

Recent Developments in European Contract Law
Winter term 2007/08
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Consideration, Cause: Indicia of Seriousness

Introduction

Situation in the national laws:

In England and Ireland a promise without 'consideration' is not binding.

§ 71 (US-) Restatement (Second) of Contracts (1981)

'(1) To constitute consideration, a performance or a return promise must be bargained for. (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.'

However, the English judges have quiet often shown a good nose for sniffing out some detriment in order to be able to speak of a bargain and admit 'consideration' (See Illustrations 1 and 2).

Illustration 1:

Mr Byham had lived in unmarried bliss with Mrs Ward for several years and a daughter was born to them. They agreed that the daughter should stay with the mother and Mr Byham promised to pay her 1 pound per week so that the child 'be well looked after and happy'. Mrs Ward subsequently married another man and Mr Byham stopped paying. On being sued, he argued that his promise to pay was invalid for want of consideration.

Ward v. Byham [1956] 2 All E.R. 318 (CA)

Illustration 2:

Mr Williams promised to his wife Mrs Williams to pay maintenance – something he was not obliged to do under law at that time since she had left him for no good reason.

Williams v. Williams [1956] 1 All E.R. 305 (CA)

US-Law: “Promissory estoppel” in order to avoid unsatisfactory results of the doctrine of consideration:

- in ‘subscription cases’ (enforceability of promises to public or charitable purposes);

- other case with unsatisfactory result:

A man promised to his nephew to meet the expense of his going to Paris and immersing himself in the spirit of Europe for a year. The nephew accordingly went to Paris with his own funds and studies there for a year. On his return he sought reimbursement.

Devecmon v. Shaw 69 Md. 199 14 A. 464 (1888)

§ 90 (US-) Restatement (Second) of Contracts (1980):

' A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding [even in the absence of consideration] if injustice can be avoided only by enforcement of the promise. The remedy granted for breach [of such a promise] may be limited as justice requires.'

A case with surprising result:

Illustration 3:

Two sailors jumped ship in a Russian port. Since the captain was unable to find substitutes, he promised the rest of the crew a supplementary wage to get the vessel safely back to England. On arrival the captain reneged on his promise. Was he right?

Stilk v. Myrick (1809) 2 Camp. 317, 170 Eng. Rep. 1168

However reflections in English law can be found:

Illustration 4:

The plaintiff contracted to fit out 27 flats but got into financial difficulties halfway through. The defendant promised him an extra 575 pounds for each further flat completed. The plaintiff agreed and completed 8 more flats before finally abandoning the job. He claimed the bonus for the extra 8 flats. Did he succeed?

Williams v. Roffey Bros. [1991] 1 QB 1 (CA)

'Past consideration is no consideration':

Illustration 5

A man died. He left his estate to his five children in equal shares. One of the sons - assisted by his wife - made improvements to a farm on the estate at his own expenses. The five children signed a document promising to pay the sons and his wife 488 pounds in consideration of having carried out these alterations.

Is this promise enforceable?

Re McArdle [1951] Ch. 669

But the situation is different where there is a element of request:

Illustration 6

P, at D'S request, promised D that they would not sell shares in a company for one year. D were the main shareholders of this company. D made this request to avoid a fall in value of their own shares. Later, D promised to indemnify P against any loss which they might suffer if the value of the shares fell.

Was the consideration for this promise merely past consideration?

Pao On v. Lau Yiu Long [1980] AC 614, 629 (PC)

US-case: moral duty is enough for consideration:

Illustration 7:

As Mr Webb started to turn the block loose so that it would drop to the ground, he saw Mr McGowin senior on the ground below and directly under where the block would have fallen. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. The only safe and reasonable way to prevent this was for Mr Webb to hold to the block and divert its direction. However the only safe way to divert it was for Mr Webb to fall with it to the ground below.

Mr Webb was engaged in clearing the upper floor of a Mill. One day he was - as usually and as it was his duty- in the act of dropping a pine block from the upper floor of that mill to the ground below. The block weighed about 75 pounds.

Mr Webb did this and diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin Mr Webb himself received serious bodily injuries. He was badly crippled for life and rendered unable to do physical or mental labour.

A few weeks days later, in consideration of Mr Webb having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of Mr Webb's life at the rate of \$15 every two weeks. Under the agreement McGowin paid to Mr Webb the sum so agreed on up until McGowin's death (overall 8 years). After his death the payments were continued for a short time but then the heirs stopped the payments.

Thereupon Mr Webb brought suit to recover the unpaid instalments. Was the promise enforceable or was it just a 'past consideration'?

Webb v. McGowin, 27 Ala.App. 82, 168 So. 196 (1935).



Please bear in mind / distinguish:

Enforceability of

Contracts with consideration

(+)

Bilateral agreements

gratuitous promises without consideration

(+) only if made in special form

Unilateral agreements

-> *Carlill v. Carbolic Smokeball Co* [1893]

1 QB 256

In Scotland and other civil law codes consideration is not required.

However in France and other European countries *cause* or *causa* is required:

France:

Art. 1108 code civile

Quatre conditions sont essentielles pour la validité d'une convention:

Le consentement de la partie qui s'oblige ;

Sa capacité de contracter ;

Un objet certain qui forme la matière de l'engagement ;

Une cause licite dans l'obligation.

Art. 1108 code civile

Four conditions are essential to the validity of an agreement:

the consent of the party who binds himself;

his capacity of contract;

a definite object which forms the subject matter of the agreement;

a licit cause.

Italy:

Art. 1325 codice civil: Indicazione dei requisiti

I requisiti del contratto sono:

- 1) l'accordo delle parti (1326 e seguenti, 1427);
- 2) la causa (1343 e seguenti);
- 3) l'oggetto (1346 e seguenti);
- 4) la forma, quando risulta che è prescritta dalla legge sotto pena di nullità (1350 e seguenti).

Art. 1325 codice civil: Conditions

The conditions to be satisfied for there be a contract are:

- (1) The agreement of the parties;
- (2) cause;
- (3) ...
- (4) form, where prescribed by law, on pain of nullity.

- But still this does not mean, that these laws have an equivalent to the English 'consideration – rule', since also gratuitous contracts have a 'cause': the intention to supply something without demanding anything in return.
- Other civil law codes do not focus on the 'doctrine of cause'.
- As already mentioned, they do not have a 'doctrine of consideration' either.
- However the Continental law systems accept the core idea of the 'doctrine of consideration' as regards **promises** of gifts in a sense already mentioned: liability arises only, if the promise is made in the legally required **form**.

France:

(Loi n° 2006-728 du 23 juin 2006 art. 9 Journal Officiel du 24 juin 2006 en vigueur le 1er janvier 2007)

Art. 931 code civil

Tous actes portant donation entre vifs seront passés devant notaires dans la forme ordinaire des contrats ; et il en restera minute, sous peine de nullité.

Art. 931 code civil

All acts containing an inter vivos gift shall be executed before notaires, in the ordinary form of contracts; and there shall remain the original of them, on pain of annulment.

Germany:

§ 516 BGB Begriff der Schenkung

- (1) Eine Zuwendung, durch die jemand aus seinem Vermögen einen anderen bereichert, ist Schenkung, wenn beide Teile darüber einig sind, dass die Zuwendung unentgeltlich erfolgt.

§ 516 BGB Concept of gift

- (1) A disposition whereby a person confers a benefit on another out of his own property is a gift if both parties agree that the disposition is made gratuitously. (...)

§ 518 BGB Form des Schenkungsversprechens

- (1) Zur Gültigkeit eines Vertrags, durch den eine Leistung schenkweise versprochen wird, ist die notarielle Beurkundung des Versprechens erforderlich. (...)

BUT SEE (!) ↓

- (2) Der Mangel der Form wird durch die Bewirkung der versprochenen Leistung geheilt.

§ 518 BGB Form for promise of gift

- (1) For the validity of a contract whereby an act of performance is promised gratuitously, notarial authentication of the promise is necessary. (...)

BUT SEE (!) ↓

- (2) Any defect of form is cured by the performance of the promise.

§ 125 BGB Nichtigkeit wegen Formmangels

Ein Rechtsgeschäft, welches der durch Gesetz vorgeschriebenen Form ermangelt, ist nichtig. (...)

§ 125 BGB Invalidity because of absence of form

A legal transaction which lacks the form prescribed by statute law is void.

Finally we will see, how the recently unified laws handled the subject of 'Indicia of seriousness'.

Art. 16 CISG

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

Art. 29 CISG

(1) A contract may be modified or terminated by the mere agreement of the parties. (...)

Art. 3.2 UNIDROIT Principles (Validity of mere agreement)

A contract is concluded, modified or terminated by the mere agreement of the parties, without any further requirement.

Article 2:101 PECL: Conditions for the Conclusion of a Contract

(1) A contract is concluded if:

(a) the parties intend to be legally bound, and

(b) they reach a sufficient agreement
without any further requirement.

(2) A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The contract may be proved by any means, including witnesses.

Thank you for your attention!