ENVISIONING THE JUDICIAL ABOLITION OF THE DOCTRINE OF CONSIDERATION IN SINGAPORE

The doctrine of consideration in contract law serves as an absolute "formula of denial" to the enforceability of otherwise legally binding agreements today. In this article, the justifications offered in defence of the doctrine will be thoroughly investigated, but each will eventually be found wanting. A study of the civilian legal system will also cast doubt on the necessity of the doctrine in contract formation. This author proposes that the Singapore judiciary abolish the doctrine, but retain the notion of "reciprocity" or "bargain" to serve as an evidentiary presumption for the intention to create legal relations – the "marrow of contractual relationships" indeed.

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The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512.) No modern authority was cited to me suggesting an intended *commercial transaction of this nature* could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship.[1]

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1 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] *per* V K Rajah JC (as he then was).

I. Introduction

1 In *Chwee Kin Keong v Digilandmall.com Pte Ltd*[2] ("*Chwee Kin Keong*"), the plaintiffs were a group of friends who attempted to take advantage, knowingly, of the mistaken price of laser printers posted on the defendant's (sellers) website. When the defendant realised the error and informed the plaintiffs that it would not be meeting their orders, the plaintiffs commenced legal action against the defendant. The Singapore High Court eventually held for the defendant on the basis of mistake, but in the process the court rebutted the defendant's contention that there was no consideration.[3] Although Rajah JC (as he then was) easily held that there was "ample consideration" due to the "mutual promises" involved in the transaction,[4] his Honour openly questioned the utility of the doctrine and commented suggestively on its possible demise as quoted above.

2 This article attempts to develop Rajah JC's comment and envision a legal landscape without the doctrine of consideration in Singapore contract law. In doing so, an accommodative approach is proposed. This approach acknowledges most of the criticisms by "abolitionists"[5] against the doctrine of consideration, but appreciates the significance of the element of "reciprocity or bargain" which the doctrine brings to contract law, an element often highlighted by "defenders"[6] against the abolition. While the accommodative approach seeks to abolish the use of the doctrine as an independent, absolute "formula of denial",[7] it incorporates the element of "reciprocity or bargain" into the judicial search for the "marrow of contractual relationships"[8] – the parties' intention to create legal relations.

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2 [2004] 2 SLR(R) 594.

3 The defendant had argued that no consideration passed from the plaintiffs to them because the credit card payments had not been processed and no cash had been collected.

4 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139].

5 Lord Wright, "Ought the Doctrine of Consideration to be Abolished from the Common Law?" (1936) 49 Harv L Rev 1225; A G Chloros, "The Doctrine of Consideration and the Reform of the Law of Contract" (1968) 17 ICLQ 137; Mark B Wessman, "Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713.

6 Edwin Patterson, "An Apology for Consideration" (1958) 58 Colum L Rev 929; Melvin Eisenberg, "The World of Contract and the World of Gift" (1997) 85 Cal L Rev 821; Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434.

7 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 4.

8 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139] *per* Rajah JC.

3 The envisioned proposal recognises, or rather presupposes, the jurisprudential reality that the search for "parties' intention to create legal relations" is an act of judicial interpretation inevitably infused with normative values. The often-used presumption that agreements in a domestic or social setting are not intended to have any legal effect,[9] for example, is part-descriptive and part-normative. It will be submitted in this article that the common law has evolved to a phase where the element of "reciprocity or bargain" in an agreement can serve as a presumption in aiding a judge determine whether the parties had intended to create legal relations. By removing the "gatekeeper"[10] function of the doctrine of consideration and conceptually transforming it into an evidentiary presumption, the problems of the modern doctrine of consideration can be eliminated, while the benefits of aiding judges to better discern the intention of the parties will be reaped.

II. The doctrine of consideration in Singapore under fire

A. Sunny Metal

4 The attack on the doctrine of consideration by the Singapore judiciary began but did not end with *Chwee Kin Keong*. In *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*[11] ("*Sunny Metal*"), Andrew Phang J (as he then was) picked up on Rajah JC's comment and furthered the criticism of the doctrine by suggesting that "the doctrine of consideration may be outmoded even outside the context of purely commercial transactions".[12] This proved to be an interesting *dictum* given the fact that consideration was not even an issue in the High Court case which involved a deed between the parties. Phang J offered his reasons for doubting the utility of the doctrine even in non-commercial transactions, stating that:[13]

> [T]he combined effect of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[14] … and the well-established proposition that consideration must be sufficient but need not be adequate [make it]

9 *Balfour v Balfour* [1919] 2 KB 571; *Choo Tiong Hin v Choo Hock Swee* [1959] MLJ 67.

10 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 716.

11 [2007] 1 SLR(R) 853.

12 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [29].

13 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [30].

14 [1991] 1 QB 1 (holding that the promisor's promise to make extra payments to the promisee if the latter performed his duties under the existing agreement was supported by consideration because the promisor would have derived "practical benefits").

> all too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant, at least for the most part. On the other hand, there are other possible alternatives available that can perform the tasks that the doctrine of consideration is intended to effect.

B. Gay Choon Ing

5 Two years later, sitting in the Court of Appeal, Phang JA was given the opportunity to comment on the doctrine of consideration again. In *Gay Choon Ing v Loh Sze Tie Terrence Peter*[15] ("*Gay Choon Ing*"), the learned judge of appeal had to address the issue of whether there was good consideration supporting a "Points of Agreement" document and a waiver letter,[16] in which the defendant had promised to relinquish his claims against a third party in exchange for the plaintiff's promise to sell him his beneficial interest in some shares.[17] His Honour held that there was sufficient consideration because the defendant had suffered a "detriment at the plaintiff's request".[18] His Honour then rightly held that "the fact that the plaintiff had not personally benefited (in an obvious manner) from the defendant's signing of the waiver letter was not relevant",[19] as long as a link existed between the parties which could be easily found in this case due to the "element of request".[20]

6 More importantly, Phang JA then wrote an 11-page critique titled "A coda on the doctrine of consideration"[21] at the end of his judgment. Building on the two criticisms he raised earlier in *Sunny Metal*, his Honour noted that there is "no legal impediment from the perspective of precedent which can prevent the Singapore courts from extending the reach of *Williams v Roffey*" to other factual variants.[22] As for possible alternatives, his Honour listed the vitiating doctrines of economic duress, undue influence and unconscionability as being "more clearly suited not only to modern commercial circumstances but also (more importantly) to situations where there has been possible 'extortion'".[23]

15 [2009] 2 SLR(R) 332.
16 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [79].
17 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [30].
18 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [80].
19 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [80].
20 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [82].
21 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [92]–[118].
22 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [106]–[113].
23 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [113].

7 This substantial attack was, however, followed by the recognition that the alternatives mentioned are "subject to their own specific difficulties"[24] and a concluding practical resignation that:[25]

> … the maintenance of the status quo … may well be the *most practical* solution in as much as it will afford the courts *a range of legal options* to achieve a just and fair result in the case concerned … [notwithstanding] problems of theoretical coherence. [emphasis in original]

III. The modern doctrine of consideration

A. History and doctrine

8 In *Gay Choon Ing*, Phang JA also opined that the precise historical origins of the doctrine of consideration are not entirely clear.[26] Simpson argues as well that the doctrine originally "meant the factors which the promisor considered when he promised, [the circumstances] which motivated his promising".[27] This seems to be the general consensus – that it originated around the 16th century, and functioned as a means "of filtering serious promises that were enforceable from those that were not".[28] For a promise to be enforceable, the promisee should be able to show "something for which the promise was made".[29]

9 The evolution of the common law led to the *modern* doctrine of consideration which stands considerably different from its historical origin. Consideration has been, in Dawson's words, "made over" and transformed from "an amorphous word drawn from common speech, into a *technical requirement* for contract formation"[30] [emphasis added]. This observation finds support in Phang JA's view of the "modern purpose of the doctrine" being one which exists to "put some legal limits on the enforceability of agreements even when they would otherwise be legally binding".[31] In short, the modern doctrine of consideration is used in common law jurisdictions today as an absolute "formula of denial", the very subject of this author's critique in this article.

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24 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [114].
25 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [118].
26 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [98].
27 A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford: Clarendon Press, 1975) at p 321.
28 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 568.
29 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 201.
30 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 202.
31 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [98].

B. The rules of the modern doctrine of consideration

10 The evolution to become an absolute "formula of denial" came in tandem with the crystallisation of rules commonly attributed to the doctrine of consideration today. These rules place "legal limits on the enforceability of agreements" because should one of them be contravened, the consequence of unenforceability follows.

11 Firstly, consideration must move from the promisee in return for the promise. A person can enforce a promise only if he himself provided consideration for it.[32] Closely related to this rule is the requirement that there has to be a "necessary link" between the promisor's promise and the act or forbearance of the promisee.[33] This rule prevents a promisee from binding the promisor when the act or forbearance performed by the promisee was not performed in return for the promise.

12 Secondly, consideration must be sufficient but need not be adequate. To be sufficient, consideration must "mean something which is of some value in the eye of the law";[34] that is to say, it must be capable of estimation in terms of economic or monetary value.[35] However, consideration need not be adequate in the sense that the contracting party "can stipulate for what consideration he chooses";[36] so for example, $50 given in exchange for the promisee coming to the promisor's house,[37] giving up a piece of paper without reference to its content,[38] and even to show a person a document[39] have been held to be sufficient consideration.[40]

13 Thirdly, past or moral consideration is not good consideration. Past acts or forbearances do not in law amount to consideration for the

32 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 3-036. For England, see *Tweddle v Atkinson* (1861) 1 B & S 393. For Australia, see *Coulls v Bagot's Executor and Trustee Co* (1967) 119 CLR 460. For the US, see §71(2) of the Restatement (Second) of the Law of Contracts (which defines the "bargained for" requirement as "… sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise").

33 For England, see *Combe v Combe* [1951] 2 KB 215. For Australia, see *Australian Woollen Mills Pty Ltd v The Commonwealth* (1954) 92 CLR 424.

34 *Thomas v Thomas* (1842) 2 QB 851.

35 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 3-022.

36 *Chappell & Co Ltd v The Nestle Co Ltd* [1960] AC 87 *per* Lord Somervell.

37 *Gilbert v Ruddeard* (1608) 3 Dy 272b (n).

38 *Haigh v Brooks* (1839) 10 A & E 309.

39 *March v Culpepper* (1628) Cro Car 70.

40 See H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 3-015 for more examples. The Australian position is similar as well, see *Woolsworths Ltd v Kelly* (1991) 22 NSWLR 189.

promise made.[41] The mere existence of an antecedent moral obligation to repay a loan was also held not to have amounted to good consideration.[42] However, the important case of *Pao On v Lau Yiu Yong*[43] has carved a big exception to this rule. The Privy Council held that a pre-existing duty owed to a third party (past consideration) can be good consideration if three conditions are satisfied.[44] The notion that a promise to carry out pre-existing contractual duties owed to a third party should not fail as past consideration had earlier been accepted in the Australian High Court.[45]

14 Fourthly, pre-existing duties owed to a promisor cannot serve as good consideration. This rule is a logical extension of the previous rule against past consideration and is of most significance in the sphere of contract modifications. Traditionally, contract modifications are not allowed for lack of "fresh" consideration – either in the case of "upward variation"[46] or "downward variation".[47] The landmark case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd*[48] ("*Williams v Roffey*"), however, has allowed contract modifications for "upward variations" to be enforceable as long as "practical benefit" to the promisor can be identified. While the English courts have shown reluctance to apply the concept of "practical benefit" to "downward variation" cases,[49] Australian courts have appeared willing to go in that direction.[50]

IV. The justifications claimed of the doctrine

15 The defenders of the doctrine of consideration have claimed various justifications which in their view justify the existence of the doctrine in contract law. The crucial question, however, is whether the modern doctrine of consideration – as an independent, absolute "formula of denial" – is in fact needed for the ends of these justifications to be served. This author would offer responses to each and every one of

41 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 3-026. See *In re McArdle, deceased* [1951] Ch 669; *Moore v Elmer* 180 Mass 15 (1901).

42 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 3-032. See *Eastwood v Kenyon* (1840) 11 A & E 438.

43 [1980] AC 614.

44 The three conditions are: (a) the act must have been done at the promisor's request; (b) the parties understood that the promisee would be rewarded for doing the act; (c) the eventual promise of payment must be one which, had it been made prior to the act, would have been enforceable.

45 *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Aust) Pty Ltd* (1978) 139 CLR 231.

46 *Stilk v Myrick* (1809) 2 Camp 317.

47 *Foakes v Beer* (1884) 9 App Cas 605.

48 [1991] 1 QB 1.

49 *In Re Selectmove* [1995] 1 WLR 474.

50 *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723.

the justifications identified, in order to convince readers that not only is the modern doctrine of consideration today unnecessary to meet the ends sought by these justifications, a few of the aforementioned rules actually run counter to some of the justifications identified below.

A. The formal justification

16 The most popular and well-known justification for the doctrine of consideration is that it serves a formal function similar to "writing requirements and other form requirements".[51] This view is usually credited to Lon Fuller and his seminal article – "Consideration and Form".[52] Fuller theorised that the requirement of consideration serves three important formal functions – namely, evidentiary[53] (to provide evidence of the existence of the contract), cautionary[54] (to protect the promisor by making him reflect carefully) and channelling[55] (to allow the promisor to express his intention to create a legally binding contract) functions.

17 This view has been supported by common law academics;[56] but it is most popular among civil law/comparative academics[57] who view consideration as the "indicia of seriousness" analogous to formal requirements[58] in the civil law or, even more specifically, the doctrine of cause in the French Civil Code.[59] In an early yet important article titled "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis", the author Arthur von Mehren concluded his analysis with the view that had the common law courts consistently kept in view the formal justification of consideration, they would not have ended up creating the modern, "complicating and obscuring doctrine" of consideration.[60] Earlier, Fuller had also derided the US position for not

51 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 216.
52 Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799.
53 Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799 at 800.
54 Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799 at 800.
55 Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799 at 801.
56 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566; Edwin Patterson, "An Apology for Consideration" (1958) 58 Colum L Rev 929.
57 Reinhard Zimmermann, *The law of obligations: Roman foundations of the civilian tradition* (New York: Oxford University Press, 1996); Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998); Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002).
58 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998) at p 389.
59 Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002) at p 127.
60 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1074.

recognising nominal or moral consideration as being "wholly out of place" with the formal functions of the doctrine.[61]

18 Smith, having critiqued the formal justification for not being able to explain why gratuitous promises in a commercial setting are not enforceable even though they "do not raise the same cautionary or channelling issues raised by donative promises",[62] concludes nonetheless that the formal justification is still "the most plausible".[63] The link between consideration and form is perhaps most strongly supported by the "proof" that "form, namely the deed, replaces the requirement of consideration".[64] Others – such as Chloros – have remained unconvinced because "absence of consideration will [still] be fatal to [an] agreement which has been publicly witnessed".[65] However, it is submitted that Chloros' criticism is misguided for it is mistaken to assume that Fuller's three formal functions are served simply because the agreement is made in public.

(1) Response to the formal justification

19 A normative critique against the formal justification can be raised by arguing that the doctrine of consideration – even if it is indeed a formality – serves as an ineffective one. In his textbook, Beale states the two goals formal requirements should aspire to: firstly, as a means of protecting the weaker or more naïve party; and secondly, that they should not be misused to the advantage of the contracting party acting in bad faith.[66] As will be argued later,[67] the doctrine of consideration is ineffective in serving the ends of fairness between parties, especially when nominal consideration is involved. Despite agreeing with the formal justification, von Mehren concedes that "the superiority … of the notarial or judicial contract over … nominal consideration is obvious".[68]

20 An even stronger critique is the conceptual critique against consideration as formality, advanced by Peter Benson in his book *The*

61 Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799 at 820–821.
62 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 218.
63 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 232.
64 Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002) at p 164.
65 A G Chloros, "The doctrine of consideration and the reform of the law of contract" (1968) 17 ICLQ 137 at 154.
66 Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002) at p 173.
67 See paras 21–31 and 39–43 of this article.
68 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1074.

Theory of Contract Law.[69] This author understands Benson as critiquing the epistemic shortcomings of the doctrine of consideration when compared with other formalities. If formalities exist to impose a cautionary impact on parties, and to allow them to channel their serious intent, then they should – practically speaking – at least "cross the minds" of the parties whom they are supposed to affect. In reality, however, "the law does not suppose that parties who request or give consideration *actually intend, or even generally would intend*, this as a way of giving legal effect to their wishes"[70] [emphasis added]. Because a valid consideration can be "ever so small and economically insignificant … the minds and intentions of both parties may in fact be focused on everything but the consideration".[71] Benson's arguments are lethal against the formal justification because he is not merely suggesting that consideration is an ineffective formality, he is in fact questioning whether the doctrine of consideration is even conceptually constitutive of the idea of a formality in the first place.

B. The substantive moral justification

21 The substantive moral justification highlights the moral reasons behind denying the enforceability of promises to parties who have not provided sufficient consideration. Mindy Chen-Wishart, who strongly defends the doctrine of consideration, argues that "bargain transactions" should have a distinct category because "it serves two important functions: firstly, it gives the party seeking to enforce the promise a compelling justification because he or she has given some enforceable agreed exchange for that promise; and secondly, it provides the basis for determining the extent of liability on that promise".[72]

22 The notion that the doctrine of consideration provides the moral basis for courts to offer remedies in the form of "expectation measure" has been articulated by various academics as well. Lookofsky theorises that the "'bargain theory' of consideration leads to the 'bargain principle' of damages for breach of contract",[73] while Benson argues that

69 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at pp 166–169.

70 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at p 166.

71 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at p 167.

72 Mindy Chen-Wishart, "Consideration: Practical Benefit and the Emperor's New Clothes" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (New York: Oxford University Press, 1995) at p 123.

73 Joseph M Lookofsky, *Consequential Damages in Comparative Context: from breach of promise to monetary remedy in the American, Scandinavian and international law of contracts and sales* (Copenhagen: Jurist-og Okonom forbundets Forloag, 1989) at p 140.

"the law postulates an intrinsic link between [consideration] and the enforceability of the wholly executory contract according to the expectation principle".[74] Treitel also makes the point that the claims of a promisee who has given nothing for the promise "are less compelling than those of a person who has given (or promised) some return for the promise".[75]

23 Recently, Chen-Wishart, in her article "Consideration and Serious Intention"[76] – a very elaborate response to Phang JA's views in *Gay Choon Ing* – adds on to what this moral justification means in the interactional context between contracting parties in society. She argues that contract law should facilitate "exchanges between strangers", encourage "respectful engagement" in contract formation and prevent parties from treating each other as "a means of facilitating the other's end, [but rather see each other] as an equal whose end is simultaneously served by the other".[77] This Kantian justification is in her view rightly reflected in the doctrine of consideration.

(1) Response to the substantive moral justification

(a) The rules of the modern doctrine of consideration do not cohere with the subjective moral justification

24 Of all the substantive justifications that will be explored, the substantive moral justification has proven to be one of the strongest arguments for the retention of the doctrine of consideration. The idea that the "self-interested exchange" should remain "the conceptual core of enforceability" in order to "facilitate exchanges between strangers"[78] is forceful and, as will be seen, not discarded completely in the new legal landscape envisioned. However, the problem is that some of the rules of the modern doctrine of consideration actually contradict this very justification.[79]

74 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at p 153.

75 G H Treitel, *The Law of Contract* (London: Sweet & Maxwell, 11th Ed, 2003) at p 67.

76 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434.

77 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 451–452.

78 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 451–452.

79 The arguments submitted in this portion will also challenge Gold's claim – which is substantially in line with the substantive moral justification – that "[c]ontractual consideration can be seen as a way of acquiring strong moral rights … the consideration doctrine is unproblematic from the perspective of promissory morality" (see Andrew Gold, "Consideration and the Morality of Promising" in *Exploring Contract Law* (Jason W Neyers, Richard Bronaugh & Stephen G A Pitel eds) (Oxford: Hart Pub, 2009) at pp 133–134).

25 Firstly, the modern doctrine of consideration denies that past or moral consideration can be good consideration. The rule against past or moral consideration denies legal enforceability to, for example, a promise subsequently offered by the promisor to a promisee who had saved his life. Assuming that when the promisee was performing the life-saving act, he had not requested – or even desired – a reward in return, it would seem inaccurate and unfair to categorise his subsequent attempt to enforce what was promised to him as "treating the promisor merely as means to his own ends". Conversely, it appears that it is the promisor in fact in such situations who has "disrespectfully engaged" someone who has just saved his life – by promising a reward and then reneging on it; yet his very act is protected by the modern doctrine of consideration, whereas the promisee's is not.

26 Secondly, the rule that "nominal consideration" is sufficient seems to be a denial of the power and role of the courts to judge whether parties are actually treating each other as a "means of facilitating the other's end".[80] In fact, by allowing a peppercorn, or "a horse or a robe"[81] to suffice as consideration for all types of contract, the law is in fact encouraging the possibility of parties merely treating each other as a means to an end. What matters is not whether the "consideration given in exchange" is actually truly beneficial to the other party, but as long as it is "of some value in the eye of the law",[82] that is sufficient. Clearly, it is not the moralistic behaviours or outcomes that the courts look at when dealing with, and legitimising, the use of nominal consideration.

27 It could be argued in Chen-Wishart's defence that the arguments above are wrong-footed for failing to recognise her important qualification that "legal enforcement of exchange reflects the *form* of respectful engagement at formation (the *substance* is controlled elsewhere)"[83] [emphasis in original]. But the latter, bracketed assertion can be respectfully questioned. Where exactly in contract law is the "substance of respectful engagement" mandated between contracting parties? The vitiating factors prevent parties from unfairly abusing the other, but they do not and cannot go as far as to insist that parties treat each other "as an equal whose end is simultaneously served by the other". This ambitious moral goal can only be achieved if, in every case, a thorough investigation of the *motives* underlying the parties' actions is conducted. Certainly no doctrine within contract law at the moment

80 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 452.

81 *Pinnel's Case* (1602) 5 Co Rep 117a.

82 *Thomas v Thomas* (1842) 2 QB 851 at 859.

83 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 451.

aspires to such a "substance". This is unsurprising, however, considering Chen-Wishart's accurate admission of the "*self-interested* exchange being the conceptual core of contract"[84] [emphasis added]. If the ultimate concern of contract law was never to promote respectful engagement to such an extent, then even if the form of respectful engagement is a good worth pursuing, one is entitled to question whether it should stand as an absolute test of enforceability in itself.

(b) Consideration is not a necessary condition for the expectation measure of damages

28 As for the importance of the doctrine of consideration justifying the "expectation measure" of damages, a few responses can be offered.

29 Firstly, civilian legal systems award expectation damages comfortably without the doctrine of consideration.[85] It is thought-provoking that the civil law is seen as generally more willing to grant specific performance despite the absence of the requirement of bargain consideration.[86] Conceptually, this shows at least the possibility that the notion of bargain consideration can be normatively divorced from the basis or measure of enforcement. While bargain consideration might be a sufficient condition for the enforcement of expectation damages, it certainly is not, normatively speaking, a *necessary* condition.

30 Secondly, expectation measures have been awarded in the common law even when consideration is absent, *eg*, agreements under a deed. In Kull's words, "the executed gift is enforced on the same terms as the completed sale";[87] there being no qualms at all that no bargain consideration is present. While Chen-Wishart sees this as an "exceptional deviation because of countervailing policies",[88] one could view it as clearly evidencing an alternative sufficient condition – the

84 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 451.

85 Gary Bell, "The Application in Singapore of the United Nations Convention on Contracts for the International Sale of Goods (CISG)" in *Articles on Singapore Law* (2005) at para 10.4.13 ("[i]n principle, in civil law the party is entitled to the performance of what was promised").

86 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998) at pp 470–474. See also Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (Basingstoke: Palgrave Macmillan, 2009) at pp 266–267; Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford: Hart Pub, 1998) at p 137.

87 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39 at 50.

88 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 438.

parties' clear intention to be legally bound – for the enforcement of promise. Many such examples abound in US law as well.[89]

31 Thirdly, the notion that it is the doctrine of consideration which justifies the expectation measure might not always come across as the most morally sensible justification. Chen-Wishart argues that it is "the agreed equivalent for the performance"[90] which justifies the expectation measure, yet it is hard to appreciate how the exchange of a peppercorn for a piece of land can be in any sense "equivalent", or more precisely, how the artificial idea of there being "equivalence" in this strange exchange can justify the expectation measure of enforcement. It pushes one to wonder whether the normative element justifying the expectation measure truly resides in the said "equivalence" of the payment for performance. This author would submit that it is the *agreement* between the parties on what would satisfy the payment for performance[91] that justifies the expectation measure, as long as one party does not unconscionably impinge on the will of the other.

C. The substantive economic value justification

32 The substantive economic value justification refers to the intuitive notion that gratuitous agreements have no, or lesser, economic value,[92] and is therefore unworthy of protection by the law. This is in contrast to "bargain agreements" which supposedly increase the wealth of society. Thus, according to this justification, "when … courts apply the doctrines of consideration … they are concerned with the effect of the transaction on the wealth of the parties".[93]

(1) Response to the substantive economic value justification

33 The substantive economic value justification has been severely critiqued by various academics. Smith offers reasons[94] why non-bargain promises are in fact economically valuable – they facilitate beneficial reliance, and increase "the present value of an uncertain future stream of

89 See Charles Fried, *Contract as Promise: A theory of contractual obligation* (Cambridge, Mass: Harvard University Press, 1981) at p 28 ("promises to keep an offer open (UCC §2-205), to release a debt (1 Williston §120), to modify an obligation (UCC §2-209), to pay for past favours (Cal Civ Code §1606)").

90 Mindy Chen-Wishart, "Consideration: Practical Benefit and the Emperor's New Clothes" in *Good Faith and Fault in Contract Law* (Jack Beatson & Daniel Friedmann eds) (New York: Oxford University Press, 1995) at p 123.

91 And whether there should be "equivalence" or not, or what constitutes that, is an issue for the parties to decide.

92 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 222; Lon Fuller, "Consideration and Form" (1941) 41 Colum L Rev 799 at 815.

93 James Gordley, "Enforcing Promises" (1995) 83 Cal L Rev 547.

94 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 222.

transfer payments".[95] Tan also questions this justification specifically in the contract modification cases – that it is "generally not uneconomical to enforce such promises unlike bare promises made outside a business arrangement".[96] It is understandable why Kreitner simply dismisses this "justification" by stating that "there is nothing to support the intuition [that non-bargain promises are unproductive] and much to refute it".[97]

34 The economic value justification also runs against several counterarguments questioning the "productivity" assumption on which the justification rests. Smith argues that many non-bargain transfers are often assumed by the parties "to be mutually beneficial", and in that regard economically valuable.[98] This parallels Benson's observation that many agreements with past consideration are actually viewed as "a valuable benefit in the circumstances of the parties' interaction",[99] yet are denied enforceability by the modern doctrine as it stands. The central theme underlying these counterarguments can be thus surmised: the parties' "contractual intent should be highly relevant" from the perspective of economic theory[100] (if followed seriously). The parties' intention to be legally bound should be "strong evidence of the efficiency of legal enforcement, since informed parties will choose enforcement only when it creates value for them".[101] In short, contractual intent serves as a better fit to the economic value justification than the modern doctrine of consideration.

D. The substantive "intangible value" justification

35 On the substantive "intangible value"[102] justification, the doctrine of consideration is credited for protecting the "intangible value" of the world of gifts. In Eisenberg's view, "the world of gift would be impoverished if simple donative promises that are based on affective consideration … were folded into the hard-headed world of contract".[103] The idea is that legal enforcement of gratuitous promises would actually lead to a reduction of their "special value"[104] – for "once it is known that

95 Richard Posner, "Gratuitous Promises in Economics and Law" (1977) 6 J Legal Stud 411 at 412.

96 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 580.

97 Roy Kreitner, *Calculating Promises: The emergence of modern American contract doctrine* (Stanford: Stanford University Press, 2007) at p 76.

98 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 223.

99 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at p 165.

100 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1439.

101 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1439.

102 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 223.

103 Melvin Eisenberg, "The World of Contract and the World of Gift" (1997) 85 Cal L Rev 821.

104 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 224.

a donor could be forced to make the transfer, and thus that the donee might be acting out of non-donative motives, the intangible value of all gifts will be lessened".[105]

36 It is on this very same note that Chen-Wishart declares that "there is value in freedom from contract as much as freedom of contract",[106] and Tan that "there is a real need for a field of human intercourse freed from legal restraints, for a field where men may, without liability, withdraw assurances they have once given …".[107] The "option of staying outside [the legal framework]" is seen under this justification as a meaningful freedom,[108] and many have credited the doctrine of consideration for serving this important function in society.

(1) Response to the substantive "intangible value" justification

37 The "intangible value" justification is considerably strong, and it certainly cannot be disputed that "there is value in freedom from contract as much as freedom of contract".[109] While it might be possible to question "on purely empirical ground whether enforcing donative promises would actually cause people to devalue their performance",[110] this author does not believe it is necessary to do so. It is most certainly sufficient to state that this justification can be better served by the "intention to create legal relations" test[111] – after all, the "freedom from contract" rhetoric assumes the parties' desire not to be legally bound.

38 Moreover, as will be seen in the discussion of the civil law legal system, the modern doctrine of consideration suffers from the fatal flaw of not being able to distinguish true gifts (where the justification arguably applies) from unilateral promises in a less-than gratuitous context (where the justification simply does not apply).[112]

105 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 224.
106 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 453.
107 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 577.
108 Dori Kimel, *From Promise to Contract: towards a liberal theory of contract* (Oxford: Hart Pub, 2003) at p 139.
109 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 453.
110 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 224.
111 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 572.
112 See paras 55–57 of this article.

E. The substantive fairness justification

39 In many cases involving the doctrine of consideration, one can detect that consequential fairness is served by the application of the doctrine. Treitel explains this comprehensively[113] by documenting the famous case of *Foakes v Beer*.[114] In this case, the House of Lords prevented an old lady (Mrs Beer) from being bound by an agreement (which Treitel describes as "a technical trap"[115]) to release the interest owed by her debtor by holding that the payment by her debtor of what was originally due could not constitute consideration for her promise to forgo the interest.[116] Treitel argues that because the concept of economic duress might not actually go far enough to assist people like Mrs Beer, the doctrine of consideration therefore serves "a protective function" in such cases[117] – the substantive fairness justification being pleaded. This seems to be von Mehren's understanding of *Foakes v Beer* as well, when he analyses that "such arrangements … may evidence *overreaching and consequent unfairness*. At times courts intervene on the ground that consideration is lacking. On the other hand, if the court does not sense an element of over-reaching in the situation, it is likely that consideration will be found and the agreement upheld"[118] [emphasis added].

(1) Response to the substantive fairness justification

40 While the doctrine of consideration can no doubt be applied in certain cases to ensure fair outcomes, the pleading of this justification is easily countered by the fact that the doctrine at times turns a blind eye to unfairness, and on other occasions, denies fair outcomes from materialising.

41 Treitel himself, while documenting the "protective function" of the doctrine in *Foakes v Beer*, concedes eventually how "blunt an instrument" consideration is because "even a nominal consideration such as the traditional peppercorn [will] potentially destroy the protective force of the rule".[119] Indeed, as already alluded to earlier, the sufficiency of "nominal consideration" is "precisely the factor that allows

113 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 24.

114 (1884) 9 App Cas 605.

115 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 25.

116 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 25.

117 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 28.

118 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1064.

119 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 28.

a particular exchange to escape scrutiny";[120] it strips the courts of the power to regulate for substantive fairness. Tan states it even more categorically – that "[what] consideration does not do is to ensure that parties have entered into a generally fair agreement from an objective standpoint".[121]

42 Moreover, the doctrine of consideration can at times *deny* fair outcomes and cause injustice if it were applied mechanically to contract modification cases (unless the concept of "practical benefit" is employed, which, as will be argued later, has its own problems). Tan has argued, in the specific context of contract modifications, that the "protective role" of consideration is "bought at the price of inflexibility and produce a *real disincentive to re-negotiate a contract which changed circumstances might have made unduly onerous*. The sensible course would be to rely on the defence of duress instead"[122] [emphasis added]. In the same regard, Eisenberg also admits that "some contracts that are entirely fair are not enforced".[123]

43 Arthur von Mehren is thus spot on in his critique that "[bargain] exchange is too restrictive a standard … either too limited or too broad to be an effective tool with which to screen individual transactions for unfairness".[124] If these arguments are valid, then for all the problems and difficulties of the vitiating doctrines, they would nonetheless fit the bill of having "relatively fewer difficulties"[125] than the problematic doctrine of consideration. Most importantly, a court using the vitiating doctrines to regulate against unfairness can at least claim the merits of conceptual candour – by being upfront that the agreement is unenforceable because of unfair dealings by one of the parties, rather than because the element of "bargain exchange" is lacking.

F. The realist "good reason" justification

44 Closely tied to the substantive fairness justification is the realist "good reason" justification championed by Atiyah.[126] This justification

120 Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007) at pp 76–77.

121 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 573.

122 Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 at 581.

123 Melvin Eisenberg, "The Principles of Consideration" (1982) 64 Cornell L Rev 640 at 646.

124 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1077.

125 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [116].

126 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 179.

sees the doctrine of consideration as an "umbrella concept"[127] which serves to "give effect to concerns such as good faith, duress, the protection of reliance"[128] and, of course, the concern of "fairness" as explained above. Atiyah even provides a historical account for this particular justification by arguing that when the courts first used the word "consideration" they meant no more than that "there was a 'reason' for the enforcement of a promise".[129] He therefore denies that "there is one doctrine, and one concept"[130] of the doctrine of consideration as used in modern legal parlance today.

45 From this realist premise, Atiyah severely critiques the modern doctrine of consideration, claiming that it has "from being merely a reason for the enforcement of a promise, … come to be regarded as a technical doctrine which has little to do with the justice or desirability of enforcing a promise, or recognizing obligations".[131] In Atiyah's view, "we must look to the reasons (or considerations) which make it just or desirable to enforce promises".[132] Smith puts this realist hypothesis to the test by deconstructing well-known "consideration cases" to reveal the "real" reasons behind courts enforcing or denying agreements[133] – either because a father did not intend his promise to be legally binding,[134] to promote a moral lifestyle[135] or to discourage extortion.[136]

46 It is submitted that Phang JA's concluding paragraph in *Gay Choon Ing*, where he argued for the "maintenance of the status quo" as the "most *practical* solution inasmuch as it will afford the courts *a range of legal options* to achieve a just and fair result …"[137] [emphasis in original] reflects this justification as well. Although there might not exist one particular doctrine or justification[138] of consideration, the array of functions it could serve is claimed to justify its place within contract law under the realist paradigm.

127 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 225.
128 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 225.
129 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 182.
130 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 181.
131 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 186.
132 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 243.
133 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at pp 226–228.
134 *White v Bluett* (1853) 23 LJ Ex 36.
135 *Hamer v Sidway* 124 NY 538 (1891).
136 *Stilk v Myrick* (1809) 2 Camp 317.
137 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [118].
138 Roy Kreitner, *Calculating Promises: The Emergence of Modern American Contract Doctrine* (Stanford: Stanford University Press, 2007) at p 31; Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 232.

(1) Response to the realist "good reason" justification

47 The response to the realist "good reason" justification will not be that its claims are questionable, for to do that one would have to put this "essentially empirical argument"[139] to an elaborate empirical test. The response, rather, would be to ask what the wider ramifications of this justification are – both to the coherence of the law, and to the impact on those relying on it. It is important to note that there are two different wings in the "realist camp" – one which uses the realist justification to advocate reform (*eg*, Atiyah), and the other to advocate preservation of the modern doctrine as it is (*eg*, Phang JA).

(a) The problems facing the reformist wing

48 In advocating his realist views, Atiyah goes so far as to question the conceptual separation between "consideration" and the other doctrines within contract law – intention, vitiating factors, illegality, *etc*.[140] Respectfully, while the question of whether there are "just or desirable considerations" for the enforcement of promise is academically interesting, it is unrealistic as a means of reform. Besides being simply "too vague to provide a workable standard",[141] it is also almost tantamount to abstracting all of contract law into a historical (but clearly different) "language" of consideration, rather than to reform the modern doctrine of consideration to fit into (the other less-blemished doctrines of) contract law theory.

(b) The problems facing the non-reformist wing

49 The problems facing the non-reformist wing can be best illustrated with the case of *Williams v Roffey*, which itself induced both Rajah JA and Phang JA to question the doctrine of consideration. The problem with this case is that its notion of "practical benefit" would make it "all too easy" to locate consideration,[142] leading to a state of affairs which is "theoretically untidy".[143] The "theoretical untidiness" would create severe doctrinal difficulty when, in the future, judges find "practical benefit" in some cases, deny it in others, or completely ignore it in the rest.[144] It is not that judges cannot have discretion on whether to

139 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 228.

140 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 189.

141 G H Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 Austl LJ 439.

142 *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [30]; *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139].

143 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [118].

144 See *T2 Networks Pte Ltd v Nasioncom Sdn Bhd* [2008] 2 SLR(R) 1. In this case, Prakash J held that the alleged "settlement agreement" was invalid for lack of

(*cont'd on the next page*)

apply a particular doctrine to hard cases, the problem here is that the modern doctrine of consideration itself – *internally* – produces no clear rules for judges as to when and for what reason it should be applied.

50 The problem of doctrinal incoherence aside, leaving the law as it is for "realist reasons" can also cause great inconvenience and impose "unrealistic" demands on commercial parties. As of yet, the "practical benefit" test does not apply, in Singapore and England, to "downward variation" cases such as the part payment of debt, leaving the modification of contracts such as those in *Foakes v Beer* and *In re Selectmove*[145] unenforceable still. Treitel has argued that the "practical benefit" test should apply to "downward variation" cases as long as the "benefit [to the original creditor] consists of something other than receipt of the part payment itself".[146] While this appears to be a simple and logical way out, one must pause to consider what its impact on judges and commercial parties would be, *realistically speaking*. It would require judges, in order to enforce such modifications, to literally conjure up some "additional benefit" the creditor received, even if the creditor does not agree. For the debtor in good faith, he would have to be advised to include in the modification agreement a peppercorn, just in case there was no "practical benefit" found on the creditor's side.

51 The doctrinal and commercial contrivances such a result would cause must surely eat away at the "practical advantages"[147] in retaining the doctrine of consideration as it is. This is especially so considering that for many of the landmark "consideration" cases, alternative judicial opinions were in fact proffered suggesting different ways to achieve justice. The traditional case of *Stilk v Myrick* has two different reports – one based on consideration and the other on duress.[148] In *Foakes v Beer*, Lord Blackburn reluctantly agreed with the majority opinion, but opined that "the courts might very well have held the contrary, and have

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consideration. Her Honour held that the defendant's promise to pay the outstanding amount could be good consideration only if "there had been dispute over the outstanding amount" in the first place (at [38]). Respectfully, while the requirement of "dispute" is a precondition to finding a "compromise agreement" (*Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd* [2002] 2 SLR(R) 136 at [120]), it is not a decisive factor to the question of whether there is good consideration or not. The question of whether the plaintiff in *T2 Networks* could be said to have derived "practical benefit" in receiving the outstanding debts on time was unaddressed.

145 [1995] 1 WLR 474.

146 G H Treitel, *Some Landmarks of Twentieth Century Contract Law* (New York: Oxford University Press, 2002) at p 44.

147 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [118].

148 Ewan McKendrick, *Contract Law: text, cases and materials* (New York: Oxford University Press, 3rd Ed, 2005) at p 173.

left the matter to the agreement of the parties".[149] This would have been compatible with Lord Fitzgerald and Lord Watson who would have held for Mrs Beer anyway based on the point of contractual construction that the agreement did not cover interest.[150] In *Williams v Roffey*, Russell LJ made the point that "courts nowadays should be more ready to find [the existence of consideration] so as to reflect the true intention of the parties"[151]. The point is simple: a realist court, desirous of achieving just and fair results, need not even utilise the modern doctrine of consideration in most cases – there are other doctrines in contract law which could serve this function.

52 Moreover, the institutional cost of leaving the law as it is even after the highest court of the land has suggested its theoretical incoherence should be worth pondering. Smith heavily critiques the realist justification on Rule of Law arguments.[152] He objects, persuasively, to the doctrine of consideration "functioning as a residual category, [allowing] judges to rely on reasons that have not been, and in some cases arguably cannot be, incorporated explicitly into the law".[153] Locally, Phang JA's "coda" in *Gay Choon Ing* has also been critiqued for "leaving the status of consideration in an unsatisfactory state, and that litigants and practitioners might find themselves in some doubt as to what may now be held to constitute good consideration in Singapore law".[154]

V. Perspectives from the civil law countries

53 The critical study of the justifications above has led this author to the view that the modern doctrine of consideration does not sync well with the justifications claimed, and that there are other doctrines within contract law which are more appropriate to meet the ends of these very justifications. Before developing the argument for reform further, it would be timely to take a rudimentary glance at the civil law legal system – where the requirement of consideration is absent in contract formation – for a broader prospective. To properly understand contract law in the civil law countries is to gain a valuable insight into whether it is systemically possible and desirable indeed to enforce

149 (1884) 9 App Cas 605 at 617.

150 *Foakes v Beer* (1884) 9 App Cas 605 at 623–627. Similarly, although the Singapore High Court in *Foo Song Mee v Ho Kiau Seng* [2011] SGHC 4 held that there was no valid consideration on the facts before it, the court could have reached the same result (*ie*, no binding contract) using the "certainty of agreement" test.

151 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 18.

152 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 231.

153 Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at p 231.

154 Wu Zhuang Hui, "A Probable Reform of Consideration" (2009) Sing JLS 272 at 281–282.

promises which lack "bargain consideration". As such, Chen-Wishart's analysis of the civilian legal system[155] will be carefully assessed.

A. Chen-Wishart's arguments

54 Firstly, Chen-Wishart argues that "civil law draws essentially the *same* line between gratuitous undertakings and reciprocal undertakings",[156] with the common law doctrine of consideration simply mirroring the formalities requirements in the civil law. Secondly, Chen-Wishart then presents the civil law countries as being "more hostile to gratuitous transactions".[157] To substantiate this claim, she points to the strict requirement of notarisation, its wide-reaching application, the "special excuses" which can be used to void gratuitous transactions and the problematic concept of "mixed transactions" accepted in the civilian legal systems. Finally, Chen-Wishart concludes with quotations from Dawson[158] hinting at the superiority of the doctrine of consideration when compared with the "malady"[159] in the civilian legal systems.

B. The key difference: What makes a gift?

55 It is respectfully submitted that Chen-Wishart's claim that "civil law draws essentially the *same* line between gratuitous undertakings and reciprocal undertakings" [emphasis in original] can be misleading. While it is true that many gratuitous undertakings without formalities are unenforceable in the civil law, it is important to note that what constitutes a "gratuitous undertaking requiring formalities" is different in the two systems. It is for this reason why Chloros has reminded his readers that "we must not discuss only straightforward gifts"[160] – in order to test if the "same line" is indeed drawn. Kötz and Flessner write of the civil law:[161]

> Every gift is a gratuitous transaction, but not all gratuitous transactions are gifts. Thus it is not a gift to let someone use your house for a time without payment, to grant him interest-free credit,

155 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 453–455.

156 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 454.

157 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 454.

158 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 455.

159 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 227.

160 A G Chloros, "The doctrine of consideration and the reform of the law of contract" (1968) 17 ICLQ 137 at 155.

161 Hein Kötz & Axel Flessner, *European Contract Law* (trans by Tony Weir) (New York: Oxford University Press, 1997) at p 65.

> provide him with information for nothing or to do some other piece of business for him – even to guarantee a debt of his – without asking for anything in return … they are not gifts, and so are not subject to the formal requirements which are used on the continent to make sure the promisor's intentions were serious.

56 Thus, the claim that "civil law defines enforceable contracts to include gratuitous ('unilateral') undertakings but subjects them to a stringent formality requirement …"[162] is, without further qualifications, incorrect. The civil law subjects *some* gratuitous undertakings to formality requirements, but not all. The doctrine of consideration, being a requirement that applies to almost *all* promises in the common law, does not function as an exact "mirror image" of the formality requirements of the civil law. In fact, as Zweigert and Kötz observe, "there are many cases in which the doctrine of consideration leads to results which the Continental jurist finds surprising or even shocking. The consideration doctrine applies not just to promises of gift but to *all gratuitous promises*"[163] [emphasis added]. The doctrine of consideration renders unenforceable many gratuitous promises which the civil law does not, as a cursory study of French and German law will show.

57 The French Civil Code, by their recognition of "unilateral"[164] and "benevolent"[165] contracts, implicitly categorises some agreements as "merely one of a larger group of transactions that presumably have some legal effect and confer a one-sided advantage but nevertheless are not gifts".[166] Gratuitous contracts are by default enforceable, unless clearly stipulated to be evidenced before a notary.[167] In fact, it is for this reason that some academics do not see the notary as the "analogue" to consideration, but point instead to the doctrine of "cause" in French law.[168] To have a valid agreement under the French Civil Code, there must be "a lawful cause".[169] Even then, "cause" can easily be found in the case of gratuitous contracts – it simply being "the unfettered, abstract intention to supply or provide something without demanding anything in return".[170] Similarly, the German Civil Code specifically identifies

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162 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 454.

163 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998) at p 393.

164 2004 C civ Art 1103.

165 2004 C civ Art 1105.

166 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 54.

167 See, *eg*, 2004 C civ Art 1341.

168 Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002) at p 127.

169 2004 C civ Art 1108.

170 Hugh Beale ed, *Contract Law: IUS Commune Casebooks on the Common Law of Europe* (Oxford: Hart Pub, 2002) at p 129. See also Arthur von Mehren's

(*cont'd on the next page*)

certain types of transactions that need to be signed and sealed at the office of the notary.[171] Outside of these special transactions dealing usually with property matters, gratuitous contracts – *eg*, gratuitous loans – are held in the Code to be valid "regardless of formality".[172] The Code aside, it has been observed that a "transaction is only a gift if both parties regard it as gratuitous"[173]. German case law is replete with such examples.[174]

C. Civil law countries do not find past or moral "consideration" problematic per se

58 A big factor why gratuitous undertakings in the civil law are not struck down as widely as in the common law can certainly be attributed to the fact that the civil law does not find past or moral consideration problematic *per se*.

59 In France, many undertakings which the common law would have held unenforceable on the basis of "past consideration" are enforceable. In *Guidez v Thuet*,[175] a husband's agreement in writing to pay 2,000 francs to a woman "to repay her for the care that she took of [his] wife during her fatal illness …" was held enforceable,[176] despite the fact that consideration was past. French courts, are, admittedly, at liberty to find unenforceable "promises made in recognition of past, *non-obligatory* fact situations"[177] [emphasis added]. Notwithstanding that, the claim that "French law … validates all promises made in

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comments in "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1024 ("the French cause does not require the transaction to contain an element of bargained-for exchange") and at 1026 ("modern French law does not consider one-sided transactions suspect as a class").

171 *Bürgerliches* Gesetzbuch 18 August 1896, *Bundesgesetzblatt* 122, as amended, §311b.

172 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998) at p 393; see also *Bürgerliches* Gesetzbuch 18 August 1896, *Bundesgesetzblatt* 122, as amended, at §598 and §662.

173 Hein Kötz & Axel Flessner, *European Contract Law* (trans by Tony Weir) (New York: Oxford University Press, 1997) at p 62.

174 Hein Kötz & Axel Flessner, *European Contract Law* (trans by Tony Weir) (New York: Oxford University Press, 1997) at p 62 ("[a] promise to contribute to the upbringing of an illegitimate child and to pay a long-standing mistress a certain sum of money for marrying someone else were held to be enforceable agreements in Germany").

175 Cour d'Appeal de Douai, 2d ch, 2 July 1847, DP II 1849, 239; see Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1039.

176 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1039.

177 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1041.

pursuance of a moral duty or a natural obligation …"[178] is generally true with exceptions that are much fewer than the number of such transactions the doctrine of consideration would presumptuously deny. The same can be said of Germany as well, where "the promise of a pension made in recognition of past services … was not considered a promise of a gift".[179] As Kötz and Flessner have critically observed:[180]

> French and German courts do not [bother about past consideration]. Certainly one must ask whether or not the promise is a gift, but if the circumstances show that the parties saw it as the performance of a duty rather than as a gift arising from pure generosity, then it is held not to be a gift at all.

60 Therefore, unless one is merely focusing on the "gifts" which are expressly required in the civil law codes to be notarised, it certainly appears that it is the common law (with the modern doctrine of consideration) that is "more hostile to gratuitous transactions" instead.

D. The "special excuses" mechanisms in civil law: Defensible, yet not inevitable

61 Given that the range of gratuitous transactions that the civil law regulates is much smaller than in the common law, it is *prima facie* understandable why their formal requirements would be stricter. With particular regards to the "special excuses for the non-performance of gratuitous transactions" Chen-Wishart drew attention to,[181] it is submitted that these civil law provisions are systemically defensible, yet not inevitable for Singapore should it abolish the doctrine of consideration.

62 The "special excuses" mechanisms allow French and German courts to revoke otherwise valid gifts for a range of reasons, as neatly documented by Chen-Wishart.[182] Interestingly, while these "excuses" are described as "hostile to gratuitous transactions" by Chen-Wishart, and severely critiqued by Dawson,[183] von Mehren clearly thinks the opposite –

178 A G Chloros, "The doctrine of consideration and the reform of the law of contract" (1968) 17 ICLQ 137 at 156.

179 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1045.

180 Hein Kötz & Axel Flessner, *European Contract Law* (trans by Tony Weir) (New York: Oxford University Press, 1997) at p 64.

181 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 454.

182 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 454–455. See also 2004 C civ Arts 953, 955 and 960; *Bürgerliches* Gesetzbuch 18 August 1896, *Bundesgesetzblatt* 122, as amended, at §519 and §530.

183 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at pp 113–121, 194–196.

seeing them as more direct[184] and appropriate[185] ways of "handling the gift problem than is the common law's prophylactic treatment". It is submitted that von Mehren has a legitimate point: for if consideration is to be justified by either the substantive moral[186] or the substantive fairness[187] justification, then one should be able to appreciate that these "special excuses" are merely analogous tools in the civil law taking these justifications to their logical conclusion. For if "fairness" or "respectful engagement" is so important that we should invalidate gift transactions for the absence of "bargain consideration", then such transactions, even if formally valid, should be held unenforceable as well if it is clear that they will lead to unfairness or disrespectful engagement. The difference is that while "fairness" or "respectful engagement" is defined *a priori* in the common law simply by abstracting to the notion of "bargain consideration", the civil law takes an *a posteriori* approach by judging, on a case-by-case basis, the factual outcome to decide the enforceability of the transaction holistically.

63 However, these "special excuses" – and the "hostility to gift transactions" in the civil law – can be explained on another account: the historical baggage of the civil law countries with respect to the "the principle of forced heirship".[188] On this account, gifts in the civil law countries are so tightly regulated because the civil law countries do not recognise total freedom of testation. These stringent requirements, therefore, "*extend to* gift promises because they implicate gifts, not because [gifts] are in any sense questionable as promises"[189] [emphasis added]. This implies that "the civil-law formalities afford no analogy to the treatment of gift promises in a legal system that accords to the owner of property the same right to give it away as to sell or consume it".[190]

64 For that reason, it has been argued by Wessman, which this author finds agreeable, that what "one may not conclude from the civil law experience is that the development of [these special excuses] defenses is an inevitable consequence of the legal recognition of gratuitous promises"[191]. On the other hand, it must also be pointed out

184 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1018.

185 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1077.

186 See paras 21–31 of this article.

187 See paras 39–43 of this article.

188 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39 at 58–59.

189 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39 at 58–59.

190 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39 at 58–59.

191 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 837.

that there are some doctrines within the common law legal system that might already play functionally equivalent roles – such as the "existing law of impracticability or frustration"[192] or "the law of implied conditions".[193] In short, these "special excuses" and more generally, the stricter rules of formalities, remain defensible in the civil law; but certainly not inevitable in a common law legal system should the doctrine of consideration be abolished.

VI. The marrow of contractual relationships – Intention to create legal relations

65 The observations and arguments above have showcased the problems with the modern doctrine of consideration in terms of its alleged justifications and also when looked upon comparatively. The proposal envisioned in this article is that the Singapore Court of Appeal, when given the opportunity, should abolish the doctrine of consideration as an independent and absolute test of contractual enforceability, but retain the element of "reciprocity or bargain" as an evidentiary tool to determine the parties' intention to create legal relations.

66 For this proposal to work, it must be shown that the strongest justifications claimed of the modern doctrine of consideration can be better served by the "obvious substitute for consideration"[194] – the "intention to create legal relations" test (hereby known as the "intention test").[195] Adopting Chen-Wishart's analysis, it appears that the strongest justifications are the substantive moral[196] and the substantive "intangible value"[197] justifications. These two justifications express normative ideals which are certainly worth preserving in contract law: the former highlights the importance of the element of reciprocity which serves to "facilitate exchanges between strangers",[198] while the latter explains the non-enforceability of gifts as a means of valuing the "freedom *from*

192 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 63.

193 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 839.

194 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 443.

195 The vitiating factors will also have to play an increased role with regards to the substantive fairness justification; see paras 84–85 of this article.

196 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 450–452.

197 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 452–453.

198 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 451.

contract".[199] It is submitted that these normative justifications – which seek to delineate "the sort of voluntary interaction that is necessary to constitute a transfer of rights between the parties"[200] – are and can be equally expressed within the judicial search for the parties' intention to create legal relations. The parties' intention to create legal relations can indeed be the determinant of which agreements are legally enforceable.

A. Intention to create legal relations: Its normative aspects

(1) The normative nature of the search for the parties' intention

67 The "intention test" is often presented as having two different facets:[201] the "factual/substantive" facet which asks whether the parties positively express their intention to be legally bound, and the "normative/presumptive" facet which presumes that commercial agreements are *prima facie* enforceable as opposed to social or domestic ones. The view which sees a strict dichotomy between the two facets above[202] is, respectfully, a paradigm that can be critically challenged. If the "rules for determining whether the parties … intended to contract are rules of interpretation",[203] and if, in law, "the interpreter typically will engage in some normative evaluation when aiming to provide a descriptive account",[204] it is perfectly understandable why the search for the parties' intention will be infused with normative-laden presumptions.[205]

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199 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 453.

200 Peter Benson, *The Theory of Contract Law: new essays* (New York: Cambridge University Press, 2001) at p 169.

201 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 444.

202 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 444 ("[i]n this sense the formulation is misnamed since [the presumptive approach] has less to do with the parties' intentions to be bound in any meaningful sense"). See also Gerard McMeel, "Contractual intention: the smoke ball strikes back" (1997) 113 LQR 47 at 49 ("one of the ironies of the rules of contract formation is that most of the cases which explicitly discuss 'intent to create legal relations' have nothing to do with contractual intention … Rather they are concerned with what we may term *justiciability* or public policy considerations" [emphasis in original]).

203 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1440.

204 Kent Greenawalt, *Law and Objectivity* (New York: Oxford University Press, 1992) at p 75.

205 DiMatteo expresses the same idea differently: "The judicial mind is biased in the interpretation of the facts and the affixation of meaning to those acts. The objective implication of intent is at times a most subjective, creative judicial act." (See Larry DiMatteo, *Contract Theory: The evolution of contractual intent* (East Lansing: Michigan State University Press, 1998) at p 9.) See also Owen Fiss, "Objectivity and Interpretation" (1982) 34 Stan L Rev 739 (where the idea of the adjudicative process being a form of interpretation is argued).

68 The use of presumptions in the search for the parties' intention to be legally bound is not a convenient fiction merely to express public policy, for it accurately "reflects the epistemic limits of judicial institutions",[206] especially when the parties have not clearly manifested their intention at the time of contracting. Because no judge can enter into the mind of the disputing parties,[207] the objective, interpretive method used by judges to determine contractual intent is to presume an epistemic correlation between the intention of the parties, and the factual and normative contexts surrounding the alleged agreement. One can affirm, without contradiction, both the normative nature of these presumptions, and also the epistemic value they play in the realm of fact-finding. The relevant question is thus: what normative values do these presumptions reflect?

(2) The normative values underpinning the evidentiary presumptions

69 The most commonly invoked presumption in this area of law is the presumption that parties to domestic agreements do not intend to create legal relations. In the famous case of *Balfour v Balfour*[208], Atkin LJ justified the presumption on largely normative grounds – "the common law does not regulate the form of agreements between spouses".[209] *Interactions of a certain nature*, it appears,[210] warrant the evidentiary presumption as to whether parties intended to create legal relations or not. Beyond the domestic context, it was also once presumed that agreements between a minister of the church and the church are not intended to create legal relations.[211] This presumption lasted until 2005 when the House of Lords in *Percy v Board of National Mission of the Church of Scotland*[212] held that an intention to create legal relations *can* exist notwithstanding the religious setting. This case certainly "marks a change in the judicial approach to the question of contractual intention in cases of this kind",[213] for the "presumption" against the intention to

206 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1500. Klass used this phrase with regards to §21 of the Restatement (Second) of the Law of Contracts in the US but the same can be said for the general test of the intention to create legal relations.

207 See Chief Justice Brian's 15th century observation that "the intent of man cannot be tried, for the devil himself knows not the intent of man" (Anon (1477) YB 17 Edw 4, fo 1 Pl 2).

208 [1919] 2 KB 571 (holding that a domestic agreement between a husband and wife did not manifest an intention to create legal relations).

209 *Balfour v Balfour* [1919] 2 KB 571 at 579.

210 *Jones v Padavatton* [1969] 1 WLR 328 at 332 ("experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations").

211 *President of the Methodist Conference v Parfit* [1984] QB 368 at 378.

212 [2005] UKHL 73.

213 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 2-181.

create legal relations in a religious employment setting appears to have been reversed.[214]

70 It is submitted that the normative values that underlie these presumptions are very similar to the substantive moral and "intangible value" justifications mentioned earlier, should a critical deconstruction of the commercial-domestic dichotomy be undertaken. The commercial setting, after all, relates to a sphere of human interaction where exchanges between strangers are common and "promises are often and should be 'purchased'"[215] (essentially, the substantive moral justification), whereas in the domestic or social setting,[216] legal non-enforceability is presumed in order to protect "the more open-ended and diffuse obligations that characterise relationships arising from trust, friendship, family and the like"[217] (essentially, the substantive "intangible value" justification). And although these interpretive presumptions reflect similar normative values as those claimed of the doctrine of consideration, their utility outshines the latter doctrine because of their flexibility in responding to contemporary societal norms and values,[218] as evidenced in the landmark case of *Percy v Board of National Mission of the Church of Scotland*.

B. The element of "reciprocity or bargain" as an evidentiary presumption

71 Having deconstructed the commercial-domestic dichotomy to reveal its normative basis, this author submits that the existence or non-existence of "reciprocity or bargain"[219] in an agreement can serve as an

214 *New Testament Church of God v Stewart* [2007] EWCA (Civ) 1004.

215 John Carter, Andrew Phang & Jill Poole, "Reaction to *Williams v Roffey*" (1995) 8 J Cont L 248 at 250 ("[i]n commerce, to be entitled to enforce a promise you have to purchase it").

216 Or the religious setting as well, at least before *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73 was decided.

217 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 453.

218 *Calverley v Green* (1984) 155 CLR 242 at 264 ("[a]s standards of behaviour alter, so should presumptions, otherwise the rationale for presumptions is lost, and instead of assisting the evaluation of evidence, they may detract from it. There is no justification for maintaining a presumption that if one fact is proved, then another exists, if common experience is to the contrary").

219 The concept of "reciprocity or bargain" in the envisioned proposal need not take after the rules of the modern doctrine of consideration and should be reformed. A more *substantive understanding* of a "reciprocal bargain" would eliminate the inconsistencies between some of the rules of the modern doctrine of consideration and the substantive moral justification as documented in paras 24–27 of this article. Briefly, the position reflected in the Restatement (Second) of the Law Contracts of the US might be worth considering and adopting. Comment b of §71 states that "a mere pretense of bargain does not suffice …", while comment d of §79 adds that "disparity in value … sometimes indicates that the purported

(*cont'd on the next page*)

evidentiary presumption as well. Given that most enforced contracts today contain the element of "reciprocity or bargain", this interpretive rule is descriptively warranted. Normatively, this rule also fits comfortably into the normative lens worn by a judge who accepts the commercial-domestic dichotomy. Appreciating that promises intended to have legal effect should usually be "purchased", with the element of "reciprocity or bargain" evidencing such purchase, is to lay claim to none other but the substantive moral justification. Turning the lens around, an agreement lacking "reciprocity or bargain" should probably be one intended to be left "to informal enforcement mechanisms such as familial and community opprobrium",[220] and this definitively finds support in the substantive "intangible value" justification.

72 To concretise the abstract discussion, there can be an evidentiary presumption that parties to a reciprocal or bargained-for agreement intend to create legal relations. This presumption would be rebutted if there is evidence to the contrary,[221] or if it is trumped by a weightier, contradicting presumption.[222] Likewise, the court should presume that parties to a non-bargained-for agreement did not intend to create legal relations. And unlike the absolute "formula of denial" that is the modern doctrine of consideration, an agreement that lacks the element of "reciprocity or bargain" can still be enforceable as long as there is clear evidence that the parties positively expressed their intention to create legal relations,[223] or if the normative value of the presumption of non-enforceability (the protection of "true gifts" from legal interference) is rendered irrelevant because the parties are in a pre-existing contractual/commercial relationship.[224] With this reform, the problem of the modern doctrine of consideration being unable to distinguish between "true gifts" and "unilateral promises in a less-than gratuitous context" is solved.

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consideration was not in fact bargained for". §86 also states the various exceptions to the rule that "past consideration is not good consideration", in recognition of the moral fact that some promises given in exchange for "past consideration" might be reciprocal nonetheless and do deserve legal enforcement.

220 Larry DiMatteo *et al*, *Visions of Contract Theory: Rationality, Bargaining and Interpretation* (Durham, North Carolina: Carolina Academic Press, 2008) at pp 140–141.

221 For example, if parties have committed in writing that the agreement will not have contractual effect (see *Rose and Frank Co v JR Crompton and Bros Ltd* [1925] AC 445); or if there is a "subject to contract" clause (see Paul Davies, "Anticipated contracts: room for agreement" (2010) 69(3) CLJ 467 at 473).

222 For example, bargained-for agreements made in the domestic setting where it is still much more reasonable to presume that the parties did not intend to create legal relations.

223 For example, if parties have committed in writing that the agreement will have contractual effect.

224 For example, the contract modification cases.

73 It is also important to realise the distinction between this proposal and the traditional understanding of consideration as form. Earlier, the objection against treating consideration as a mere formal requirement has been acknowledged – it is conceptually problematic given the epistemic shortcomings of the doctrine. This objection, however, does not arise in the envisioned proposal. This is because it is not in the nature of the element of "reciprocity or bargain" in an agreement to serve the "channelling" or "cautionary" needs of the parties, needs which are more directly served by legal formalities such as the deed. Instead, the element serves as a part-descriptive and part-normative tool *for the judge* to holistically decipher if the parties could *reasonably* be said to have manifested an intention to create legal relations.

C. The individualism objection

74 An objection to the proposal of abolishing the doctrine of consideration is that it will result in contract law being overtly individualistic. Championing the test for serious intention as the criterion of contractual enforceability has been commonly associated with the elevation of "the individual's autonomy … [as] the sole and unqualified value".[225] To this, Chen-Wishart argues that "no legal system does or can enforce all promises and the idea that all serious undertakings should be respected gives no guidance in determining which undertakings should be supported by the force of law".[226]

75 It is submitted that the reform proposed in this article can adequately withstand this objection. Unlike libertarian-leaning authors such as Fried[227] and Barnett,[228] this author has emphasised that the search for the intention to create legal relations is not a "value-free" enterprise, least of all one which compels the State to "stay 'hands off' in evaluating the choices made by individuals".[229] It is for this reason that this author can wholeheartedly agree with Braucher's view that "consent to contract is no less socially constructed".[230] Chen-Wishart is right in

225 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 442.

226 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 442.

227 Charles Fried, *Contract as Promise: A theory of contractual obligation* (Cambridge, Mass: Harvard University Press, 1981) at pp 28–39.

228 Randy E Barnett, "Rights and remedies in a consent theory of contract" in *Liability and Responsibility: Essays in law and morals* (R G Frey & Christopher W Morris eds) (New York: Cambridge University Press, 1991).

229 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 442.

230 Jean Braucher, "Contract versus Contractarianism: The Regulatory Role of Contract Law" (1990) 47 Wash & Lee L Rev 697 at 704.

arguing that the "the individual's intention is not the be all and end all … [contract law should leave] room for other important values",[231] but the crucial argument proffered here is precisely that the *interpretation* of the individual's intention has already incorporated these "other important values".

76 Admittedly, the individual's autonomy is highly valued in the envisioned proposal and does have the final say when the evidence is clear, *eg*, if there is a clause in the non-bargained-for agreement that reads: "This is a legally enforceable agreement." This is perhaps the largest consequential difference between the envisioned proposal and the modern doctrine of consideration. Two responses can be offered to those who deem such elevation of the individual's autonomy in contract law objectionable. The simpler response is that contract law *already* allows "the individual's autonomy" the final say as long as the agreement is in the form of a deed, and all that is proposed is that the "opt-out option to the non-enforcement default rule"[232] be made easier. The more sophisticated response is this: this autonomy that the individual can choose to exercise comes at the price of bearing a moral burden which Klass identifies as the "relational cost".[233] The exercise of this autonomy to explicitly request for provisions providing for legal liability (or not) will often come with the moral cost of interfering, or even eroding, "extralegal forms of trust that otherwise create value in transactions".[234] While the courts can and should minimise relational costs by presuming legal enforceability of bargained-for agreements made in the commercial setting, and *vice versa*, it is submitted that the *ultimate choice* should belong to the individual because such costs "are not only transactionally relative, but also transactor-specific".[235] The individual – free from duress, undue influence or unconscionable dealings – is in the best epistemic and moral position to decide whether the relational costs in voicing out legal concerns is justified by the benefits he or she can expect to receive in return.

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231 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 443.

232 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1441.

233 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1475.

234 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1441. To elaborate, Klass observes that "an expressed preference for legal liability early in the transaction might be taken, for example, as evidence of distrust or a propensity to litigate. An expressed preference for no legal liability might be taken as evidence that the party might not perform, or that she does not trust the other side not to engage in opportunistic litigation" (at 1473–1474).

235 Gregory Klass, "Intent to Contract" (2009) 95 Va L Rev 1437 at 1475. See Patricia Williams, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harv CR-CL L Rev 401 at 407 for an informative account on how an expressed preference for legal enforcement of the same transaction can have very different relational implications to different parties.

D. The uncertainty objection

77 Another objection to the reform proposed in this article would likely be that it would "open the door to great legal uncertainty".[236] Atiyah, for one, is unconvinced that the intention to create legal relations is a good alternative, opining that "to abolish the doctrine of consideration is simply to require the courts to begin all over again the task of deciding what promises are enforceable".[237] Chen-Wishart has also built on this argument by highlighting that "such an elastic criterion as the intention to create legal relations will be no less problematic or susceptible of judicial manipulation than bargain consideration itself".[238] The uncertainty objection can be broken down into two facets: its underlying *source* (the fear of the "intention test" being overburdened with what it cannot and was not meant to handle), and its dreaded *consequence* (the fear of judicial manipulation).

(1) Response to the fear of the "intention test" being overburdened

78 It is submitted, with emphasis, that what has been proposed in this article is for the doctrine of consideration to be replaced by what already is present in the law of contract,[239] not a completely foreign doctrine or idea. If the earlier submission – that the highest normative values claimed of the doctrine of consideration are already or can be reflected in the "intention test" – is accurate, the envisioned proposal will *not* require the latter test to do a great deal more normative work.

79 Even if this author should grant that what influences a judge's decision in finding the "intention to create legal relations" is not entirely clear at times, this problem is hardly exacerbated by abolishing the modern doctrine of consideration, nor will it be ameliorated by retaining the doctrine as it is. Whether or not the doctrine of consideration is abolished, the court *still* has to decide, on contractual doctrines such as the "intention to create legal relations" and "certainty of agreement", the same perplexing questions which learned academics have opined will cause uncertainty: "What did the parties seriously intended to be bound by and how? What rights or liabilities were intended to be transferred? Was it to be absolute or conditional? To what excuses was it to be subject?"[240] The modern doctrine of consideration

236 Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* (trans by Tony Weir) (New York: Oxford University Press, 3rd Ed, 1998) at p 399.

237 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 241.

238 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 445.

239 See also *Gay Choong Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [117].

240 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 445.

provides no clear answers to many of these questions either. For example, the present law already compels judges to have to decide whether an alleged agreement (in a "social or domestic" setting) is so frivolous such that it manifests no intention to be legally bound,[241] *even if* the consideration requirement has been satisfied. There is no need for the courts to "begin all over again the task of deciding what promises are enforceable",[242] for the existent contractual doctrines – and the normative values they reflect – have long been "up to the task".

(2) Response to the fear of judicial manipulation

80 As for Chen-Wishart's justifiable fear of "judicial manipulation", it is submitted that even if such "manipulation" can still reign with or without the doctrine of consideration, the envisioned proposal at least provides judges with a reasoned path to yield just results in a conceptually coherent manner. No longer would judges need to dig for consideration to uphold an agreement clearly intended to have legal effect,[243] or use the lack of consideration as the basis to deny an agreement where, for example, the fact that it was a domestic agreement not intended to have legal effect as supported by the post-agreement conduct of the promisee would have been the better reason.[244] This ties in with the earlier argument[245] that judicial discretion is not the problem, it is the lack of *principled* discretion as a result of the modern doctrine of consideration – due to the "practically redundant concept of practical benefit"[246] – that is. It would certainly be beneficial to the common law if judges spell out explicitly the normative values driving their search for the "intention to create legal relations", but this is a call for more robust judicial reasoning; and to that the retention of the modern doctrine of consideration with all its problems (where the normative values underlying a judge's use of the doctrine are seldom spelt out either) is not the solution.

VII. The effect on other doctrines within contract law

81 The abolition of the doctrine of consideration will certainly impact other doctrines within contract law, requiring "the appropriate

241 H G Beale ed, *Chitty on Contracts* (London: Sweet & Maxwell, 30th Ed, 2008) at para 2-168; see also *De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co Ltd* [2003] 4 SLR(R) 682 at [199]–[201].

242 P S Atiyah, "Consideration: A Restatement" in *Essays on Contract* (New York: Oxford University Press, 1990) at p 241.

243 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

244 *Combe v Combe* [1951] 2 KB 215.

245 See paras 49–52 of this article.

246 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [101]; Wu Zhuang Hui, "A Probable Reform of Consideration" (2009) Sing JLS 272 at 279–280.

recalibration of the excuses and remedies",[247] as Chen-Wishart accurately observes. It is beyond the scope of this article to engage in a detailed elaboration of the changes that will result or be required. Regretfully, all that will be presented here is a brief sketch of what needs to be further worked on should the envisioned proposal be adopted.[248]

A. Basis of enforcement

82 While it is true that the abolition of the doctrine of consideration will usher in a "non-bargain criteria for enforcement",[249] this author respectfully disagrees that it would "necessitate enormous compromises which will weaken rather than strengthen the internal coherence of contract law".[250] As argued earlier,[251] it is conceptually possible to divorce the basis of contractual enforcement from that of bargain exchange. Historically, consideration did not even refer to "exchange or bargain"[252] and the common law itself survived large periods where contract was "defined … in terms of agreement or assent".[253] Moreover, if the "intuitive justice of exchange"[254] could qualify as the moral basis of enforcement, it would appear hard to accept that the intuitive justice of *keeping one's serious promises which were intended to have legal effect* cannot fulfil the same moral dimension in a legal landscape without the doctrine of consideration.[255]

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247 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 445.

248 Likewise, it is also beyond the scope of this article to consider the impact of the envisioned proposal on *other areas* of law. This is an important inquiry, however, as the language of "consideration" has been adopted in other areas such as property and banking law. A careful study of whether "consideration" (as understood in each of these areas of law) is similar to how the doctrine has been defended and critiqued in contract law would first be required, before deciding on whether the doctrine should be retained, modified or abolished in these respective areas. The abolition of the doctrine of consideration *in contract law* as envisioned in this article need not (and should not, automatically) result in a similar move in other areas of law.

249 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 445.

250 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 445.

251 See paras 28–31 of this article.

252 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press, 1991) at p 138.

253 James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (New York: Oxford University Press, 1991) at p 135.

254 Mindy Chen-Wishart, *Contract Law* (New York: Oxford University Press, 2nd Ed, 2008) at p 125.

255 See Charles Fried, *Contract as Promise: A theory of contractual obligation* (Cambridge, Mass: Harvard University Press, 1981) at p 17 ("[i]f I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance").

B. Promissory estoppel

83 Because promissory estoppel is usually invoked to get around the strict doctrine of consideration,[256] the abolition of the doctrine of consideration would render promissory estoppel less relevant than before. While the abolition of consideration will decrease the role of promissory estoppel, the opposite is true as well – keeping the doctrine of consideration could easily lead to the expansion of promissory estoppel[257] to prevent injustice to the promisee. In a legal landscape without the doctrine of consideration, promissory estoppel can still be relevant. Even if there was objectively no intention to create legal relations, the promisee should be able to plead the estoppel if the promisor exhibited unconscionable conduct[258] in his dealings *and* detrimental reliance[259] was suffered by the promisee.

C. Vitiating factors

84 To the extent that substantive unfairness is and can be regulated against by the doctrine of consideration, the abolition of the doctrine would certainly need to be accompanied by the increased role of the vitiating factors.[260] Chen-Wishart objects to this by arguing that it is a mistake to assume that the "vitiating factors relate to the negation of the serious intention [of the contracting parties]".[261] It is respectfully submitted, on the contrary, that no such assumption need be made in proposing that the vitiating factors take over the "protective function" played by the doctrine of consideration. All that is asserted is that *functionally* speaking, substantive fairness can be better achieved by the vitiating factors, whether or not it is conceptually accurate to view the vitiating factors as relating to the negation of intent.

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256 *Hughes v Metropolitan Railway Co* (1877) 2 App Cas 439.

257 See *Austotel Pty Ltd v Franklins Self Serve Pty Ltd* (1989) 16 NSWLR 582 at 610 (holding that equitable relief can be granted even when the plaintiff (promisee) was unable to point to the precise terms describing what was expected from the defendant. The traditional requirement of a "relevant assumption or expectation" appears to have been expanded to reflect an assumption or expectation "that a contract will come into existence or a promise be performed or an interest granted to the plaintiff by the defendant").

258 See *Waltons Stores (Interstate) Ltd v Maher* (1987) 164 CLR 387 (holding that unconscionable conduct is the touchstone for the operation of equitable estoppel but that it requires more than a mere failure to fulfil a promise).

259 See *Lam Chi Kin David v Deutsche Bank AG* [2011] 1 SLR 800; *cf Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 (holding that no detrimental reliance was required for promissory estoppel to be invoked).

260 This view has been supported in case law as well: see *US v Stump Home Specialties Manufacturing, Inc* 905 F 2d 1117 (1990) at 1121–1122; *The Alev* [1989] 1 Lloyd's Rep 138 at 147.

261 Mindy Chen-Wishart, "Consideration and Serious Intention" (2009) Sing JLS 434 at 455.

85 As mentioned, it is beyond the scope of this article to chart out how the defences of duress, undue influence and unconscionability are to be respectively expanded to fill the gap left by the abolished doctrine of consideration. It suffices to note, however, that whether or not the doctrine is abolished, the case for expanding the duress defence is already being strongly advocated as a requirement of "dynamic market individualism".[262] The view that the vitiating factors can play a better role than consideration is also supported by Fried[263] and Dawson,[264] and the prolonged failure to effect this change has led von Mehren to observe that it is the doctrine of consideration which has "hampered the development in the common law of an adequate approach to the general problem of policing individual transactions for fairness".[265] Adams and Brownsword have also made the important observation that the current law, because of the impact of *Williams v Roffey*, has already shifted "the burden of regulating price re-negotiation on to the doctrine of economic duress".[266] That these doctrines are "subject to their own specific difficulties"[267] should not be an obstacle to a reform that would allow judges to regulate against unfairness in a conceptually sound and direct manner, instead of having to wield the blunt instrument of "bargain exchange" as a test for fairness.

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262 Roger Brownsword, "Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism" in *Contracts, Co-operation and Competition: studies in economics, management and law* (Simon Deakin & Jonathan Michie eds) (New York: Oxford University Press, 1997) at p 273.

263 Charles Fried, *Contract as Promise: A theory of contractual obligation* (Cambridge, Mass: Harvard University Press, 1981) at p 46 ("[s]ubstantive unfairness should be controlled not by the manipulation of formalities but by substantive inquiry under the aegis of the doctrines of duress and unconscionability").

264 John P Dawson, *Gifts and Promises: Continental and American Law Compared* (New Haven: Yale University Press, 1980) at p 215 ("[a]s a guarantor of 'mutuality', consideration provides no insight into the origins and effects of such transactions or the standards by which they should be judged. On the whole we would do much better without it").

265 Arthur von Mehren, "Civil-law Analogues to Consideration: An Exercise in Comparative Analysis" (1959) 72 Harv L Rev 1009 at 1075. Indeed, von Mehren's observation probably rings true in Singapore, given the recent pronouncement by the Singapore High Court that unconscionability as a vitiating factor in contract is not part of Singapore law, "not until the time comes for an abandonment of the doctrine of consideration in favour of doctrines like economic duress, undue influence and unconscionability" (*EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232 at [66] *per* Quentin Loh J).

266 John Adams & Roger Brownsword, "Contract, Consideration and the Critical Path" (1990) 53(4) Mod L Rev 536 at 537.

267 *Gay Choon Ing v Loh Sze Tie Terrence Peter* [2009] 2 SLR(R) 332 at [114].

VIII. Conclusion

86 In *White v Jones*,[268] Lord Goff lamented that "our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration". Throughout this article, this author has attempted to argue that Lord Goff's sentiment is largely accurate, because the justifications claimed of the modern doctrine of consideration do not sync with its rules and can be given effect to by other contractual doctrines. The detailed study of the justifications claimed has proven to support Fried's analysis that "[consideration] … is like a rather awkward tool, which has the virtue of being able to pound nails, drive screws, pry open cans, although it does none of these things well and although each of them might be done much better by a specialized tool".[269] A cursory glance at the civil law system also brings to light the fact that the notion, "all agreements without the element of bargain exchange are *prima facie* unenforceable", is alien to many countries. If Kull is right that "[judging] by the American decisions of the last several decades, courts are no longer willing to regard the absence of consideration as a sufficient reason to deny the enforceability of a promise",[270] then Rajah JA is not alone in opining that "the time may have come … to shed the pretence of searching for consideration".[271] The doctrine of consideration – as an independent, absolute test of enforceability – should be abolished.

87 What has been envisioned in this article is an accommodative approach that seeks to abolish the doctrine without going to the extreme of claiming that consideration "makes no contribution to English law"[272] as Chloros so claimed. Despite making this strong claim, Chloros had to admit immediately that "the abolition of consideration will leave certain gaps in English law, if for no other reason, at least because it has for so long been associated with the very definition of contract".[273] Indeed, because the notion of "reciprocity or bargain" has been so closely associated with the archetypal contract in a common law legal system like Singapore – both descriptively and normatively so – it can and should serve as an evidentiary presumption for the intention to create legal relations. This proposal fulfils Wessman's prediction that

268 [1995] 2 AC 207 at 262.

269 Charles Fried, *Contract as Promise: A theory of contractual obligation* (Cambridge, Mass: Harvard University Press, 1981) at p 39.

270 Andrew Kull, "Reconsidering Gratuitous Promises" (1992) 21 J Legal Stud 39 at 39.

271 *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 at [139]. See also Baragwanath J's views in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 at [86]–[94].

272 A G Chloros, "The doctrine of consideration and the reform of the law of contract" (1968) 17 ICLQ 137 at 165.

273 A G Chloros, "The doctrine of consideration and the reform of the law of contract" (1968) 17 ICLQ 137 at 165.

"even if consideration is no longer used as a gatekeeper, it may thus be retained to play a useful, if somewhat less decisive, role as a signalman".[274] More importantly, judges would have the freedom (and duty) to cogently explain the exact motivations and reasons behind their decisions without being straight-jacketed to the issue of whether or not there is "bargain exchange".[275]

88 Finally, the envisioned proposal, if found convincing, should be implemented judicially instead of via a legislative reform. The conditions to ensure the success of the reform – a judicial consensus of the normative values involved in the interpretation of the parties' intention, and a judicial willingness to engage in robust reasoning to explain why an agreement is enforceable or not – are essentially *judicial attitudes* that cannot be simply legislated for. The modern doctrine of consideration is a "common law problem" created by judges, and likewise, it can be resolved by judges inspired by Karl Llewellyn's insightful and stirring admonition:[276]

> For in the common-law tradition at its best, reason has ever controlled principle, and principle has always controlled precedent … Let any court become convinced of its duty to the system and the future, and no rule which defaults on a show cause order can stand against reform.

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274 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 845.

275 Mark B Wessman, "Retraining the Gatekeeper: Further reflections on the Doctrine of Consideration" (1996) 29 Loy LA L Rev 713 at 782 ("[i]t is important, not just that judges reach the right results, but that they articulate the right reasons … Sometimes … the vagaries of consideration doctrine are not finely tuned to the policy concerns they are dragged in to serve, and courts are forced to distort consideration doctrine to achieve the desired results").

276 Karl N Llewellyn, "Common-law reform of Consideration: Are there measures?" (1941) 41(5) Colum L Rev 863 at 876.