²⁸ Ibid

5.3 Possible methods for the implementation of recommendations for reform

5.3.1 The possibility of judicial reform

Unlike the German civil law system, there are several ways in which the Anglo-Canadian common law may be reformed. The first of these methods is through decisions made by judges which diverge from the previously accepted precedent. This was the case in *NAV Canada v. Greater Fredericton Airport Authority Inc.*³²⁹ in which, as will be recalled, New Brunswick Court of Appeal held that the requirement of consideration could be eliminated in the context of agreements to modify contracts where there was no economic duress present. The New Brunswick Court of Appeal judges came to this decision on the basis of the idea that the requirement of consideration:

offends reality and lacks “commercial efficacy” because it ignores the practical necessity, at times, for reasonable parties to adjust their bargains to deal with unanticipated post-contractual contingencies and, because it does that, it fails to protect such parties’ “legitimate expectations” that their voluntary adjustments will be recognized in law as enforceable.³³⁰

The advantages of such a reform include the fact that it does not involve a lengthy drafting process, the fact that case law can be highly influential, not just in the country that the case was decided but also in other jurisdictions of a similar type, and the fact that the doctrine of consideration is a judge-made and there is some feeling that it should therefore be amended or abolished by the judges themselves.

³²⁹ Supra Note 12

³³⁰ Rick Bigwood, “Doctrinal reform and post-contractual modifications in New Brunswick: *Nav Canada v. Greater Fredericton Airport Authority Inc.*” (2010) 49:2 Can Bus LJ 256 at 260 Available online at http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1380&context=law_pubs (Last viewed 15/07/2013)

However, there are also several disadvantages to this approach which cannot reasonably be ignored. The first of these disadvantages is the fact that, under the English and Canadian law, the courts do not, or should not, at least in theory, have the power to modify the law to the extent which they would have to in order to abolish the doctrine of consideration and replace it with other rules. There was some argument that the judges who encouraged the ‘refinement’ of the law on contracts in *NAV Canada v. Greater Fredericton Airport Authority Inc.*³³¹ had gone beyond their powers and were in fact usurping power from the legislature. In order to reform the law using judicially, the ‘right’ case must also come to the court. There is a possibility therefore, that the ‘right’ case might not arise for a considerable amount of time, leaving the reform of the doctrine of consideration at a standstill. Not only that, but the English judges especially, appear to have a certain degree of attachment to the doctrine of consideration and they are often somewhat reluctant to remove the doctrine from the common law. When one considers these disadvantages, it may be wise to seek alternative methods for the reform of the doctrine of consideration.

5.3.2 The possibility of legislative reform

Legislative reform is another way in which the doctrine of consideration could be formally abolished from both the English and Canadian law. The advantages of this approach (when considering the adoption of the German law into the English and Canadian Law) include the fact that the German law is legislative in form. Thus it would be significantly easier to incorporate clauses taken from the German civil law into the Anglo-Canadian common law. Legislative reform also has the advantage of being unquestionably binding on every court and cannot simply be overturned by a later decision. This means that, if the doctrine of

³³¹ Supra Note 12

consideration were to be completely eradicated from the Anglo-Canadian common law, it could not be re-instated without further legislative reform.

Problems arise however, particularly with regards to the reform of the Canadian law because contract law is currently regulated on a provincial level and a country-wide abolition of the doctrine of consideration would require the agreement of each and every province to implement legislation to that effect. Not only this, but drafting such legislation would be a long and complex process and would require a certain amount of support in order to be passed. It therefore seems that the adoption of such a method would also be inadvisable.

5.3.3 The possibility of the creation of a restatement or model laws

Thus we return to the method of reform discussed by Ziegel: a restatement similar in some ways to the United States' Restatement of the Law of Contract (First and Second)³³² but in other ways very different.

The purpose of a restatement is most commonly used to inform judges and lawyers about the common law as it stands. Thus, the American Restatements appear very similar to the codification of the case law. They take the decisions made by judges over the course of many years and convert them into sets of principles.

The aim of the American Restatements was to clarify the law where it was unclear or under discussion in some way. The second Restatement addresses the issue of the doctrine of consideration and its place within the law of contracts. Though the Restatement Second does not go as far as to abolish the doctrine of consideration, it does reaffirm the idea that, where a

³³² *Restatement (First) of Contracts* (1932) and *Restatement (Second) of Contracts* (1981)

promise has been relied upon, no consideration is necessary in order for that promise to be deemed enforceable providing that the reliance was reasonable³³³.

For example, §17 comment (e) of the Restatement (Second) of Contracts covers the requirement of bargain:

e. Informal contract without bargain. There are numerous atypical cases where informal promises are binding though not made as part of a bargain. In such cases it is often said that there is consideration by virtue of reliance on the promise or by virtue of some circumstance, such as a "past consideration," which does not involve the element of exchange....There is no requirement of agreement for such contracts. They are the subject of §§82-94.³³⁴

Thus, even though the Restatement (Second) of Contracts does not entertain the idea that consideration should be removed from the common law, it does act as a means of reforming the doctrine, at least to some extent, by clarifying the pre-existing duty rule.

The success of the American Restatements is clear. They have become a highly influential source of guidance for the interpretation of legal rules and, though some of the sections do in fact go against previously accepted legal doctrine, they have been widely cited by judges and the rules within the Restatements have largely been accepted as if they had the power of law³³⁵.

³³³ *Restatement Second of Contracts* §17 Comment (e)

³³⁴ *Ibid*

³³⁵ Gregory Klass, *Contract Law in the US*, (Alphen aan den Rijn: Kluwer Law International, 2010) at 46

Similar mechanisms have also been used by some international organisations such as UNIDROIT. The UNIDROIT Principles of International Commercial Contracts³³⁶ have a similar effect to a restatement but they would perhaps better be described as “model laws” since they are the result of a combination of laws from many different jurisdictions used to make a new, harmonized set of principles. Once again, they do not have any legally binding effect but have been highly influential not only in the realm of international contract law, but also in the interpretation of other international regulations and, in some cases, even national law.

Such a mechanism can also be designed to reflect the current attitudes and opinions of the legal community. Thus, where the majority of the legal community agrees that a particular legal rule should no longer be a part of the common law, a model law similar to the UNIDROIT Principles of International Commercial Contracts can be used to remove that legal rule.

It is this type of action which would perhaps best suit the situation facing Canada and England. In order to include various aspects of the German law, an English or Canadian “model law” would have to be similar to the UNIDROIT Principles of International Commercial Contracts in that it would be a new set of rules created using inspiration taken from the legal rules of more than one jurisdiction (in this case England, Canada and Germany).

Like the UNIDROIT Principles of International Commercial Contracts and the American Restatements, a model law could be used as means of guiding the interpretation of

³³⁶ Supra Note 16

legal rules as well as being a persuasive device to encourage the eventual legislative reform of the doctrine of consideration. Once again, model laws do not usually have any legally binding effect, but they do carry a significant amount of persuasive power. The reason for this persuasive effect is the fact that they are written by scholars, judges and law professionals alike and are usually the result of a thorough drafting process.³³⁷

The most obvious problem with this method of reformation is the possibility that the rules included in a set of model laws could simply be ignored by the legal community. As seen from the preceding chapters, in the United Kingdom for example, the UNIDROIT Principles of International Commercial Contracts have not been received with a great deal of enthusiasm. Having said this, a lack of legally binding effect can also be an advantage. Because a set of model laws does not need to be enacted into legislation in order to have effect, it could reasonably be adopted by many different provinces within Canada as well as in England as a whole. Though it might indeed, as Ziegel says, be “difficult to sell”³³⁸ and it might prove extremely hard to convince the judges (and eventually the legislature) to adopt the rules, the “model law” offers a means of altering the law surrounding the doctrine of consideration in the modification of contracts which does not require each and every province to legislate, they could simply adopt the “model law” into legislation.

It seems then, that, especially in respect to the reform of the doctrine of consideration in Canadian law, the creation of a set of model laws offers the most viable, though not unproblematic, solution to the problem that is the doctrine of consideration.

³³⁷ Supra Note 335 at 45

³³⁸ Supra Note 324

5.4 To what extent can and should the German law be used to draft this new set of model laws?

Now that it has been established that the best way to begin the reform of the doctrine of consideration is likely to be a model law of contracts, it is important to examine the extent to which the German law may be used in the reform of the modification of consideration in the English and Canadian law. Firstly, there is the possibility of the direct transplantation of the civil law rules into the English and Canadian systems with few changes to the German law as it stands within the German legal system; secondly and alternatively, there is the possibility of using the German civil law rules as ‘inspiration’ for the reform of the English and Canadian law on the modification of contracts; thirdly, By demonstrating that the German contract law is effective without the doctrine of consideration, it is possible to suggest that the common law could reasonably manage just as adequately without it. In other words, it is possible that the German civil law rules could be used as a persuasive device. By this, I mean that they could be utilised as a good example of rules within a legal system which functions effectively without the doctrine of consideration thus encouraging movement away from the Anglo-Canadian doctrine of consideration towards a new set of laws more suited to modern contract law needs. I analyse each of these possibilities in turn.

5.4.1 The transplantation of the German civil law rules into the English and Canadian law

There are several different arguments which surround the transplantation of legal rules from one jurisdiction to another and there are varying theories as to whether or not it is indeed possible to conduct a successful legal transplant. I do not wish to delve too far into the theories surrounding legal transplants for several reasons: firstly, in order to address these

issues fully, I would be required to stray from the focus of this paper, which is of course, how the German law specifically can be of use to the reform of the doctrine of consideration.

Secondly, much like the purpose of the doctrine of consideration, this is a subject which has long been discussed within the legal community and a great deal has already been said about legal transplants. Having said this however, it is important to note that there are several different theories concerning the transplant of legal rules; these theories might easily have an effect on the adoption of a new set of rules which has been transplanted from the German legal system.

The debate surrounding legal transplants centres around two schools of thought. There are those who subscribe to the theory that the transplantation of legal rules can be successful and indeed has been: the ‘transferists,’ and those who believe that the law derives its meaning from the context in which it is developed and cannot be detached from this context: the ‘culturalists’.

5.4.1.1 The transferists

Alan Watson was the first to coin the term “legal transplant” and is considered to be one of the leading ‘transferists’. His theories are one of the biggest influences surrounding the transferist movement. Watson defines the transplantation of legal rules as:

The moving of a rule or a system of law from one country to another, or from one people to another³³⁹

³³⁹ Supra Note 43 at 21

He argues that legal transplants have been occurring throughout legal history and that they are a substantial part of the development of many different legal systems. He also states that legal transplants are “socially easy”³⁴⁰:

Whatever opposition there might be from the bar of legislature, it remains true that legal rules move easily and are accepted into the system without too great difficulty. This is so even when the rules come from a very different kind of system. The truth of the matter seems to be that many legal rules make little impact on individuals, and that very often it is important that there be a rule; but what rule actually is adopted is of restricted significance for general human happiness.³⁴¹

Though it does seem that there are many historical instances in which the transplantation of legal rules have indeed been successful, there are other issues which must be considered, namely, those addressed by the culturalists.

5.4.1.2 The culturalists

The ‘culturalists’ notion that the law cannot be separated from its origins leads back to Montesquieu’s theory that the law is embedded in the culture in which it was developed; he said that:

Law in general is human reason, inasmuch as it governs all the inhabitants of the earth: the political and civil laws of each nation ought to be only the particular cases in which human reason is applied. They should be adapted in such a manner to the

³⁴⁰ Ibid at 95

³⁴¹ Ibid at 96

people for whom they are framed that it should be a great chance if those of one nation suit another.³⁴²

Legrand offers a particularly interesting counter argument to Watson's theory. He states that:

I disagree with Watson's views which I regard as providing a most impoverished explanation of interactions across legal systems - the result of a particularly crude apprehension of what law is and of what a rule is.³⁴³

Legrand puts particular emphasis on the idea that the meaning of a rule is not derived from the words of the rule itself. Instead, rules are given meaning by the society and culture in which they are created. He states that:

No form of words purporting to be a 'rule' can be completely devoid of semantic content, for no rule can be without meaning. The meaning of the rule is an essential component of the rule; it partakes in the ruleness of the rule. The meaning of a rule, however, is not entirely supplied by the rule itself; a rule is never completely self-explanatory.³⁴⁴

According to Legrand the transplantation of these rules without their context, leads to what is essentially the transportation of virtually meaningless rules which are, in turn, interpreted by the new host legal system and given new meaning.

While Watson's transferist theory might be somewhat accurate when one looks at legal transplants from a historical point of view, it seems that it may be considered overly

³⁴² Charles Baron De Montesquieu, *The Spirit of Laws*, Translation by Thomas Nugent (New York: Cosimo, Inc., 2011) at 6

³⁴³ Supra Note 88 at 113

³⁴⁴ Ibid

simple. The culturalist view that the law is inextricably linked to the culture in which it was developed suggests that there are further issues which must be considered when attempting to facilitate the successful transplantation of legal rules from one jurisdiction to another.

Each time the transplantation of legal rules is suggested, the same counter arguments appear to reoccur. Most of the arguments against the transplantation are centred around the idea, supported by Legrand, that the context in which a legal rule is developed gives that rule its meaning.

5.4.1.3 The civil law is fundamentally different to the common law

The argument that the civil law is fundamentally different from the common law stems from the idea that the different roots of the common law and the civil make them inherently incompatible. In some cases this might be true: for example, suggesting that the entire English contract law should be codified and that the judges should be seen to apply the law as they do in Germany would likely be met with huge opposition as it would fly in the face of the entire concept of the common law.

Having said this, as Watson points out, the use of transplanted legal rules can often be observed from historical evidence³⁴⁵. Indeed, in some areas, the civil law has already been absorbed into the common law. Offer and acceptance for example, are, as mentioned in the first chapter of this study, originally civil law doctrines. These doctrines have become as entrenched in the common law of contracts as the doctrine of consideration, yet their roots are distinctly civil. Indeed, in the early development of the common law judges “transplanted many doctrines, like the ideas of mistake, frustration and tests for the measurement of

³⁴⁵ Supra Note 43 at 31

damages from the scholarly tradition of natural law whose own intellectual roots lay in Roman law.”³⁴⁶ Thus, a surprisingly large amount of the Anglo-Canadian common law is in fact the result of transplantation from civil law. This is not to say however, that this process was entirely unproblematic; in fact, there was much confusion and inconsistency because “these transplants overlapped with existing common law concepts.”³⁴⁷

It can therefore be observed then from historical evidence that the transplantation of the German civil law into the Anglo-Canadian common law is possible but not without its problems. Thus, perhaps in this case, both Watson and Legrand’s theories are in some way correct. However, as with the doctrines of offer and acceptance, though the German law has rules distinct from the doctrine of consideration to identify those promises which are to be held legally enforceable and those which are not, many of the mechanisms used to provide the parties with a means of making an otherwise valid contract void, such as duress, already exist in the Anglo-Canadian common law. If these rules were to be transplanted, this could lead to huge amounts of confusion and unnecessary upheaval and would likely result in a similar overlap.

Not only this, but, as previously mentioned, the German law is a codified legal system and, as such, the German civil law rules on the modification of contracts are part of the codified German contract law which consists of many different Articles which are categorized and which relate to one another. Without transplanting the entire code, it is possible that some of these rules would no longer make much sense. Thus, simply taking

³⁴⁶ Hugh Collins, *The Law of Contract: Law in Context*, 4th ed (London: Butterworths, 2003) at 40

³⁴⁷ Ibid

singular rules from the German civil code and transplanting them into the Anglo-Canadian common law might be considered inadvisable.

5.4.1.4 The transplantation of civil law rules into common law systems results in the alienation of those rules from the rest of the system

Another common argument against the transplantation of civil law rules into common law legal systems is the idea that this results in the alienation of those rules from the rest of the law. The rationale behind this idea is that the civil law rules have a different theoretical basis to common law rules.

As we have discovered from the second chapter of this thesis, much of the theoretical basis for the doctrine of consideration and the German civil law relating to the enforcement of promises in the context of contractual modification is in fact similar. Both sets of rules exist to determine which promises should be held enforceable under the law and which should be regarded as gratuitous.

The main difference is simply (or not so simply) that the German system allows an agreement which bears all the signs of a valid contract intended to be legally binding by all the parties to be held valid unless proven otherwise, whereas the Anglo-Canadian common law presumes that an agreement is not intended to be relied upon unless there is a consideration to support it. The Anglo-Canadian common does already focus on the intention of the parties, but it also requires a promise to be bargained for in order for it to be considered binding; the bargain is the reason for enforcement, whereas the German law focuses solely on the intention of the parties. The German law thus requires fewer reasons *to* enforce a contract.

With regards to the substantive adoption of the German civil law rules, there therefore seems to be relatively little cause for concern towards the resulting alienation of the imported laws.

5.4.1.5 Cultural differences prevent the smooth transplantation of law from foreign legal systems

Legrand argues that the context in which a legal rule is developed and from which it is taken gives that rule a particular meaning. If this is the case, then the process of moving one set of legal rules out of its context and into another context could result in a change in the meaning of that rule. Even where the cultural differences are fairly minimal (as they are between England, Canada and Germany), the meaning of transplanted rules can be significantly altered when they are moved from one jurisdiction to another. This is problematic because it means that the rules cannot be successfully transplanted without the possibility of taking on new meaning. This area is particularly problematic when one considers rules such as the principle of good faith or the concept of public policy³⁴⁸ which are closely linked to the German civil law rules on the modification of contracts as well as the doctrine of consideration and which take on different meanings in different legal cultures. Once again, this issue means that it is most probably wise to avoid the complicated process of attempting to promote the transplantation of the German civil law rules into the common law of contracts.

³⁴⁸ These principles and rules are in fact addressed later on in the chapter

5.5 Conclusions regarding the transplant of the German civil law into the Anglo-Canadian common law

It appears that both Watson and Legrand, or indeed the transferists and the culturalists, hold valid points. It does seem that many legal rules do take their meaning from the context in which they were developed, thus the transplantation of those legal rules results in a change in their meaning. However, regardless of whether or not these rules retain the exact same meaning once they have been transplanted, it seems that legal transplantation has been successful in many historical cases.

However, as exemplified by the transplantation of the doctrines of offer and acceptance, they can sometimes produce further, unexpected problems including overlap with pre-existing common law rules. Thus, while not impossible, from a practical point of view, legal transplants are not ideal and there are perhaps better ways to reform the law.

There is also reluctance of the judges, which Watson himself highlights³⁴⁹, particularly in England, to consider foreign legal rules in domestic judgements which would likely result in a failure to accept any suggestion to transplant German civil law rules into the Anglo-Canadian contract law regardless of whether it is in fact workable. It would perhaps be better then, to find another way of using the German civil law rules to aid in the reform of the Anglo-Canadian common law and the abolition of the doctrine of consideration. Even if legal transplantation is “socially easy”³⁵⁰, the opposition from the bar or legislature is surely enough to prevent such methods of reform from being implemented in well-established legal systems.

³⁴⁹ Supra Note 43 at 95

³⁵⁰ Ibid

5.5.1 German law as inspiration for the drafting of a model law

As it seems that it would be unwise to simply transplant the German law into the Canadian or English law, it may be more helpful to use the German law as inspiration for the creation of a new set of rules which combines some ideas which have been taken from the German civil law with those rules which already exist under the common law. The fact that the German civil law is used only as a source of inspiration means that some of the rules taken from it may be modified to suit the purposes of the Anglo-Canadian common law. Not only this, but general principles, such as the focus on the intention of the parties rather than the presence of a bargain, can be adopted without the need to modify the entire law on the formation of contracts to fit the German model. Failing this, perhaps the German law should simply be looked at as an example of a system which functions extremely well without a doctrine of consideration and should be seen as encouragement towards the reform of the Anglo-Canadian common law doctrine of consideration.

5.6 Proposals for reform

As the previous chapter has shown, the German law does not require consideration to act as a reason for the enforcement of a promise to modify a pre-existing contract. Instead, the German law focuses on the intention of the parties and requires only that there is an agreement and an intention to be bound by that agreement. The reason for the enforcement of a promise is therefore the intention of the parties to enter into the agreement and to be bound by that agreement. The German law therefore requires fewer reasons to enforce a promise to modify a pre-existing contract. However, in order to ensure that there remains adequate protection for the contracting parties, the German law has developed other mechanisms to

ensure that contractual agreements are not entered into as the result of duress, deceit or other influences which might affect the actual intention of the parties.

5.6.1 A reason for enforcement rather than the reason for enforcement

In order to improve the situation surrounding the doctrine of consideration in the modification of contracts within the Anglo-Canadian common law, several changes could be made so as to minimize its role. This does not necessarily mean that the doctrine of consideration must be abolished entirely from the Anglo-Canadian common law. However, if the doctrine is to remain a part of the contract law, its role should perhaps be restricted to acting as *a* reason for the enforcement of a promise rather than an essential part of a contractual modification.

5.6.2 A change of focus from bargain to the more German intention

It is my proposal that the focus of the Anglo-Canadian law on the enforcement of promises in the modification of pre-existing contracts should be changed from whether or not a promise has been bargained for, to the more German notion that, where the parties are in agreement, and they intend to be bound by that agreement, a valid contract modification exists. If the focus of the Anglo-Canadian common law was to become the intention of the parties instead of the presence of a bargain between the parties, the requirement of consideration would no longer be necessary in order to distinguish enforceable and gratuitous promises. Instead, the presence of consideration would act as evidence to suggest that the parties intended to be bound by their agreement. Having said this, where it could be shown that the parties intended to be bound despite a lack of consideration (in the case of a contract modification which altered the obligations of only one party for example) the agreement would still be

enforceable because the will of the parties was to create a legally binding contract upon which they could rely.

In order to do this however, there must be a way to determine whether or not the parties intended to be bound by their agreement. As seen in chapter four of this thesis, the German law has various mechanisms which it uses to determine the parties intentions. The principle means used by the German law to establish the intent of the parties to a contract is the formation of the contract itself. The elements of a valid declaration of intent (Willenserklärung) are used to ensure that the parties are aware that their actions will lead to legal consequences. To suggest however, that the English or Canadian common law should adopt such a system for the formation of contracts would perhaps be a step too far and would likely be quickly rejected. There is however a mechanism used in the Anglo-Canadian common law which could be employed for a similar purpose. That mechanism is intention to create legal relations.

5.6.3 The increased role of intention to create legal relations

If the focus of the English or Canadian common law on the modification of contracts was to be changed from the presence of a bargain to the intention of the parties, in situations where an agreement to modify a contract alters only the obligations of one of the parties, consideration would become secondary to the intention of the parties. If it could be shown that the parties intended (as in German law) to be bound by their agreement, the contract modification would be valid and enforceable under the law even without consideration. The reason for enforcement becomes the will of the parties to be bound. “A written gratuitous promise in the language of binding commitment would in most cases doubtless become

enforceable”³⁵¹ because the fact that they are in writing indicates that they were intended to be legally binding.

If this were to be the case, the doctrine of intention to create legal relations would have a stronger role in determining which promises should be deemed enforceable under the law. There is some concern that the doctrine of intention to create legal relations might not be the ideal mechanism for distinguishing between promises which should be deemed enforceable and those which are merely gratuitous. Atiyah points out however that:

In particular, there are many promises in connection with family or social matters which the courts would probably be reluctant to enforce. Traditionally, they have refused enforcement because there is no good consideration for them. But a rival theory has recently come to be advanced, namely, that in cases of this kind, there is no intention to create legal relations.³⁵²

While this is true, and the doctrine of intention to create legal relations does provide adequate protection for those entering into agreements in familial or social contexts, the rebuttable presumption that agreements between commercial parties are made with the intention to create legal relations means that parties can sometimes be faced with the difficult task of rebutting this presumption. It may be then, that, particularly in the case of commercial contract modifications, the doctrine of intention to create legal relations might cause further issues. Since the requirement of consideration is also currently one of the ways in which judges are able to prevent contracts which are considered to be against public policy or

³⁵¹ Supra Note 4 at 151

³⁵² Ibid at 150

otherwise undesirable from being enforced, there is also a problematic ‘gap’ in the law which would not be filled by the doctrine of intention to create legal relations.

The German solution to this problem, as seen in chapter four of this thesis, is the requirement that each declaration of intent contains certain elements which ensure that they are made with the intention to create a binding agreement. The three requirements of the German contract law: ‘Handlungswille’ (intention to act). ‘Erklärungsbewusstsein’ (conscious declaration of intent) and ‘Geschäftswille’ (business intent) enable those who did not intend to be bound by their agreements to escape their obligations by demonstrating that one or more of these elements were missing when the agreement was made.

The Anglo-Canadian law does not appear to any rule similar to that of ‘Erklärungsbewusstsein’ or ‘Geschäftswille’.³⁵³ Though, as previously mentioned, it would likely be unwise to attempt to completely change the way in which a contract is formed within the common law by introducing these German law requirements, it might be possible to build into the doctrine of intention to create legal relations elements such as these. This would help to ensure that the parties are aware that they are entering into a legally binding contract while they make the agreement. Requirements such as these could easily act as a means of alerting the parties to the seriousness of their undertakings and a way of providing evidence that a contractual agreement was intended to be made. By including requirements similar to those present in the German law formation of contracts, the scope of the common law doctrine of intention to create legal relations would be increased.

³⁵³ As we have seen, this is the result of the fact that common law has taken a far less formal approach to the formation of contractual agreements, instead relying on consideration.

By removing, or at least lessening the role of consideration, the ability of the courts to refuse the enforcement of promises would be greatly lessened. It is important therefore that other mechanisms are in place to provide reasons *not* to enforce a contract. This would mean increasing the scope of existing mechanisms such as economic duress and intention to create legal relations as well as the possibility of additional vitiating factors such as concepts similar to those of the German law.

5.6.4 The current doctrines of economic duress and undue influence in the Anglo-Canadian common law-adequate protection in the absence of consideration?

Currently, there are two forms of action under English and Canadian law for those who are coerced into contractual agreements: The doctrine of undue influence and the doctrine of economic duress.

The doctrine of undue influence focuses mainly on the relationship between the contracting parties rather than the behaviour of the parties themselves. Thus, two types of undue influence can be found under the Anglo-Canadian common law: Actual undue influence³⁵⁴ is found where one party can prove “on the basis of probabilities, that in relation to a particular transaction, the defendant used undue influence³⁵⁵” and presumed undue influence which is found when a certain relationship exists between the parties. These relationships are those in which “one party acquires influence over another who is vulnerable and dependent”³⁵⁶. Common examples include “guardian/ward, trustee/beneficiary, doctor/patient, solicitor/client and religious advisor/disciple”³⁵⁷.

³⁵⁴ Richard Stone, *The Modern Law of Contract*, 9th ed (Oxon: Routledge, 2011) at 340

³⁵⁵ Ibid

³⁵⁶ Ibid at 342

³⁵⁷ Ibid

Since the doctrine of undue influence focuses mainly on the relationship between the contracting parties, it generally does not offer any protection to those entering into contracts in commercial transactions. Thus, many cases, particularly those concerning contractual modifications which often fall under the category of commercial agreements cannot be deemed voidable under the doctrine of undue influence. It makes more sense therefore to focus on the modification of the doctrine of economic duress if adequate protection is to be given to those attempting to modify pre-existing contractual obligations.

Economic duress under the Anglo-Canadian common law occurs when “one party uses his superior economic power in an ‘illegitimate’ way so as to coerce the other contracting party to agree to a particular set of terms.”³⁵⁸ The Anglo-Canadian common law currently recognises only threats to perform an illegal action as illegitimate. Though, as explained by Lord Justice Steyn in the case of *CTN Cash and Carry V Gallaher Ltd.* [1993] EWCA Civ 19³⁵⁹ in some cases it may be possible to include threats which are not unlawful:

Can lawful pressures also count? This is a difficult question, because, if the answer is that they can, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality...On the other hand, if the answer is that lawful pressures are always exempt, those who devise outrageous but technically lawful means of compulsion must always escape restitution until the legislature declares the abuse unlawful. It is tolerably clear that, at least where they

³⁵⁸ Supra Note 182 at 284

³⁵⁹ *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19

can be confident of a general consensus in favour of their evaluation, the courts are willing to apply a standard of impropriety rather than technical unlawfulness.³⁶⁰

Therefore it is possible that the English courts might consider a threat to be illegitimate where it is not unlawful, but improper. Having said this,

Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which "lawful-act duress" can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying "never."³⁶¹

5.6.5 Widening the scope of economic duress in the Anglo-Canadian common law

The New Brunswick Court of Appeal recognised the need to widen the scope of economic duress in order to provide greater protection for those seeking to modify pre-existing contractual obligations. As previously mentioned, it accordingly held that a contract could be modified through the agreement of both parties without the requirement of consideration but, there could be no economic duress present. The New Brunswick Court of Appeal modified the doctrine of economic duress so that the requirement of illegitimate pressure was no longer necessary. This decision appears primarily to have been based upon the scholarly work of Professor Ogilvie, namely, her "Economic Duress in Contract: Departure, Detour or Dead-End?"³⁶² in which the need for a more liberal test for economic duress is discussed.

Robertson LJ devised a new test for economic duress stating that:

³⁶⁰ Ibid

³⁶¹ Ibid

³⁶² MH Ogilvie, "Economic Duress in Contract: Departure, Detour or Dead-End" (2001) 34: 2 Can. Bus. L.J. 194

First, the promise (the contractual variation) must be extracted as a result of the exercise of “pressure”, whether characterized as a “demand” or a “threat”. Second, the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer’s demand to vary the terms of the underlying contract. However, even if those two conditions are satisfied, a finding of economic duress does not automatically follow. Once these two threshold requirements are met, the legal analysis must focus on the ultimate question: whether the coerced party “consented” to the variation. To make that determination three factors should be examined: (1) whether the promise was supported by consideration; (2) whether the coerced party made the promise “under protest” or “without prejudice”; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable³⁶³

This decision was received with some scepticism and several authors have highlighted the problems with modifying the doctrine of economic duress in this way. The strongest criticism of this new test for economic duress is that it provides a very “victim-sided, consent-based conception of legal coercion”³⁶⁴ and does not take into account that the parties’ obligations are dependent upon one another. Bigwood states that Robertson J.A.’s argument focuses on the invalidity of the victim’s consent and fails to recognise the promisee’s “own legitimate interest as an agent in freedom of action functioning within a liberal institution of contract.”³⁶⁵ If this were to become the case in the whole of the Canadian contract law, the

³⁶³ Supra Note 12 at paragraph 54

³⁶⁴ Supra Note 330 at 267

³⁶⁵ Ibid

doctrine of economic duress could lead to the presence of further obstacles to the enforcement of promises as well as freedom of contract.

While I agree that in order to provide more comprehensive protection to those parties who seek to modify pre-existing contractual obligations without the requirement of consideration, the doctrine of economic duress must be expanded, for the reasons explained above, I do not think that the removal of the requirement of illegitimate pressure is a step in the right direction. Unlike the New Brunswick Court of Appeal, I propose that the doctrine of economic duress in the Anglo-Canadian common law should be expanded in a way that reflects the German rules on economic duress and duress.

The German law on this subject has a wider scope than the Anglo-Canadian common law. However, this is not because there is no requirement to demonstrate illegitimate pressure.

As we have seen from chapter four of this thesis, unlike the Anglo-Canadian common law, the German law a threat may be considered illegitimate firstly, if the means used to exert the pressure and induce the other person is illegitimate; if the demands made by the threatening person are illegitimate; and finally because, though the means themselves are legitimate but they are inadequate in comparison to the intended legitimate purpose.³⁶⁶ Thus, the German law does not just recognise threats to perform an illegal action as being illegitimate, a threat will be considered illegitimate even if the means and the aim are lawful, providing that it can be shown that combination of the threat and the aim of the threat is unlawful. It is apparent then, that the threshold for economic duress under the Anglo-

³⁶⁶ Supra Note 258 at 51

Canadian common law is much higher because it does not recognise threats which are not unlawful (except in rare circumstances) whereas the German law does. Therefore, if the Anglo-Canadian common law was to begin recognising those threats which are not unlawful in themselves but which were made with the aim of achieving unlawful demands as well as situations in which the means and the aims of the threat are legitimate but the relationship between the two is socially unacceptable as illegitimate threats, the scope of economic duress could be widened.

It should be noted however that the German law requires a test of good faith in order to establish whether the means are inadequate. If the means do not pass the good faith test, they are considered illegitimate.³⁶⁷ §242 BGB states that:

An obligor has the duty to perform according to the requirements of good faith, taking customary practice into consideration³⁶⁸.

Though §242 BGB appears only to apply to the performance of contractual obligations, the German courts have used this provision to develop a general principle of good faith which applies to the whole of the German contract law. Thus, the doctrine of economic duress in the Anglo-Canadian common law was to follow the German example, a good faith test might also be required to aid in the identification of those threats which are to be considered illegitimate. This could prove somewhat problematic given the reluctance demonstrated, especially by the English, but also by the Canadian courts to adopt a general test of good faith.

³⁶⁷Ibid

³⁶⁸ §242 BGB Translation found at http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0437
(Last viewed 20/11/2013)

Traditionally, good faith has played an extremely limited role in English contract law. It was introduced into the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999³⁶⁹ but their scope is limited and good faith does not therefore apply to all contracts under English law. Not only this, but the English courts do not “have a consistent conception of the contents of good faith”³⁷⁰. Indeed, according to Chen-Wishart³⁷¹ even the cases concerning the UTCCR are somewhat inconsistent when it comes to good faith. The case of *DGFT v First National Bank* (2001) UKHL 52³⁷² good faith is defined as “fair and open dealing” by Lord Bingham but this is later rejected by Lord Steyn who states that “any purely procedural or even predominantly procedural interpretation for the requirement of good faith must be rejected”³⁷³.

Much like England, Canada does not recognise a general doctrine of good faith but in recent years some courts have made decisions which appear to have brought them closer to the adoption of a general doctrine of good faith. For example, though it also re-affirmed the idea that there is no “general or stand-alone duty to bargain in good faith”³⁷⁴, in the case of *Barclays Bank v Devonshire Trust* (2013) ONCA 494³⁷⁵ the Ontario Court of Appeal held that there was “an established principle that a duty of good faith arises when necessary to ensure that the parties do not act in a way that defeats the objects of the very contract the parties have entered”³⁷⁶.

³⁶⁹ *Unfair Terms in Consumer Contracts Regulations* (UTCCR) 1999

³⁷⁰ *Supra* Note 136 at 382

³⁷¹ *Ibid*

³⁷² *DGFT v First National Bank* (2001) UKHL 52 at 17, Bingham LJ

³⁷³ *Ibid* at 36, Steyn LJ

³⁷⁴ *Barclays Bank v Devonshire Trust* (2013) ONCA 494

³⁷⁵ *Ibid*

³⁷⁶ *Ibid*

The lack of an accepted definition of good faith poses large problem for those advocating the adoption or creation of a general doctrine of good faith and this is one of the topics widely discussed by many scholars. This does not however appear to be much of a problem for the German legal system which also has no legislative definition of good faith. Instead, the German law has developed a vast amount of case law³⁷⁷ on the subject. For example, the German courts have used §242 BGB to hold that:

- 1) Section 242 is the statutory basis for various supplementary duties in a contractual relationship (e.g. the protection of the other party's life and property; duties of disclosure, information, counselling, warning, omission and co-operation etc.).
- 2) Under certain circumstances s.242 can be the basis of an independent claim for discovery and information
- 3) Section 242 may prohibit the intentional abuse of a right (e.g. the use of a right or formal position which has been acquired by breach of contract or breach of law).
- 4) Section 242 may prohibit an action of one party, which, without reasonable justification, contradicts this party's previous ongoing conduct on which the other side has meanwhile relied, or may prohibit an action which is contradictory to previous conduct from a logical point of view (e.g. if one party to a contract has for years maintained the other side's mistaken belief that this is the true debtor of a certain claim, this party cannot deny being the correct defendant if the creditor files a claim in court (BGH decision of December 7, 1989 VII ZR 130/88, [1990] N.J.W, -RR.417)

³⁷⁷ Although it should of course be remembered that the German legal system is not precedent-based and therefore all case law is not regarded as legally binding.

- 5) Section 242 can be used as a statutory basis for the forfeiture of a right or claim.³⁷⁸

It seems then, that the German law has in fact used its lack of a definition of good faith to its advantage. Despite the German example, it would likely be very hard to convince either the English or the Canadian courts to adopt such a principle and it might therefore be necessary to develop a different means of identifying those threats which are to be considered illegitimate.

Unlike the abolition of the requirement of illegitimate pressure seen in the case of *NAV Canada v. Greater Fredericton Airport Authority Inc.*³⁷⁹ which, as previously discussed, has been fairly heavily criticised, this method of broadening the scope of economic duress would leave the existing test for economic duress, including illegitimate pressure intact, thus allowing for the recognition of the fact that the parties obligations are dependent upon one another, but broadens the scope of the doctrine by widening the definition of ‘illegitimate pressure’.

Having said this, it appears that both the German law and the English law are somewhat unclear on the subject of illegitimate pressure in economic duress. As Jänig states in his “Commercial Law: Selected Essays on the Law of Obligations, Insolvency and Arbitration”³⁸⁰ however, the German law seems at least to have the advantage of recognising that it is not possible (or very difficult) to find just one test for illegitimacy of pressure. He states that:

³⁷⁸ Marco Ardizzoni, *German Tax and Business Law* (London: Sweet and Maxwell, 2005) at 1055

³⁷⁹ Supra Note 12

³⁸⁰ Supra Note 258 at 69

The German law has accepted that there isn't a single clear-cut solution, and that there isn't a single-straightforward test to identify the illegitimacy of a threat. The named factors aren't to be applied singularly, they are to be applied side-by-side. Hence, in some cases, several or all factors may be decisive for the illegitimacy of the threat. In other cases just one of the factors may be decisive.³⁸¹

In any event, it is important to recognise that in the absence of the doctrine of consideration in the modification of contracts, the doctrine of economic duress would need to be substantially modified in order to provide protection for those entering into agreements to modify pre-existing contractual obligations.

5.6.6 A general means of rendering an agreement void for reasons of public policy

As previously stated, one of the purposes for which the doctrine of consideration has frequently been used is the barring of transactions which are considered unfair or against public policy. As the law currently stands, England and Canada are divided on the subject of 'unconscionability'. The doctrine of unconscionability is already well-established in Canadian contract law and it enables contracts which are made by the exploitation of one party by the other to be deemed void or voidable. Exploitation can be found by examining the circumstances surrounding the agreement. This means that factors such as the age, mental capacity and relative bargaining power of the parties may be taken into account. In the English law on the other hand, no such doctrine exists. The closest to a doctrine of unconscionability that the English courts have come to is 'unequal bargaining power'.

³⁸¹ Ibid

Neither of these doctrines enables the court to set aside an agreement on the grounds that it is against public policy or morals and thus, consideration was often used as a means of rendering void such agreements.

As seen in the previous chapter, the German Civil Code contains §138, a rule which fulfills both the need to ensure that contracts are agreed to under circumstances which might cause the intention of the parties to be clouded in some way and the need to ensure that transactions are made in accordance with public policy and the morals of society. The first section of this rule expressly states that a transaction may be set aside if it is “contrary to public policy or morals”³⁸². The adoption of a rule such as this would enable the gap left by the removal of the doctrine of consideration to be filled as well as providing a means for the courts to explicitly state that the reason for a contract being held void was public policy. Thus, transparency could be increased and consideration would no longer be a disguise decisions which are essentially made on the grounds of policy.

Though somewhat closely linked to the doctrine of economic duress because of its involvement in the avoidance of exploitation and unfairness, such a provision would be separate from the doctrine of economic duress and used in cases where the agreement, were it to be enforced, would likely result in a situation that would be contrary to the public sense of decency. Thus, contracts which are clearly exploitative but are not the result of duress or economic duress could easily fall under such a category.

There has already been some recognition of the fact that public policy can be deemed a sufficient reason for declaring a contract to be void. According to Stephen Waddams:

³⁸² Supra Note 280

One aspect of contract law plainly demands an open and direct engagement with questions of public policy. This is the question of when, for policy reasons, the courts have refused to enforce agreements that otherwise meet all the requirements of valid contracts. Modern accounts of contract law have tended to marginalize this aspect of the subject, visualising it as impliedly a small island in a wide sea of enforceability. But this is not the only way of looking at the matter. Compliance with public policy might plausibly be presented as a primary, or even a threshold requirement for the creation of enforceable obligations.³⁸³

In some older cases public policy has been the express reason for the non-enforcement of a contract. The case of *Harris v Watson* (1791) Peake 102³⁸⁴ which involved the wages of sailors: In this case, the claimant was a crew member of a ship captained by the defendant. During one of the ship's voyages, the defendant promised the claimant additional wages in return for performing some additional duties. Despite the fact that the contract modification appears to have been supported by valid consideration, the courts decided that the contract should not be enforceable for fear that a ruling to this effect might encourage sailors to take advantage of situations at sea which could result in the exploitation of their masters, a situation which could be considered immoral. Thus, public policy was at the forefront of this decision.

The issue of public policy also arose in the case of *Stilk v Myrick*³⁸⁵. Though this case was decided on the basis that no fresh consideration had been given in return for the modification of the original contract terms, it seems fairly obvious that there were also some

³⁸³ SM Waddams, *Principle and Policy in Contract Law: Competing or Complementary Concepts?* (Cambridge: Cambridge University Press, 2011) at 148

³⁸⁴ *Harris v Watson* (1791) Peake 102

³⁸⁵ Supra Note 169

policy concerns. Indeed, it seems that many modern commentators consider this decision to be one of the first cases in which the doctrine of consideration was used as a means of disguising the fact that the decision was in fact made on policy grounds. Now of course, this case would likely be decided using the doctrine of economic duress and public policy need not therefore be brought into the equation. Public policy is now rarely brought up as an argument for or against the enforcement of contracts, and, when it is, it usually as a mere consideration as opposed to the deciding factor of the case.

One reason for this might be the fact that public policy is not easily defined because it is transient and alters with time. Indeed, Justice McCardie stated that:

The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of time³⁸⁶

Not only this, but a delicate balance must be struck between freedom of contract and the public interest. Justice Burrough described public policy as “an unruly horse and once you get astride it you never know where it will carry you”³⁸⁷. It is this attitude which led the English courts to “limit and make precise those instances in which contracts were not enforceable for policy reasons”³⁸⁸. A list of the types of contracts which are unenforceable for reasons of public policy or morality was therefore developed and they are known as “the heads of public policy”³⁸⁹. One can see from this list that public policy in English law is often intertwined with illegality. Types of contract which are considered illegal according to the English courts are as follows:

³⁸⁶ Supra Note 383 at 160

³⁸⁷ *Richardson v Mellish* (1824) 2 Bing 229

³⁸⁸ Supra Note 383 at 153

³⁸⁹ Ibid

1. Contracts to commit crimes, torts or frauds on another party
2. A contract that is sexually immoral
3. A contract to the prejudice of the public safety
4. A contract prejudicial to the administration of justice
5. A contract that tends to corruption in public life
6. A contract to defraud the revenue³⁹⁰

There are however other types of contracts which are not illegal, but which can be held void on the grounds that they offend public policy. These types of contract considered to be against public policy in English law include:

1. A contract to oust the jurisdiction of the court
2. A contract that tends to prejudice the status of marriage
3. A contract in restraint of trade³⁹¹

One can easily see that the types of agreements covered by the public policy doctrine are somewhat few and highly specific. Indeed, there has been a great deal of debate as to whether new heads of public policy can be invented by the courts to cover those instances which do not fall into any of these categories. It was however determined by the courts that the heads of public policy were to remain closed and new ones could not be developed to accommodate situations which had not been previously taken into account.³⁹²

The Canadian courts have taken a similar approach to the English courts on the subject of public policy by “approaching public policy with caution, and have often declined

³⁹⁰ MP Furmston, Geoffrey Chevalier Cheshire & Cecil Herbert Stuart Fifoot, *Cheshire, Fifoot and Furmston's Law of Contract* (New York: Oxford University Press, 2007) at 470

³⁹¹ *Ibid*

³⁹² *Janson v Driefontein Consolidated Mines* [1902] AC 484

to the doctrine in relation to situations not falling within one of its traditional categories”³⁹³ but they seem, at least in comparison with the English courts, to be more willing to consider the further development of the heads of public policy and “there is now an increasing recognition of the need for a fluid, vibrant public policy doctrine to supplement the more barbarous interstices of the common law”³⁹⁴.

The incorporation of a more general provision would allow the courts to include the situations which do not fall under these heads but which could be seen as immoral or contrary to public policy, thus allowing the judges to reveal the true policy reasons behind their decisions rather than hiding them behind the veil of consideration.

Having said this, many of the situations which could fall under the public policy umbrella even in the absence of consideration would likely be covered by other legal mechanisms. For those which are not, such as, for example, agreements for part payment of debt³⁹⁵, the inclusion of a immorality or public policy ground for the non-enforcement of contracts could be extremely useful as a means of filling in the gaps create by the removal of the doctrine of consideration.

If such a rule were to be introduced, modification cases such as *Vanbergen v St. Edmunds Properties Ltd*³⁹⁶ mentioned earlier in the third chapter of this thesis where it was held that the promise to pay a debt already owed in installments was not good consideration for a promise not to initiate bankruptcy proceedings would fall within this category. Cases

³⁹³ Brandon Kain & Douglas T Yoshida, Todd L Archibald & Randall Scott Echlin eds, *The Doctrine of Public Policy in Canadian Contract Law*, Annual Review of Civil Litigation, 2007 (Toronto: Thomson Carswell, 2007) at 12

³⁹⁴ Ibid at 13

³⁹⁵ See *Pinnel's Case* supra note 119, *Re C (a Debtor)* [1996] BPLR 535 and *Ferguson v Davies* (1996) CILL 1208

³⁹⁶ Supra Note 224

such as this could overtly be decided on the basis of public policy (the issue here being the avoidance of bankruptcy proceedings) rather than covertly under the guise of the consideration requirement.

Cases involving promises to perform pre-existing duties such as *Williams v Roffey*³⁹⁷ would not fall under such a provision because the practical benefit gained on the part of the promisee would prevent the argument that the agreement was exploitative and therefore against any sense of public decency. It would be extremely difficult to argue that such an agreement should not be enforceable on the grounds of immorality or public policy, especially when considering the business context in which it was formed and the general leaning towards efficient business practices.

Though this example does not apply specifically to the modification of contracts, under this rule, those contracts which are not illegal in themselves could also be rendered void on the express grounds that they are against public policy. For example, had such a provision been in effect, the case of *Collins v Godefroy*³⁹⁸ could have been decided on the grounds of immorality or public policy rather than a lack of consideration.

This case concerned an attorney who was required by law to attend court in order to give evidence on the behalf of the defendant. The defendant promised to pay the attorney for each day he had to spend in court while giving evidence. It was held that the attorney could not claim the money promised to him by the defendant because he was already bound by law to attend court and the defendant's promise was therefore unsupported by consideration.³⁹⁹

The public policy rationale behind this decision appears to have been the avoidance of

³⁹⁷ Supra Note 22

³⁹⁸ Supra Note 179

³⁹⁹ Ibid

contractual agreements which would allow one party to charge another for something that they are already bound to do which could, in turn, result in exploitation.

5.7 Proposed provisions to be contained in the “model law”

These proposals are intended to give some idea of how the provisions concerning the modification of contracts in a new, model law might read. They are intended merely to be suggestions and a significant amount of work would need to be done in order to make them ready for publication or eventual enactment.

Section 1

The modification of pre-existing contractual duties

(1) A pre-existing contractual agreement may be modified by the agreement of the parties where:

(a) It can be shown that the parties intended to be legally bound by that agreement.

(2) In the case of social and domestic agreements, the parties will be considered to have intended to be legally bound by an agreement to modify a pre-existing contract where it can be shown that:

(a) There was a written formal agreement,

or

(b) The parties are separated or estranged,

or

(c) There is a third party agreement,

(3) In the case of commercial agreements, the parties will be considered not to have intended to be legally bound by an agreement to modify a pre-existing contract where it can be shown that:

(a) The existence of a binding in honour only clause demonstrates an intention not to be legally bound,

or

(b) The agreement was the result of economic duress.

Section 2

The distinction between social or domestic agreements and commercial agreements is as follows:

(1) An agreement is considered to be social or domestic in nature where it is made between family members or friends known only in a social context.

Section 3

Duress and Economic Duress

(1) Economic duress will be held to be present where:

(a) There is an illegitimate threat,

and

(b) There is no reasonable alternative,

and

c) It can be determined subjectively, taking into particular consideration the age, background, education and relationship of the parties, that the threat actually induced the agreement,

and

(d) The party caused actual or threatened financial distress.

(2) A person who has entered into contract as the result of coercion through duress or economic duress may avoid the obligations arising from that agreement as it is to be considered voidable.

(3) The definition of an illegitimate threat is as follows:

(a) A threat will be considered illegitimate if the means used to make threat are unlawful; if the intended results of the threat are unlawful; and if the relationship between a lawful means used to make a threat and lawful intended results of a threat is found to be unlawful.

(b) The relationship between a lawful means used to make a threat and the lawful intended results of a threat will be found to be unlawful where the test of good faith cannot be satisfied or where the result of such a relationship is considered immoral.

Section 4

Contracts can be held void for reasons of immorality and/or public policy

(1) An agreement to modify a pre-existing contract shall be held void if it is found to be immoral and/or against public policy.

(2) An agreement to modify a contract will be considered immoral and/or contrary to public policy where it contravenes the sense of decency of right and proper thinking persons.

5.8 Conclusions from this chapter

Despite the scepticism of the previous reform committees, it seems that the German law can in fact be a highly useful tool in the reform of the doctrine of consideration. Though it would be unwise to attempt the transplantation of the German law rules into the Anglo-Canadian common law, it can be used as both a general guide to the ways in which an established and efficient system of contract law is able to function without the requirement of consideration and, more specifically, inspiration in the development of new legal mechanisms. These mechanisms are designed to avoid problematic gaps in the law if the role of the doctrine of consideration were to be significantly reduced and even eliminated.

Given the success of the American Restatements, it seems that this might be the most effective method of reform is likely to be a Restatement of the English and/or Canadian law. This method is more likely to be received well in Canada, especially when one considers the reaction of the lawyers and judges in the England to the UNIDROIT Principles of International Contract, but this is not to say that it would be unwise to attempt a reform in this manner there.

The reform of the doctrine of consideration will not be an easy process and there will be many problems along the way. However, with the use of the German law as a guide to the ways in which contract law is able to function without the doctrine of consideration, the

process may be made somewhat smoother. If nothing else, the German law on the modification of contracts should be an example to the Anglo-Canadian common law judges, lawyers and scholars and a source of motivation towards the reform and eventual abolition of the doctrine of consideration.

Chapter 6: Conclusion

6.1 Conclusions regarding the goals or hypotheses presented in the introduction

6.1.1 A new direction for the reform of the doctrine of consideration

In the introduction of this thesis, I stated that my work had several goals; the first of these goals, and the main focus of this thesis, was the suggestion of a new alternative solution to the problem of the doctrine of consideration. As we have seen, both the reform committees of 1937 and 1987 dismissed the idea of looking toward the civil law in order to reform the doctrine of consideration. They stated that it would be ‘unwise’ to consult such sources.⁴⁰⁰ Few scholars have therefore chosen to conduct research on this subject (though there are some) the use of the German civil law as a model for reform is a direction which has been left relatively unexplored. Thus, the aim of exploring a new direction for the reform of the doctrine of consideration has been achieved through the comparison and evaluation of the German civil law rules. My research has shown that, though the German mechanisms used to differentiate between those promises which are enforceable under the law, and those which are not, are, in some ways, very different to those used by the common law, there are some areas which could be introduced into the English and Canadian common law as replacements for the doctrine of consideration.

6.1.2 The encouragement of the use of foreign laws in the reform of the common law

As seen from the preceding chapters, the doctrine of consideration was developed as the result of necessity. Though it has served the English and Canadian legal systems well for the past several hundred years, it has now become a serious obstacle over which many

⁴⁰⁰ Supra Notes 9 and 10

contracting parties are forced to stumble. Both the reform committees of 1937 and 1987 previously dismissed the idea of looking toward the civil law for inspiration with regards to the abolition of the doctrine of consideration stating that it would be ‘unwise’ to consult such sources⁴⁰¹

Contrary to what seems to be the common beliefs of both the judiciary and many scholars, the German civil law has much to offer in the way of guidance for the drafting of new mechanisms for the replacement of the doctrine of consideration. It is evident that it would be unwise, particularly given the reluctance shown by both the English and Canadian legislatures, to suggest the transplant of German civil law rules into the English or Canadian common law systems as a replacement for the doctrine of consideration. However, as demonstrated by the suggestions for legislation presented in the preceding chapter, the German law can be used to reshape the Anglo-Canadian common law into a system which is more modern and less problematic.

Some of the research I have conducted indicates that this past reluctance towards looking to other jurisdictions for inspiration and guidance for reforms seems, at least in Canada, to be weakening. The *NAV Canada v Greater Fredericton Airport Authority Inc.*⁴⁰² is an example of a case in which the Canadian courts looked to decisions made in Australia. Though this case drew on a decision made in a common law jurisdiction, it demonstrates the willingness of the Canadian judiciary to consult sources outside the Canadian law.

The English courts seem less willing to acknowledge the decisions of courts from other jurisdictions, let alone consider the rules contained in the civil codes of Europe. This

⁴⁰¹ Supra Note 9

⁴⁰² Supra Note 12

thesis demonstrates however, that the German civil law has much to offer in the way of guidance on the creation of a system of contract law which functions effectively without a doctrine of consideration. It does so by pointing out that the German law is an example of a system of contract law which does not rely on the doctrine of consideration as the reason for the enforcement of contracts and that it should therefore be looked to during the process of drafting new legislation to fill the gaps in the law that the doctrine of consideration would undoubtedly leave if it were to be abolished.

6.1.3 How might the German civil law be used to improve the English and Canadian law?

The third aim of this thesis, as stated in the introduction, was to determine how the German law might be used to improve the Anglo-Canadian common law surrounding the modification of contracts. The historical research that I have conducted shows that though the development of the English law and the German law began very differently, there was a period of time in which there appears to have been some similar developments. The German contract law did, at one time, have a requirement similar to that of the French *cause*. It was the later developments in the German law which changed the requirements for the formation and modification of a contractual agreement. Not only this, but the English law adopted the civil law concepts of offer and acceptance. Thus the German law is not, at least in this particular area, as different as it might first appear. This suggests that it might be more easily used to improve the English and Canadian common law than first thought.

Though my research indicates that the transplantation of the German rules on the modification of contracts would be unwise, the German law can be used as inspiration for a model law which could in turn be used to encourage both the English and Canadian courts to

abandon the doctrine of consideration in favour of other, more efficient rules which perform the same function.

My comparison of the current German, English and Canadian law has shown that the German requirement of consensus results in a much less complex and more efficient process of contract modification. This is namely because there is no requirement that a promise must be bargained for and thus no need for a mechanism such as the doctrine of consideration. The German law thus has fewer reasons *for* the enforcement of a promise (the consensus of the parties being the only reason needed) and enables the parties of a contract to modify their agreements with relative ease, especially in cases where the parties' obligations are altered only on one side.

The focus upon the will of the parties present in the German civil law could be relatively easily adopted by the English and Canadian law, though it would perhaps be unwise to incorporate the requirements of a valid declaration of intent or 'Willenserklärung' to do so as this would require the complete reform of the formation of contracts within the Anglo-Canadian common law. However, since intention to create legal relations is already a part of the Anglo-Canadian common law, there is already a requirement that the parties must intend to be bound by their agreement and it is this doctrine which could be expanded in order to perform a similar task to that of the elements of the German declaration of intent.

My research has also shown however, that the removal of the doctrine of consideration would leave other possible gaps within the Anglo-Canadian common law. The German law also provides useful examples of mechanisms which could be used to overcome this problem. In order to prevent the enforcement of promises which are the result of

coercion or unethical dealings, the German law has a number of rules, some of which are present, at least to some extent, in the Anglo-Canadian common law. However, as shown in the preceding chapters, the scope of these rules is, in most cases, wider than those found in the Anglo-Canadian common law. The definition of an illegitimate threat, for example, is much broader under the German civil law than that under the English and Canadian law. The ability to void contractual agreements on the express grounds of public policy is also a mechanism found within the German civil law which, if adopted by the Anglo-Canadian common law, could increase transparency in judicial decision-making.

It should be noted however, that the proposals I have made are by no means conclusive and much work would need to be done before they could be considered fit for promulgation. However, they do demonstrate the possibility of using the German civil law as a guide for reforming the common law of contracts.

6.1.4 The re-opening of the discussion surrounding the problems caused by the doctrine of consideration

The final aim of this thesis was the re-opening of the discussion surrounding the problems caused by the doctrine of consideration in the modification of contracts. Though it remains to be seen whether or not there will ever be renewed interest in attempts to reform consideration, it is my hope that identification of the problems still being caused by the doctrine in the modification of contracts contained in the third chapter of this thesis might perhaps spark further debate.

6.2 Reflective analysis of the research and its conclusions in light of current knowledge in the field

The current knowledge of the subject of consideration is wide and opinions within the field are highly varied. The doctrine of consideration is regarded by most as an essential part of the contract law. Indeed, it is taught as such to every law student in Canada and England. However, many of the textbooks given to first year undergraduates⁴⁰³ include passages on the problems surrounding the doctrine of consideration and some discussion of the various theories presented by the most respected scholars. Most of these theories are now thirty years old and it seems that although consideration is viewed as one of the more problematic doctrines found in the Anglo-Canadian law, little has been done in recent times to solve the issues surrounding it. The problems highlighted in chapter three of this thesis are well-acknowledged and hardly disputed. Thus, it is widely accepted that the doctrine of consideration is in need of some reformation or indeed, removal from the Anglo-Canadian common law. Thus, while I am unsurprised to find that there are many problems caused by the doctrine of consideration, I am relatively surprised to discover that little has been done to remedy these problems.

According to my research, yet fewer efforts have been made towards the investigation of the ways in which the laws of civil law jurisdictions might be relevant to the reform of the doctrine of consideration. The finding that the German law could in fact be useful in the reform of the Anglo-Canadian common law seems somewhat inconsistent with the view that little can be done about the problems caused by the doctrine of consideration. It seems perhaps that some legislatures, reform committees and judges have been all-too quick to

⁴⁰³ Supra Note 182 at 68

dismiss the possibility of using the German civil law as a guideline to the reform of the doctrine of consideration for fear that it might result in the alienation of the contract law from the rest of the common law. This is somewhat surprising as the German law is a prime example of a system of law which functions well without a doctrine of consideration, or indeed, anything comparable to such a doctrine.

My research has shown that finding an accurate definition of the purpose of the doctrine of consideration is one of the biggest problems which must be overcome before the removal of the doctrine of consideration can take place. It would, after all, be exceedingly difficult to replace the doctrine of consideration when we are not entirely sure what its function actually is. Though this study does not focus a great deal of attention on its function, it does highlight the need for further discussion and at least some consensus as to the purpose of the doctrine of consideration. It is surprising, to me at least, that despite the many theories about the function of the doctrine of consideration, none appears to be more widely accepted than the others (as is often the case with theories surrounding the law).

If it is accepted (as I believe it should be) that consideration acts as a reason for the enforcement of a promise (and its presence therefore differentiates between those promises which are enforceable by law and those which are considered to be gratuitous) it is entirely possible to replace the doctrine of consideration with other mechanisms taken from or inspired by the German law which are able to perform a similar function.

In light of the fact that there is much scepticism surrounding the use of civil law rules as inspiration for modern laws, especially in the United Kingdom, the proposals contained within this study might easily be ignored on the grounds they are too highly influenced by the

German law. Bearing this in mind, it is important to highlight the fact that virtually all previous suggestions for the reform of the doctrine of consideration have failed and the use of civil law rules appears to be one of the only avenues yet to be properly explored. The notion that civil law rules cannot be useful in the reform of the common law is misguided.

Indeed with the globalisation of trade and the economy there is a growing need for harmonized law (particularly in commercial areas of law such as contract law). Thus, looking towards the civil law for ideas and solutions to the problems caused by the doctrine of consideration in the modification of contracts does not seem nearly as unwise as it once did. By using the German civil law as inspiration for the reform of the law surrounding the doctrine of consideration in the modification of contracts it is possible that the new rules will be more in harmony with those in other jurisdictions, thus facilitating international trade and business. Because of this, it now makes more sense than ever to consider eliminating a doctrine as specific to the common law as the doctrine of consideration.

The UNIDROIT Principles of International Commercial Contracts for example, demonstrate the possibilities that can be achieved when the civil law and common law of varying jurisdictions are brought together and harmonised. They also demonstrate the fact that doctrines which are highly specific to the common law, such as consideration, are unnecessary and even problematic in commercial circumstances which demand the use of international contracts. It seems then, that the drafters of more modern legal mechanisms (although, to reiterate, the UNIDROIT Principles of International contracts do in fact have no legally binding effect) seek to eliminate requirements such as consideration in favour of a model more similar to that of the German system in which agreements can be modified on

the basis of the consensus of the parties. Thus, the trend is towards the will of the parties rather than the presence of a bargain.

6.3 Comments on the significance and contribution of the research reported

As mentioned in the introduction of this thesis, there has already been much discussion on the topic of the problematic doctrine of consideration. Its shortcomings and its unique features have been analysed in great detail by many scholars and judges alike. This thesis does not add much in the way of analysis of the doctrine itself (nor is it intended to). Instead, it takes a different approach to the problem of solving the issues caused by the doctrine of consideration than those traditionally taken by law reform committees.

Though the civil law has previously been introduced as a means of reforming the doctrine of consideration (most notably in the form of Chloros' "The Doctrine of Consideration and the Reform of the Law of Contract"⁴⁰⁴) many of the authors who seek to involve the civil law in the reform of the doctrine of consideration, as Chloros does, fail to acknowledge that the doctrine of consideration continues to perform a function within the common law. This study acknowledges this fact but also maintains that there are other mechanisms which could perform these functions more effectively.

This thesis therefore contributes a new perspective for the specific study of the Common Law doctrine of consideration in the modification of contracts which has not been previously explored; it does not simply seek to point out the problems with the doctrine, but also to solve these problems and, unlike much of the previous literature on the subject, it does not just employ the use of principles and mechanisms from common law jurisdictions.

⁴⁰⁴ Supra Note 3

The comparative method is regarded, especially by the English courts, with some suspicion because it is often believed that the use of civil law rules, even as a reference, in the common law courts would result in alienation of that area of law. This thesis acts as evidence against this argument and can be seen as a demonstration of the ways in which the civil law can in fact be extremely useful to the reform of common law doctrine.

As mentioned earlier, this thesis also demonstrates that the use of civil law principles such as those identified in chapter four of this thesis does not necessarily mean that they must be transplanted directly from the civil law into the common law. Instead, this thesis demonstrates that inspiration can be taken from the civil law and implemented through the modification of existing common law rules or the creation of new common law rules which are inspired by both the common law and the civil law. Not only this, but broader ideas (such as a changing the reason for the enforcement of a promise from the presence of a bargain to the consensus of the parties) can be implemented by modifying the common law without including any rules that are essentially civil in nature. Thus the notion that the use of civil law rules in the reformation of common law doctrines demands that the common law must in some way be made to look more like the civil law is unfounded. Part of the significance of this work therefore lies, not in the proposals themselves, but in the encouragement towards the use of the German civil law rules as inspiration for possible reforms surrounding the doctrine of consideration.

The focus of this thesis on the modification of contracts is also somewhat significant. Understandably, given that the doctrine of consideration is so widely regarded as problematic, many of the existing proposals for reform seek to abolish the requirement of consideration and have thus focused more generally on consideration in the formation of

contracts. The outright abolition of the doctrine of consideration would be a very drastic move for the common law and some might view this as overly extreme, indeed this may be one of the reasons none of the previous proposals such as those made by Chloros⁴⁰⁵ and Wright⁴⁰⁶ have been implemented.

The modification of contracts appears to be an area of the law in which reformation is likely to be more successful (especially in Canada as there has already been some attempts towards the reform of the contract law in this area⁴⁰⁷) and it is also, as seen from chapter three of this thesis, one of the areas of the modern contract law most negatively affected by the doctrine of consideration. The piecemeal reform of the doctrine of consideration is something that has rarely been considered in recent times as most scholars seek to find ways of eliminating the doctrine entirely, or they seek to modify only certain rules. Though my work is primarily concerned with solving the problems caused by the doctrine of consideration in the modification of contracts, some of the proposals I have made are in fact transferrable and could reasonably be implemented in the context of contract formation. Therefore, this work may be seen a contribution to possible future efforts towards the reform of the doctrine of consideration in the context of contract formation.

⁴⁰⁵ Ibid

⁴⁰⁶ Lord Wright, “Ought the Doctrine of Consideration to be Abolished from the Common Law?” (1936) 49:8 Harv LR 1225

⁴⁰⁷ Supra Note 12

6.4 Comments on strengths and limitations of the research

6.4.1 Strengths

6.4.1.1 Historical context

The fact that this study takes into account not only the present state of the doctrine of consideration but also its historical development is also beneficial because it demonstrates the point in time where the common law and the civil law began to diverge. It also highlights the fact that the Anglo-Canadian common law and the German civil law are not perhaps as different as first thought. This may be encouraging for those seeking, as I am, to dismiss the notion that the German law can be of no assistance in the process of drafting new laws.

Where there are some basic similarities, it becomes much easier to identify areas where the German law can be used as inspiration without the risk of causing the alienation of certain rules within the common law.

6.4.1.2 The Acknowledgement of the fact that the doctrine of consideration continues to have a purpose within the Anglo-Canadian common law

The research I have conducted takes a different approach to the reform of the doctrine of consideration by re-introducing the possibility of using the German civil law as a means of inspiration. As previously mentioned, this approach has not been seriously considered by many scholars and dismissed by several others. Those who have considered the civil law as a means of aiding the reform of the doctrine of consideration have failed to acknowledge the fact that consideration continues to have a purpose within the Anglo-Canadian common law. This thesis combines the knowledge that the doctrine of consideration is not without purpose

whilst considering the idea that other mechanisms could reasonably perform that purpose just as well and potentially even better.

6.4.1.3 The use of a modified functional comparative approach to identify equivalent rules

The use of the modified functional comparative approach in this thesis has enabled me to identify those rules within the German law which perform the same, or very similar, functions to the doctrine of consideration whilst avoiding unnecessary steps such as the explanation of the reasons behind the differences within the two legal systems.

6.4.1.4 A clear explanation of the German civil law rules

In order to encourage the use of the German civil law in the modification of contracts, my thesis is intended to act as a means of informing those who are unfamiliar with the German civil law of its peculiarities and its potential for use within the common law. I have attempted to explain the German law in a way that would be useful to any legislator, judge or other authority considering the use of civil law rules as part of recommendations for reform.

6.4.1.5 The inclusion of preliminary proposals for a model law

The proposals which I have included at the end of this thesis have been written to serve as a possible guideline or starting point for the creation of a model law. These proposals demonstrate how the ideas set out in chapter five of this thesis might be presented as a model law and provides a simplified example of how the law might be reformed.

6.4.2 Limitations

6.4.2.1 Difficulties in fully exploring the issue of the purpose of the doctrine of consideration

This study does not address the problem of defining the purpose of the doctrine of consideration as fully as it might. The reason for this, as stated previously, is that addressing this particular issue would have been a separate thesis in itself and demanded more research than I was able to conduct. Though I was unable to formulate my own theory, I was able to consider some of the more highly regarded theories submitted by many well-respected scholars. My work may be criticised for its lack of contribution in this area, especially as the theory I have chosen to accept does not necessarily apply as neatly to those cases which involve contract formation. For the purposes of determining how the German law might be useful in the reform of the doctrine of consideration however, it was not necessary to consider the subject in too much detail and I therefore chose to focus more closely on other matters.

6.4.2.2 Focus on the modification of contracts

The fact that this study focuses solely on the modification of contracts, rather than the formation of contracts could be considered to be a limitation, particularly as far as the applicability of this research is concerned. However, this appears to be the area in which proposals for reform are most likely to succeed and has therefore been the main focus of my interest. Though it might be possible to consider some of my proposals in the context of a more general reform, some of the proposals I have made cannot be applied to the formation of contracts.

6.4.2.3 Difficulties in exploring the transferist/culturalist debate surrounding the transplantation of legal rules from one jurisdiction to another

Owing to the constraints of this work, I have been unable to fully address the debate surrounding the transplantation of legal rules from one legal system to another. The transferist/culturalist debate is long standing and much has already been written on the subject. This being the case, though I have attempted to include sufficient information to enable the reader to understand my reasons for rejecting the idea of directly transplanting the German civil law rules into the Anglo-Canadian common law, I have not perhaps explored every possible aspect of the debate.

6.4.2.4 Preliminary proposals only

Though this research does provide some preliminary conclusions on the possibilities of reforming the doctrine of consideration in the modification of contracts it does not provide proposals which could simply be enacted without further work. The proposals in this study are intended to act as starting points and ideas rather than concrete proposals. This does however mean that there may be some areas contained in these proposals that would need to be thought out more clearly by those with experience in the drafting of legislation.

6.5 Discussion of any potential applications of the research findings

The research I have done in order to complete this study could be used as a starting-point for the reform of the doctrine of consideration in the context of the modification of contracts within the Anglo-Canadian common law. This study is intended not to be the final word on the matter of the doctrine of consideration, indeed, it is intended to be the exact opposite. As previously mentioned, one of the purposes of this study is to reignite discussion about the doctrine of consideration which appears to have been extinguished in recent years and to

once again begin to encourage proposals for reform. As such, the findings and proposals contained in this piece of work could be used as a guide to possible steps which might be taken in order to affect the reform of the doctrine of consideration. The proposed legislation contained in the final chapter of my thesis could act as a reasonable starting point for those who are far more experienced than I in the creation of legislation.

The research into the German law contracts of contained in this thesis might also be a useful guide to those seeking to learn more about the German law and the ways in which it might be applied to aid the reform of the Anglo-Canadian contract law. One of the reasons that the Ontario Law Reform Committee has given for its reluctance to adopt any rules or principles from the civil law is that its ability to examine civil systems is:

Obviously limited, and we recognize the difficulties and dangers of drawing superficial conclusions from apparent rules in other legal systems. Without an intimate knowledge of the system in question, it is easy to be led astray”⁴⁰⁸

This thesis might therefore act as a source of knowledge for those seeking to better understand the German law so that they might be prepared to consider adopting or introducing some of these rules. The comparative aspect of this thesis highlights the differences and similarities between the German laws which govern the modification of contracts and the Anglo-Canadian laws which govern the same area. This enables the easy identification of areas within the common law which could be modified using German civil law principles or rules. By completing a detailed analysis of the German rules on the modification of contracts, ‘superficial conclusions’ are avoided and the risk of being ‘led

⁴⁰⁸ Supra Note 10 at 8

astray' is significantly reduced. This work could be used as a basic guide which points out exactly what German law does differently to the Anglo-Canadian common law.

Once more, in a broader sense, this thesis might therefore act as a means of encouragement towards the adoption, or influence, of the civil law in common law jurisdictions. As previously stated, the comparative aspect of my work demonstrates that the Anglo-Canadian common law and the German civil law do in fact share many commonalities. This indicates that the principles and rules contained within the German civil law can be adapted to the Anglo-Canadian common law or, at the very least, be used as inspiration for the reform of the contract law surrounding the doctrine of consideration. My work also demonstrates that, though transplantation is not always ideal, this does not mean that the civil law cannot be useful in the reform process and encourages reform committees not to shy away from the idea of researching and including foreign legal principles in their proposals for reform.

6.6 A description of possible future research directions, drawing on the work reported

According to my research, the biggest problems surrounding the doctrine of consideration lies in its lack of definition, its complexity and its entrenchment within the Anglo-Canadian common law because they make the process of removing the doctrine and replacing it with new legal rules extremely difficult. The biggest barrier to the removal of the doctrine of consideration, however, appears to be the confusion and disagreement surrounding its purpose within the common law. After all, how can we replace something if we do not know what its purpose is?

The first step in the reform of consideration must therefore be some agreement as to the purpose of the doctrine. This thesis proposes that Professor Atiyah's definition of consideration should be the definition adopted in order to facilitate the reform of the doctrine of consideration. The reason for this is its broad nature and its recognition of the original purpose of the doctrine. Many other scholars have already addressed this problem but none have successfully been able to convince the legal community that their theory is correct. It seems then, that there may still be work to be done on the subject, particularly if the doctrine of consideration is ever to be removed from the Anglo-Canadian common law. An interesting direction for future research could therefore be the analysis of the purpose of the doctrine of consideration and the ways in which the doctrine has and continues to evolve. Either the development of new a new theory of the purpose of the doctrine of consideration, or the in-depth study of existing theories with a convincing argument to support one of those theories would be highly beneficial to the process of preparing for the reform of the doctrine of consideration.

Further work would also be necessary to bring the proposals I have made into effect. As previously stated, though I have attempted to address some of the ways in which new legislation might be drafted, the proposals I have made are intended to be starting points rather than final recommendations. In order to draft proposals which could be successfully brought into legislation, further research could be conducted into the ways in which civil law rules can be incorporated into common law legislation. A focus on the translation of terminology and the incorporation of civil law concepts into common law legislative style would be particularly interesting as this is one of the areas in which many problems and challenges can arise.

An analysis of the ways in which the civil law has previously been incorporated into the legal systems of jurisdictions which are not traditionally civil in nature would be highly useful in order to determine how this might successfully be done. The study of the UNIDROIT drafting methods might also be beneficial as the process used by the working group sought to harmonize the laws of many jurisdictions by taking inspiration from them and creating new principles.

Further research could also be conducted into the reasons for the failure of the previous recommendations for reform addressed in the preceding chapters. Though I have attempted to address some of these issues, it has not been possible for me to conduct as much in-depth research as would be necessary in order to establish why exactly none of the recommendations for reform were ever implemented. It would be particularly interesting, for example, to conduct interviews with judges, scholars and members of reform committees and ask questions regarding previous attempts at the reform of the doctrine of consideration and their failures (though of course it might be very difficult to find anyone willing to comment on such delicate matters). Depending on the results, this particular direction could be highly useful in order to avoid repeating similar mistakes if the reform of the doctrine of consideration were ever to be seriously considered.

Finally, the focus of this thesis has been the reform of the doctrine of consideration in the context of the modification of pre-existing contracts. Much of the research I have done could be translated into more general proposals for the reform or removal of the doctrine of consideration as a whole. However, some aspects, such as the purpose of the doctrine of consideration, vary in different contexts, and this would need to be taken into account. For example, in the context of contract formation, it is possible to argue that the doctrine of

consideration does perform an evidentiary function. Thus, it would also be important to consider this when recommending directions for reform.

Some concern has in fact been voiced that the reform of the law surrounding the doctrine of consideration in the context of the modification of contracts but not formation could lead to further complexities in the law⁴⁰⁹. Though I submit that this is not the case, and that the modification of contracts is an ideal place to begin the reformation of the doctrine of consideration, further research into the possibility of looking to the German civil law (or indeed other civil law systems) as inspiration for the reform of the doctrine of consideration in the context of contract formation could be highly beneficial if the doctrine of consideration is ever to be eliminated entirely from the Anglo-Canadian common law.

⁴⁰⁹ British Columbia Law Institute Unfair Contracts Relief Project Committee: Law Foundation of British Columbia, *Consultation Paper on Proposals for Unfair Contracts Relief* (Vancouver: British Columbia Law Institute, 2010) Available online at <http://ssrn.com/abstract=1727528> (Last viewed 21/11/2013) at 73

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