Reconsidering Consideration in American Contract Law Under Japan's Civil Law Model

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I. Introduction

The old adage that "there's no such thing as a free lunch" may not always be true, but American contract law has historically been a believer. Under the common law, a contract requires the element of consideration from each party. The effect is that a valid contract generally requires an exchange of something for something (quid pro quo) to create, amend, or terminate a contract. This concept makes a commodity of promises, with the theory that one would not intentionally create a personal obligation or give up a right without receiving something advantageous in return.[1] The law separates contracts from gifts, to enforce economic exchanges, and steer clear of involvement in one-sided vows of kindness. One way to look at the different approach to gifts and contracts is that a contract is "productive" for each party and perhaps the greater economy, while a gift represents a benefit primarily to just one side of the attempted transaction.[2] This view is not universal, however. The common law requirement of consideration is a strange concept from the perspective of Japan's civil law, which does not include this as an element of contract formation under its Civil Code.

Graduates of the American legal education system learn early in their studies that consideration is a fundamental principle of contract law. It is only gradually thereafter that we see the many exceptions to this rule, and realize that its application can seem haphazard and inconsistent. Japan's civil law students see consideration as a curious concept, and question why the common law places an additional burden on contract formation. Americans may wonder if Japan is missing something without this basic element of contract formation, or if consideration is a concept unique to and effective for only common law systems. Perhaps a better inquiry is whether one approach can provide more consistency and equity under modern contract law.

Centuries ago, requiring consideration as a contractual element made sense for common law contracts. It was a method of providing external evidence of the intention of each party to a contract. Today, however, such element is not necessary to prove the intent

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1) Rick Bigwood, *Exploitative Contracts,* 97 (Oxford University Press 2003).
2) *Id.* at 101-102.

of parties to a contract, and the uneven application of consideration can lead to unnecessary confusion and the unintentional undoing of an agreement duly considered by both parties. America should follow the civil law example adopted by Japan and abandon the reliance on consideration as a default requirement for valid contracts. Eliminating consideration from the common law would provide greater uniformity and fairness in a system that has outgrown this particular pro forma principle.

II. Consideration in the Common Law as a Requirement for Valid Contracts

From their earliest days, common law judges were tasked with determining how to enforce promises. The legal system could have taken the position that all promises are binding. Instead, the rule came to be that mere promises would be unenforceable by default, unless certain conditions were met that made the promises binding.[3)]

A. Development of Consideration in the English Common Law

Breaches of enforceable promises were originally seen as tortious matters. A party was liable for a tort in the common law courts when a promisor accepted an obligation but harmed the promisee in its performance. The promisee could sue for an action in assumpsit. From the early fourteenth century, such suits were limited, however, to cases where there was some failure in the performance of the promised obligation itself, rather than the failure to begin performance.[4)]

As the action of assumpsit developed over the fifteenth and sixteenth centuries, it became the principal basis for aggrieved parties to enforce their rights. Towards the end of this time, the concept of "consideration" came to mean "the sum of the conditions necessary for an action in assumpsit to lie." The term could differentiate between social niceties and promises that "were of sufficient significance to society to justify the legal sanctions of assumpsit for their enforcement."[5)] The practical application of consideration became clearer in the 1601 opinion known as *Pinnel's Case.*

In *Pinnel's Case*, a lender assured a debtor that partial payment of a debt would be accepted in lieu of payment in full. The court determined that such a promise alone was not valid consideration for waiving the rest of the debt, as "payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum".[6)] What made this case even more significant to the evolution of consideration,

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3) E. Allen Farnsworth, *Contracts* 13 (2d ed., Little, Brown and Company 1990).
4) *Id.* at 15-16.
5) *Id.* at 19-20.
6) Pinnell's Case [1601], 5 Coke Rep. 117a, 77 E.R. 237 (footnotes omitted).

however, was the court's example of what would have constituted good consideration in place of the unreciprocated promise to reduce the outstanding loan. The court made it clear that it did not need to examine the specific value of consideration exchanged, as "the gift of a horse, hawk, or robe, [etc.] in satisfaction is good. For it shall be intended that a horse, hawk, or robe, [etc.] might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction."[7] Something had to be received for giving up something. A reduction of the debt due was of no benefit to the lender.

As English law became the basis for the law in the American colonies, the concept of consideration also took root there. By the end of the nineteenth century, the English doctrine of consideration evolved generally into something that was "bargained for" between the parties in the United States.[8]

B. General Rules

Observers from civil law jurisdictions may be bemused by the concept of consideration, given that it is a not an element necessary for the formation of a contract in their legal systems. The concept is simple enough to understand, even if its necessity is arguable: each party to a contract must strike a bargain to give up something of value in order to receive something of value. Past consideration (an obligation already performed, or benefit received prior to the contract) is not adequate consideration, but "present or future" consideration is sufficient. "Promises are not binding unless they are obligatory on the part of both parties to the contract."[9] Generally, any bargained-for performance is sufficient consideration.[10]

1. Valid Consideration

It is easy to understand the idea of exchanging something for something. Less obvious is the idea that *not* doing something can also be considered an action with value. In the case of *Hamer v. Sidway,* a young man was promised $5,000 from his uncle, "if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age".[11] The nephew abstained as required, and notified his uncle, who passed away before remitting payment for the nephew's forbearance. The executor of the uncle's estate refused to pay the money and claimed that the contract was invalid due to a lack of consideration. The court held not only that consideration can take the form of giving up an action that one would otherwise have the right to do, but that the

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7) *Id.* (footnotes omitted).
8) Farnsworth, *Contracts* at 43.
9) Kelble Operating Corporation v. Jarka Corporation, 20 F. Supp. 647, 649 (S.D.N.Y. 1937).
10) Restatement (Second) of Contracts § 72 (1981).
11) Hamer v. Sidway, 124 N.Y. 538, 545 (N.Y. 1891).

promisee's performance does not have to provide a benefit to the promisor.[12] In other words, even assuming that an uncle's knowledge of his nephew's clean living was of no direct "benefit" to the uncle, the fact that he agreed to exchange money for the nephew giving up legal rights to do something consisted of adequate consideration.

In commercial purchases and sales, the idea of consideration is usually much clearer, as the value of goods or services in a commercial exchange will be roughly equal in value to payment. However, no objective yardstick is required to measure the relative "fairness" of any particular deal. Individuals are free to use their judgment (both good and bad) when making exchanges, and requiring any particular "value" in an exchange would open up every single contract to potential judicial scrutiny for pricing alone. This approach allows for intentionally "unequal" exchanges, particularly in familial relationships, or in the case of bargains made more in the interest of familial affection than economic merit.

2. "Sufficient" Consideration

While a contract without any consideration will be invalid, the parties are free to strike whatever bargain they desire, even if an outside observer would be shocked that the value of things exchanged was very unequal.[13] So long as consideration is bargained for between the parties, the amount of the exchange will be accepted as sufficient. Much like the horse, hawk, or robe from *Pinnel's Case*, a mere "cent or a pepper corn, in legal estimation, would constitute a valuable consideration."[14] Competent parties have the right to manage their business as they best see fit. In theory, the price at which an owner is willing to part with an item is as fair as the price that a buyer is willing to pay for said item, even if the seller thinks the "actual" price is lower, or the buyer would have been willing to pay even more. The adequacy or objective "fairness" of the exchange is not something that the courts want to weigh in on. "The consideration agreed upon may indefinitely exceed the value of the thing for which it is promised and still the bargain stand. The doing of an act by one at the request of another, which may be a detriment or inconvenience, however slight, to the party doing it, or may be a benefit, however slight, to the party at whose request it is performed, is a legal consideration for a promise by such requesting party."[15]

Unless a severe imbalance of consideration demonstrates a joke or mistake,[16] and "[a]bsent a claim of fraud or unconscionability, the adequacy of consideration is not a

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12) *Id.* at 545-46.

13) Embraer S.A. v. Dougherty Air Trustee, LLC, 348 F. Supp. 3d 246, 260 (S.D.N.Y. 2018). *See also* Restatement (Second) of Contracts § 71, Comment (c) (1981). "Ordinarily… courts do not inquire into the adequacy of consideration, particularly where one or both of the values exchanged are difficult to measure… Even where both parties know that a transaction is in part a bargain and in part a gift, the element of bargain may nevertheless furnish consideration for the entire transaction."

14) Whitney v. Stearns, 16 Me. 394, 397 (Me. 1839).

15) Hardesty v. Smith, 3 Ind. 39, 41 (Ind. 1851).

16) E. Allen Farnsworth, *Contracts* 70 (2d ed., Little, Brown and Company 1990).

proper subject for judicial scrutiny."[17] While the value of the consideration is not subject to judicial review, the trend is that the consideration needs to be "an actual bargain, not merely a pretense of bargain".[18] Thus, an "unequal" bargain can be made, so long as it was a genuine exchange, and not mere pretense. For example, if a contract states that a party provided one dollar as consideration, but no actual exchange of the dollar took place, the mere use of the word "consideration" without actual exchange does not in and of itself create sufficient consideration for a binding exchange. A contractual recital regarding consideration "does not preclude the parties from disputing the fact, nor does it give the promise any validity."[19] However, courts do not like to make subjective conclusions about the adequacy of consideration, and will look to find it, even when combined with consideration that would otherwise not be acceptable on its own.[20]

3. Agreements Failing for Adequate Consideration

a. Gifts

When one party provides some form of consideration while receiving nothing in return, a contract is not made, as consideration must be provided by each party to a bargain. Thus, under the common law, a gratuitous promise is not a legally binding commitment. Failing to deliver a promised gift is not a breach of contract. Once a gift is completed, it is final and complete. However, the anticipated beneficiary does not have the right to collect a gift before it is delivered.[21] A delivered gift is binding, while a promised gift is not, because delivery "performs an 'evidentiary' function by providing some proof of the fact that the donor intended to make a gift and of the fact that a gift was actually made. Actual delivery performs a 'cautionary' function, by bringing home to the donor the significance of the act and preventing ill-considered and impulsive gifts."[22]

It is important to note that consideration is required to show that the parties have bargained for something, but no actual "bargaining" is required as a practical matter. That is, no protracted negotiation process is required for any particular transaction. In this sense, the "bargain" is the exchange itself and not the process. The only requirement is that a party's promise and consideration is made for the promise and consideration of the other party.

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17) Spaulding v. Benenati, 57 N.Y. 2d 418, 423 (N.Y. 1982).

18) Farnsworth, *Contracts* at 71.

19) Strobe v. Netherland Co., Inc., 245 A.D. 573, 576 (N.Y. App. Div. 1935).

20) Good consideration may be found even when part of the consideration would otherwise be insufficient due to illegality. For example, "although compensation for illicit sexual relations cannot form the primary or main consideration for an agreement… New York courts will sever valid consideration where possible" so that the non-offending parts of an exchange may survive. Truman v. Brown, 434 F. Supp. 3d 100, note 3 (S.D.N.Y. 2020) (internal citations omitted).

21) Farnsworth, *Contracts* at 49-50.

22) *Id.* at 50-51.

b. Past Consideration and Moral Obligations

A promise to pay for a past service is unenforceable, as consideration must be something a party is giving up.[23] A party cannot give up a service that was already completed. However, parties could make a promise for past services binding if it is structured to include additional work to be performed in the future as well.[24] Furthermore, the common law does not like to make judgements on whether parties *should* make good on a promise due to moral or ethical considerations when no bargained-for consideration exists. The default rule is that all binding agreements must be supported by consideration. While some states recognize moral obligations, most do not.[25]

This general rule is demonstrated clearly (and arguably, somewhat harshly) in *Mills v. Wyman.*[26] Levi Wyman was an adult male who became ill after returning from a sea voyage in 1821. Daniel Mills, of no relation, provided care and shelter to Wyman until the traveler died from his illness. No legal consideration was exchanged, as Mills provided the care without any promise of payment, in an act of kindness. Wyman's father thereafter wrote a letter to Mills in gratitude, promising payment for expenses incurred. The father later decided not to pay as promised, and Mills sued for enforcement of the promise.

It did not matter that perhaps the father had a moral obligation to pay, for he did not bargain for the services provided to his adult son. "The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful."[27] The court held that a promise is not legally binding unless the promisor gains something or the promisee loses something. In this case, it is true that Mills lost the time and expense of caring for Wyman's son. But because this loss occurred *before* the father's promise, Wyman's written pledge to compensate Mills was made for no consideration.

Wyman's refusal to pay promised restitution may seem unkind, at best. Yet the court refused to bind him to what was a clear and unambiguous promise. Such a case may make the common law requirement of consideration seem inflexible and absolute. However, consideration as created under American common law has in many cases been modified by statute, with varying degrees of consistency or fairness.

C. Exceptions to the General Rules

As the traditional requirements of consideration for binding contracts are somewhat

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23) Subject to exceptions such as those under N.Y. Gen. Oblig. Law § 5-1105 as discussed in Section II.C.3 below.

24) Farnsworth, *Contracts* at 53. *See* Truman v. Brown, 434 F. Supp. 3d 100, note 3 (S.D.N.Y. 2020).

25) *See* In re McConnell's Estate, 6 Cal. 2d 493, 498 (Cal. 1936), but *cf.* Old Am. Life Ins. Co. v. Biggers, 172 F. 2d 495, 499-500 (10th Cir. 1949).

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

27) *Id.* at 209.

inflexible, some jurisdictions have altered their application statutorily. As an example, we will look at some of the ways New York has approached such modifications, and their effects on the ability to form agreements when consideration may be otherwise lacking.[28)]

1. Modifications to Existing Contracts

New York law requires consideration for a valid contract. However, modifications to existing contracts do not require additional consideration "when the modification is in writing and signed by the party against whom it is sought to be enforced."[29)] The Uniform Commercial Code explicitly permits existing commercial sales contracts to be modified even if no consideration is provided for the new modification.[30)] On its face, proponents of strict adherence to common law consideration requirements might see this as an opportunity for unscrupulous parties to contracts to use newfound leverage or the desperate situation of their counterparts to require extremely one-sided and unreasonable concessions, long after the mutual agreements provided in the original contract were made. The official comments to the model U.C.C. foresaw the possible abuse of this rule, and clarified that the purpose of the rule is to permit modifications that may be "necessary and desirable" without being bogged down by technicalities that can get in the way of transactional adjustments. They emphasize, however, that changes must be made in good faith, and that forced changes "without legitimate commercial reason" are prohibited.[31)]

Additional exceptions to the common law requirement of consideration are found in New York's General Obligations Law for written releases of claims, debts, or obligations,[32)] the assignment of or naming beneficiaries to insurance policies,[33)] and written agreements to change, modify or discharge obligations in real or personal property.[34)]

2. New Contracts

Certain types of contracts made by parties without a preexisting business relationship may also be exempt from consideration requirements. Written or published promises to pay a reward for lost or mislaid property are enforceable even without consideration.[35)] Written offers by merchants to buy or sell goods that promise to hold the offers open for a fixed period of time are "not revocable, for lack of consideration, during the time stated or if no

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28) The exceptions discussed herein are illustrative rather than exhaustive, and exclude issues, such as premarital agreements or promissory estoppel, as beyond the scope of this discussion.
29) Deutsche Bank Securities Inc. v. Rhodes, 578 F. Supp. 2d 652, 660 (S.D.N.Y. 2008).
30) N.Y. U.C.C. § 2-209(1) (McKinney).
31) Unif. Commercial Code § 2-209, comments 1 & 2.
32) N.Y. Gen. Oblig. Law § 15-303 (McKinney).
33) N.Y. Gen. Oblig. Law § 5-701(a)(9) (McKinney). Industrial life or health policies or accident insurance are excepted from this provision.
34) N.Y. Gen. Oblig. Law § 5-1103 (McKinney).
35) N.Y. Gen. Oblig. Law § 5-1113 (McKinney).

time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months".[36] And promises and warranties in real estate conveyances executed in a form that would allow the writing to be duly recorded are binding without consideration if the lack thereof was on purpose.[37]

The requirement of consideration is thus not absolute.[38] Courts have even extended similar exceptions to the general rule for some promises that are considered "moral obligations" as opposed to commercial obligations.

3. Limited Acknowledgment of Past Consideration

Not all jurisdictions hold that moral obligations are unenforceable just because consideration was not present when the promise to pay was made. For example, New York's General Obligations Law § 5-1105 changed the common law to recognize past consideration when included as part of a written contract, making what might otherwise be a moral obligation a binding one.[39] Such exceptions have also been made in other jurisdictions either statutorily or through case law.

An example of the rationale for such changes is seen in a case that began on August 3, 1925, when Webb, the plaintiff, was cleaning the upper floor of the mill where he worked. As part of the usual cleaning process, he began to drop a large wood block weighing approximately thirty-four kilograms to the floor below. While in the process of dropping the block, he saw McGowin on the ground below where the block would fall. To prevent McGowin's certain death, Webb held on to the block as is descended, thus changing the direction of its fall so that it missed McGowin completely. This unfortunately resulted in serious physical injury to Webb, breaking his right arm and leg, and tearing off his right heel. He was left disabled for life, and unable to ever work again. On September 1 of the same year, McGowin, "in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received," agreed to make payments to Webb every two weeks for the rest of his life for his care.

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36) N.Y. Unif. Commercial Code § 2-205 (McKinney). Further, except as provided in U.C.C. § 2-205, a signed offer "which states that the offer is irrevocable during a period set forth or until a time fixed… shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability". N.Y. Gen. Oblig. Law § 5-1109 (McKinney).

37) N.Y. Gen. Oblig. Law § 5-1115 (McKinney).

38) In some jurisdictions, the necessity of consideration may be disregarded when a party agrees to repay a discharged debt, even when no new consideration is exchanged. Debtors need to exercise caution in making any promises to make even partial repayments, as "most states found that a debtor's promise to repay… debt was enforceable despite a lack of consideration… Under California law, an agreement to pay a debt discharged by a bankruptcy court is enforceable despite the lack of new consideration." In re Bennett, 298 F. 3d 1059, 1066-67 (9th Cir. 2002) (internal citations omitted).

39) A written agreement signed by the promisor "shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed." N.Y. Gen. Oblig. Law § 5-1105 (McKinney).

McGowin honored this pledge until his death on January 27, 1934, but the payments were stopped by his estate's executors.[40)]

The court compared McGowin's post-accident promise to pay Webb's injury compensation to a patient accidentally poisoned, who receives an unrequested antidote from a doctor. In such a case, a subsequent promise to pay the doctor would be held enforceable. "Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received."[41)] The court held that a person's life and physical well-being have monetary value that would be sufficient to form contractual consideration, as distinguished from moral obligations unrelated to receiving a benefit. For example, in *Mills v. Wyman,* the promised payment was a moral obligation for the benefit of Wyman's adult son. But McGowin "received a material benefit constituting a valid consideration for his promise."[42)] Presumably, if it was the elder Wyman's care that was the subject of the promised payment, the past consideration could have been sufficient to form a binding contract.

4. Charitable Pledges

Making a gift to charity is perhaps the clearest example of promise made without consideration. Of course, charitable pledges can be made in exchange for something of value, such as a building being named after the donor in honor of the gift. However, people commonly make charitable gifts out of nothing more than the desire to do something good for others.[43)] One could argue that the satisfaction of helping others does actually have some intrinsic value that should be deemed as sufficient consideration, but to do so would mean that any transaction could theoretically have the same effect for a promisor at some level. Some states provide that charitable donations are binding when made, which is supported by the Restatement of Contracts.[44)]

New York case law has held that promises of charitable donations need to be enforceable for good public policy. "To that end, New York… courts have frequently bent over backwards to find the requisite consideration making a pledge enforceable"[45)] as exemplified in *Allegheny College v. National Chautauqua County Bank.* In 1921, Johnston signed a pledge for $5,000 to be paid to an endowment fund at Allegheny College thirty

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40) Webb v. McGowin, 27 Ala. App. 82 (Ala. Civ. App. 1935).

41) *Id.* at 85.

42) *Id.* at 86.

43) Tax planning is also a reason for some to make charitable contributions, but the courts (and perhaps many donors themselves) would prefer not to delve too deeply into whether tax considerations are the primary motivation for making charitable gifts, rather than incidental benefits of generosity.

44) Restatement (Second) of Contracts § 90(2) (1981).

45) Christina M. Mason and Sean F. McLernon, *Enforcing Charitable Pledges,* October 7, 2016 https://www.wealthmanagement.com/philanthropy/enforcing-charitable-pledges (accessed Jan. 31, 2023).

days after her death. On the back of her written pledge, she wrote in part that, "this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field." In December 1923, the first $1,000 was delivered to the college while Johnston was still alive, which the college set aside for a scholarship fund for ministry students. In July 1924, Johnston notified the college that she was terminating her promise. Nevertheless, the college sued her estate for payment of the remaining balance thirty days affer her death.[46)]

The court held that the promise was a binding contract and explained that Johnston wanted her name honored, and made conditions for her gift. "The moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation."[47)] Allegheny College's duty to so honor the donor constituted consideration. The dissent believed that the majority unnecessarily stretched the bounds of consideration to find consideration when none was truly intended. "Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a 'gift' by the offeror."[48)] As a result, the exchange should not have been reinterpreted as a trade when a one-sided gift was objectively intended.

A 2016 case presented somewhat similar facts to *Allegheny* in that a donor signed a pledge card and promissory note to an educational institution for payment after death, which was challenged by the donor's estate.[49)] However, the facts of this case demonstrated that the donee incurred no liability in reliance of the promise. Since the promisee failed to take steps to set up a fund or earmark the donation for a particular purpose, the gift was not binding. While not guaranteed, donees still have means to help ensure that their charitable donations are enforced by paying attention to the method of accepting and accounting for such promises. But the principle of consideration presents itself as a potential trap in this way for both donors and donees. Japan's civil law system does not pose such difficulty.

III. Japan's Civil Code Approach to Contracts and Consideration

Japan's Civil Code does not require an equivalent common law concept of consideration in order for a binding contract to be formed, but instead adheres to the German concept of looking at the intent to be legally bound when making a promise.[50)] No

46) Allegheny Col. v. Nat. Chautauqua Co. Bank, 246 N.Y. 369, 371-72 (N.Y. 1927).
47) *Id.* at 375.
48) *Id.* at 379 (Kellogg, J., dissenting).
49) In re Kramer, 140 A.D.3d 768 (N.Y. App. Div. 2016).
50) Hiroo Sono, Luke Nottage, Andrew Pardieck, and Kenji Saigusa, *Contract Law in Japan* 56-57 (Kluwer ↗

consideration is necessary, and the default rule is that contracts do not need to be in writing to be valid, unless required in other laws or regulations.[51)]

A. Cultural and Historical Background

Reasons for Japan's lack of the concept of consideration could be attributed in part to the cultural and historical differences between it and the Western world. A promise creates trust from others in one's future behavior.[52)] More than just economic benefit or reliance, one who makes a promise should be able to be trusted to make good on their words with actions. However, the Anglo-American contractual view of a promise is that it cannot be binding if given freely. Instead, consideration is required to make a promise legally enforceable.

Conversely, contracts in feudal Japan were seen more as "understandings" to be dealt with locally, to the extent possible, with agreements enforced by village authorities.[53)] The preferred method for this enforcement, however, was not from a judge on high, but rather through a process of negotiation and conciliation. People adhered to their agreements less from moral or religious imperatives that influenced agreements in the West, but focused on a broader sense of a reliance on and obligation to others. Neither common law concepts nor Roman codes for structuring legal obligations were necessary when agreements were maintained through a sense of family and community obligations.[54)]

It may seem like the simple answer to Japan's fairer approach to consideration is related to "the fact that in Japan relationships, including economic relationships, are considered basically to be social rather than legal. If a contract is concluded between two parties, for instance, its precise content will depend more upon what the parties feel that their relationship is or is expected to be than upon the objective words used to frame the contract."[55)] While there is some merit to the argument regarding the differences between Eastern and Western culture and religion and their effects on legal jurisprudence, Japan's lack of a consideration principle in its contract law is more strongly influenced by its choice to model its law on the German and French civil codes, rather than a common law system.

General rules that apply to all contracts in Japan include: 1) private rights must not

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↘Law International B.V. 2019).

51) Minpō [Minpō] [Civ. C.] art. 522. All English language references to the Civil Code (Minpō) (Act No. 89 of 1896) herein are from translations available at the Ministry of Justice's Japanese Law Translation Database System https://www.japaneselawtranslation.go.jp/en/laws/view/3494/en#je_pt3ch2 (accessed February 9, 2023).

52) Charles Fried, *Contract as a Promise,* 11 (2d ed., Oxford University Press 2015).

53) Carl F. Goodman, *The Rule of Law in Japan,* 308 (Kluwer Law International B.V. 2008).

54) *Id.* at 308-09.

55) Charles R. Stevens, *Modern Japanese Law as an Instrument of Comparison,* 19 Am. J. Comp. L. 665, 668 (1971).

violate the public welfare; 2) good faith requirements; and 3) a prohibition of the abuse of rights.[56] Furthermore, interpretation of the Civil Code "must be construed so as to honor the dignity of individuals and the essential equality of both sexes."[57] As part of the civil law tradition, Japan comparatively relies less on judicial precedent than common law systems, and focuses more on statutory law. Nonetheless, Japanese courts are not hesitant to revise the terms of contracts brought before them that are deemed to fall short of the above requirements.[58] Fairness is set into the default principles from the outset.

B. Contractual Categories

A major difference from common law systems is that Japan's Civil Code delineates thirteen different categories of contracts. Many are familiar to the common law system, such as sales (*baibai*) or leases (*chintaishaku*). Unlike the American system, the Civil Code explicitly provides for contracts that would be generally viewed as unenforceable in the common law due to a lack of consideration, with a specific category for gifts (*zōyo*).[59]

1. Sales Contracts

Sales agreements become binding when a party promises to transfer a certain property interest to another party and the other party promises to pay for it.[60] Although consideration is not explicitly required, such contracts for value (*yūshō keiyaku*) "involve economic exchange," unlike gratuitous contracts (*mushō keiyaku*).[61]

The lack of the principle of consideration does not therefore mean that a contract will be formed whenever a preliminary discussion about pricing and exchange takes place. Intent is the critical element of contract formation, as a case from the Tokyo High Court illustrates. Dynalab Japan and Traffic Software were engaged in discussions for a software license agreement. Traffic Software's representatives traveled to Japan for the negotiation, and the two sides agreed to a plan for an agreement, and memorialized their basic terms for a deal by signing a short, handwritten memorandum of understanding ("MOU"). Subsequently, the two parties exchanged multiple draft agreements to finalize the deal, but

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56) Minpō [Minpō] [Civ. C.] art. 1.

57) Minpō [Minpō] [Civ. C.] art. 2.

58) Andrew M. Pardieck, *Layers of the Law: A Look at the Role of Law in Japan Today,* 22 Pac. Rim L. & Pol'y J. 599, 611-12 (2013).

59) Colin P.A. Jones and Frank S. Ravitch, *The Japanese Legal System,* 380-81 (West Academic Publishing 2018). This Section III.B does not delve into all thirteen contract categories, but focuses on the main issues of comparison from the point of view of consideration. Further, other types of contracts are governed under the purview of separate sections of the Civil Code, such as labor laws, or business franchises subject to antimonopoly laws and governmental guidelines. *See* Hiroo Sono et al., *Contract Law in Japan* at 40-42 and https://iclg.com/practice-areas/franchise-laws-and-regulations/japan (accessed January 30, 2023).

60) Minpō [Minpō] [Civ. C.] art. 555.

61) Hiroo Sono et al., *Contract Law in Japan* at 42.

no final agreement was executed before the first contemplated payment due date under the MOU. Traffic Software claimed that an agreement was made, and payments were due. The court, however, noted that the MOU did not include full details of the purported deal. An MOU is just a summary of terms that the parties wish to include in a binding contractual agreement, and not a binding instrument in and of itself.[62)] Mere statements of a contemplated bargain are not sufficient to bind the parties. The discussion of pricing and payments is secondary to the actual intent of each party.

2. Gifts

While an exchange is part of an agreement, no special provision for consideration is necessary to make it effective. This lack of requiring consideration to be part of an enforceable contract permits gratuitous exchanges to be legally binding. Under Japan's Civil Code, gifts are effective upon the expression of intent to give something to another for free, and the acceptance by the other party.[63)] If the promised gift is not in writing, it can be cancelled before performance, but any portion of the transfer already completed cannot be retroactively undone by the donor.[64)] If the gift is not to be immediately delivered, the donor is presumed to maintain the item in the condition it was in at the time the gift was first made.[65)]

3. Unilateral Amendments

A party is permitted to unilaterally change provisions in the standard terms to an existing contract, without consideration or consent, under limited conditions. Such amendments are permissible if the changes conform "to the general interest of the counterparties", or the amendment "does not run afoul of the purpose of the contract, and it is reasonable in light of the circumstances" regardless of whether the original contract made explicit provisions for such revisions.[66)]

4. Forgiving Obligations

Unlike the English precedent set in *Pinnel's Case*, Japan's Civil Code permits an obligee to terminate an obligor's obligation with a manifestation of the intent to do so. So, no consideration needs to change hands to extinguish the duty, if that is the obligee's wish.[67)]

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62) 1745 Hanrei jihō 96 (Tokyo High Ct., April 19, 2000).
63) Minpō [Minpō] [Civ. C.] art. 549.
64) Minpō [Minpō] [Civ. C.] art. 550.
65) Minpō [Minpō] [Civ. C.] art. 551(1).
66) Minpō [Minpō] [Civ. C.] art. 548-4(1).
67) Minpō [Minpō] [Civ. C.] art. 519.

5. An Exception to the Rule: Non-compete Agreements

As discussed above, Japan's contract law has no general requirement for consideration to be provided by either party in order to create an enforceable obligation. In cases where employers extract non-compete agreements from departing employees, however, consideration is one element of assessing the validity of such agreements. Court opinions "indicate that the courts do not require the employer to pay an exact and strict consideration for the contractual restrictions. However, some courts have considered whether the employers have paid a consideration corresponding to the former employee's disadvantage, by comparing with other employees who do not owe the non-competition obligation to the employers."[68] A majority of court decisions indicate that while not a prerequisite to make such agreements binding, including compensation for the employee is an element in determining the reasonableness of post-employment restrictions.[69] Requiring some form of exchange in these situations helps prevent employers from unduly abusing their greater power over employees.

IV. Japan's Civil Law Approach to Consideration is More Practical for Contract Formation than the Common Law

While American students learn contract law by reading a patchwork of judicial opinions, both old and new, plus statutory law that can vary from state to state, Japan's Civil Code provides comparative consistency and completeness. Not having to consider the principle of consideration is one less potential pitfall in the analysis of whether or not a contract was validly formed.

A. Modern Consideration is More Form than Function

Consideration should be immaterial if the parties truly intend to make a binding agreement. Within the core of almost any analysis of consideration rests the intent of the parties, which should be the true measure of a binding agreement. Courts will not permit parties to transform something that is clearly not consideration into an effective bargain by simply adding language like "in consideration of…" or "I promise, in exchange of….". Furthermore, consideration alone is not proof positive that the parties had a meeting of the minds, and can fail as an effective measure of intent.

In *Leonard v. Pepsico*, the soft drink company held a promotion whereby customers could collect points from purchased soft drinks, and redeem the points for prizes, such as t-shirts, sunglasses, or jackets. A consumer saw an amusing Pepsi advertisement on television that invited consumers to redeem the extraordinary amount of 700,000 points for a military

68) Toru Ueda, *Restrictions on Post-Employment Competition: Comparing the United States with Japan,* 34 Conn. J. Int'l L. 169, 202 (2019).

69) *Id.* at 204-05.

fighter jet. Pepsi did not adequately factor in that its own rules permitted customers to inexpensively purchase Pepsi points for money, thereby allowing an enterprising consumer to effectively acquire a multimillion-dollar piece of military hardware from the soda company for a fraction of the market price. Leonard did so, and demanded his jet.

If the presence of consideration was the main factor in determining whether or not a binding contract was created, Leonard should have won this case. He did not, even though he fully intended to exchange something of value (Pepsi points) for the jet. The court determined the intent of the parties by interpreting "what an objective, reasonable person would have understood the commercial to convey… If it is clear that an offer was not serious, then no offer has been made… An obvious joke, of course, would not give rise to a contract."[70] If the consideration is insufficient to determine the sincerity of a contract, it may offer little probative value. The expressed intent of the parties is ultimately what matters above all. Consideration in and of itself is not conclusive.

If an objective, reasonable person's understanding is key to determining valid contract creation, then consideration should merely be one element of evidentiary support, rather than a necessity. For example, if a buyer and seller agree to transfer ownership of real property at a certain price and memorialize their agreement in writing, does intent matter if one party claims the agreement was made in jest, since the outward forms of a binding contract have been met? While true intent is important, "the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind…"[71] Just as one's outward actions must be seen from an objective, reasonable observer's point of view in a contract with consideration, a true reflection of a donor's intent can similarly be determined from the formation of a contract without consideration. As the presence of consideration alone is not determinative of valid contract formation, its absence alone should similarly not be determinative.

An argument can be made that the necessity of consideration will require the parties to think carefully about their potential contractual obligations before agreeing to hand over consideration. In this way, "impulsive" gifts, such as the grieving parent's promise in *Mills v. Wyman* to reimburse Mills for the expenses incurred for his dying son, may be prevented. But the law does not need to prevent a competent party from making a rational gift. If we embrace the concept of "freedom of contract", why should the concept of "freedom to gift" not be given equal weight? "Impulsive" contracts are executed daily by individuals around the globe who click on shrink-wrap contracts for computer software and cell phone apps, usually without even reading the agreements to which they will be bound. If these contracts

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70) Leonard v. Pepsico, Inc., 88 F. Supp. 2d 116, 127 (S.D.N.Y. 1999) (internal citations omitted).
71) Lucy v. Zehmer, 196 Va. 493, 503 (Va. 1954) (internal citations omitted).

can be given full legal enforcement, then surely an individual's desire to unilaterally give money to a charity or reimburse a good Samaritan for taking care of a family member can be enforced. Japan's statutory provision for gifts is clear and fair. If a donor wishes to make an irrevocable donation, one needs only to reduce the wish to writing. Nothing need be expected in return, and no well-intentioned gift need be held invalid due to the failure to get something in return.

B. Words Matter and Promises Should Have Meaning

Is it unreasonable to expect a person to be bound by a promise made, consideration notwithstanding? An argument can be made that the intent of a unilateral promisor is much more difficult to distinguish from that of a transaction in which the promisor received something of value in-kind.[72)] Certainly, in business transactions, each party needs to be able to rely on the other so that sellers can acquire goods to sell with the expectation of getting paid, and buyers can rely on receiving delivery of their desired items at the pre-determined price, quantity, location, and time. "Freedom of contract *is* freedom of promise, and… the intrusions of the standard doctrines of consideration can impose substantial if random restrictions on perfectly rational projects."[73)]

The theory of consideration is that something more than an empty promise is given, as signified by an exchange of something for something. Thus, the law should also preserve the ability of two parties to freely contract, without undue interference or subjective analysis of the adequacy or "fairness" of the terms of the deal. Unfortunately, this frame of reference cannot always work, as it would be impossible for a court to determine if "something" is exchanged without at least giving a cursory examination of the adequacy of such exchange.[74)]

Courts do not like to step in to breach of contract claims when it sees the potential for a moral or ethical issue, rather than a familiar business transaction. In a case between a newspaper and a source whose identity was revealed without consent, the court sided with the publisher's claim that its disclosure of a confidential source was not a breach of contract with the informant. The law does not consider every exchange of promises as binding. Sources and reporters "are not thinking in terms of offers and acceptances in any commercial or business sense. The parties understand that the reporter's promise of anonymity is given as a moral commitment, but a moral obligation alone will not support a contract."[75)] The court held that no contract was formed as this disclosure of information in exchange for a promise of confidentiality and reporting was an "'I'll-scratch-your-back-if-

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72) Michael J. Trebilcock, *The Limits of Freedom of Contract,* 182-83 (Harvard University Press 1993).

73) Charles Fried, *Contract as a Promise,* 35 (2d ed., Oxford University Press 2015).

74) *Id.* at 29.

75) Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990) (internal citations omitted), *rev'd on other grounds* in Cohen v. Cowles Media Co., 501 U.S. 663 (1991).

you'll-scratch-mine' accommodation… To impose a contract theory on this arrangement puts an unwarranted legal rigidity on a special ethical relationship…"[76)]

A moral or ethical obligation should be no less worthy than an obligation made over money. Japan's civil code eliminates the need to go down this path. Common law courts may find it expedient to hold that "moral obligations do not give rise to contractual liability" and "because a reporter's promise of confidentiality is a moral obligation, not a contractual requirement, and because a moral obligation does not give rise to express or implied contractual duties, there is no contractual relationship" in such instances.[77)] But almost every transfer is essentially an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation. There is no difference whether one party gives another money to receive goods, or whether that same party gives another information in confidence in exchange for further investigation and reporting on that information, or even if a donation is made for the personal satisfaction it gives one to see the donee happy. Japan's civil code looks to the promisor's act of making the promise, and that should be sufficient. After all, if a promisor does not want to be bound, no promise needs to be made in the first place. Once a guarantee is made, the promisee should be able to take it at face value, and not have to worry about the promisor being let off the hook due to a legal technicality of which few outside of the legal profession are even aware.

C. Disregarding Consideration Will Provide Consistency and Fairness

Consideration is understood as a fundamental requirement for contracts under the common law. This general rule, however, gives way to notable exceptions as discussed in Section II.C above, either through specific exceptions permitted through case law, or as spelled out legislatively. While past performance is not respected as valid consideration, this rule can be and has been modified by statuary law. As discussed above, New York provides a statutory exception, allowing the enforcement of written promises signed by the promisor even when only past consideration was provided.[78)] However, the piecemeal and oftentimes conflicting exceptions among the different jurisdictions in the United States are inefficient in a federal legal system, with the practical effects not always to the benefit of a level playing field, because the exceptions are applied inconsistently.

Generally, a contract executed pursuant to the rules under the Uniform Commercial Code must adhere to the traditional common law requirement of consideration. However, once an agreement is reached, the parties may change the terms of the agreement without any additional consideration.[79)] While such an exception is useful for commercial purposes, such as enabling parties to update agreements as necessary for compliance with changing

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76) *Id.*
77) Steele v. Isikoff, 130 F. Supp. 2d 23, 31-32 (D.D.C. 2000).
78) N.Y. Gen. Oblig. Law § 5-1105.
79) Unif. Commercial Code § 2-209(1).

governmental requirements, exceptions can also skew against the interests of consumers, to the advantage of corporations and contractual partners with superior bargaining positions.

A reasonable observer of the concept of consideration might believe that a large company's unilateral decision to alter a services contract should be void, at the change lacks consideration. After all, the company set a price and terms for certain services, the customer agreed and signed a contract, and the mutual understanding was made. Yet unilateral amendments abound when companies change terms of service agreements with little notice to or choice for consumers.[80] To be truly fair, exceptions to the requirement of consideration should ideally be either accepted or prohibited across the board as a general principle.

Admittedly, a virtual abolition of consideration from the common law would present difficulties at first, but it is not without precedent. Pennsylvania enforces signed contracts without consideration under its Uniform Written Obligations Act, so long as a statement to the effect "that the signer intends to be legally bound" is included.[81] "This closely tracks the current civil law approach to contract validity and, while not widespread, is evidence that frustration over the consideration doctrine permeates common law jurisdictions."[82] Yet exceptions to even this rule will be found, such as when the Pennsylvania Supreme Court held that non-compete agreements are an exception to this statute, and must be supported by consideration, due to the state's historically unfavorable view of restraint of trade.[83] However, this approach is similar to Japan's approach to non-compete agreements, as it provides an exception to a general rule for the purpose of protecting those with significantly weaker positions from being taken advantage of by parties with disproportionate bargaining

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80) As discussed above, the Uniform Commercial Code permits changes to existing agreements without additional consideration. In some cases, not only is consideration not required, but the concept of knowing and voluntary acceptance is stretched. In *Byrne v. Charter Communications, Inc.,* 581 F. Supp. 3d 409 (D. Conn. 2022), customers sued a cable company over its fees. Plaintiffs argued that the cable company's contract allowed it to "in its sole discretion, change, modify, add or remove portions of the Terms of Service at any time" so long as it notified subscribers. "Acceptance" of the terms would be reflected by the customer's "continued use of the [s]ervices following notice of such change, modification or amendment" and lack of agreement must be acknowledged by terminating the service. Plaintiffs argued that the cable company was not bound by any consideration because it had unlimited unilateral power to change anything in the service agreement. The court disagreed (*Id.* at 417-418). Because the cable company was required to provide notice of impending unilateral changes and customers were given the choice to either keep using the services or cancel the contract, "these respective promises by the parties together are sufficient to constitute valid consideration" (*Id.* at 419). While consumers may bristle at the idea that they are "agreeing" or "promising" to be bound by non-negotiated changes to a telecommunications service contract under the threat of losing the service completely, consumers are, in theory, free to choose another service. If that particular company has a local monopoly, or if all other service providers adopt similar policies, the sufficiency of such consideration should be questioned.

81) 33 Pa. Stat. Ann. § 6.

82) Kevin J. Fandl, *Cross-Border Commercial Contracts and Consideration,* 34 Berkeley J. Int'l L. 1, 46 (2016).

83) Socko v. Mid-Atlantic Systems of CPA, Inc., 633 Pa. 555, 567-68 (Pa. 2015).

positions.[84] Consideration should be used judiciously, as an added element to protect the weak from injustice, rather than as a source of inequity itself.

V. Conclusion

The common law concept of consideration as an essential element for a valid contract is a strange historic anachronism. "It would be foolhardy to attempt to defend it by an exercise in logic, for it must be viewed in the light of its history and of the society that produced it."[85] It is time to learn from Japan's approach, and move consideration from the rule to an exception for valid contract formation.

Consideration does not effectively distinguish between the value of a contract and a gift. American courts will generally look to determine if something was exchanged for something else; however, they will not look too deeply into the value of what is exchanged, leaving it to the parties themselves to determine if the consideration was sufficient when making the contract. If a person agrees to sell a new car to another for one cent, is the consideration "sufficient" for the seller? It would appear that this exchange, when viewed by an impartial third party, is effectively a gift, but the courts do not want to look at the motives of the parties voluntarily exchanging consideration.[86] There is virtually no practical difference between a promise to pay one cent for a car and paying nothing, other than to fulfill a pro forma requirement. The requirement of an exchange of consideration serves merely as a trap for the unwary, which may cause an otherwise perfectly well-intentioned gift to be undone as a contract that fails for lack of consideration. The intent of the donor should be the primary concern, which can be determined with or without token consideration.

Lack of a requirement for consideration does not, however, make Japan's civil code approach intrinsically fairer than American common law in all cases, especially in terms of protecting the rights of less powerful parties from unilateral changes by their more powerful counterparts. For example, modifications and amendments to contracts in Japan can be implemented when one party unilaterally agrees to perform some additional work, or undertakes an obligation not otherwise required under an already executed contract,[87] just as amendments without consideration are permitted under the Uniform Commercial Code. A better approach is to use the principle of consideration as an exception to the rule, rather than as a default, as a tool to prevent abuse of weaker parties to an agreement.

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84) Such protections for workers against restraint of trade agreements are arguably more important in the United States, which has relatively few protections from termination for "at will" workers without cause in comparison with Japan.

85) E. Allen Farnsworth, *Contracts* 20 (2d ed., Little, Brown and Company 1990).

86) Rick Bigwood, *Exploitative Contracts,* 103 (Oxford University Press 2003).

87) Hiroo Sono, Luke Nottage, Andrew Pardieck, and Kenji Saigusa, *Contract Law in Japan* 58 (Kluwer Law International B.V. 2019).

The concept of consideration's early development in the common law made sense, as it could provide additional evidence for or against a bargain made, as a safeguard against unscrupulous parties. In early seventeenth century England, documenting the intent of parties to a contract would have proven comparatively difficult, as literacy rates were relatively low.[88] Proving that an individual had a self-interested motive for entering a binding agreement would have been easier than forcing illiterate individuals to sign, stamp, and seal documents that one or both parties could not even read. Today, however, between almost universal literacy rates and the way that individuals can provide ample evidence of their intentions through written or electronic communication, the need to prove that an individual's promise was solely motivated by selfishness is unnecessary and counterproductive. Proponents of the common law principle of consideration may worry that every minor social agreement will suddenly be elevated to the highest courts in the land in the event of personal disagreements. Japan, however, has shown that this is not a very likely outcome. People do not generally go to court over such trivialities, especially when a judiciary is fully capable of not rewarding those who do. The United States should adopt Japan's civil law approach and consider consideration an exception to be used judiciously, rather than the default rule for contract formation.

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88) David Cressy, *Literacy in Seventeenth-Century England: More Evidence,* 8 The Journal of Interdisciplinary History 1 (1977).