UNIVERSITAT DE BARCELONA

Facultat de Dret

Spanish and American Approaches to Contract Formation:

A Comparative Study

by Àlex Levin Canal

16707762

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Chantal Moll de l'Alba

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1. INTRODUCTION

I first contemplated writing this paper when I was in the United States, back in the first semester. I had travelled to Florida, where I would spend the first semester of the academic year enrolled in Nova Southeastern University. My life-time academic goal, and one of the reasons I chose to attend Universitat de Barcelona. These six months have been part of a two-year journey which will hopefully culminate in my graduation from NSU, and the fulfillment of a deeply-rooted dream: practicing in the US.

During my six months stay I was marveled by the teaching methodology employed in American Law Schools, whereby we would take home five to ten cases per subject, peruse them, brief them, and analyze them in class, following what they pridefully call the Socratic method. A method I have come to revere (and fear) as it develops a number of skills that are crucial to the practice of law. These skills are developed by the means of challenging the student to think critically; expecting him to persuasively articulate different sides to any issue; or submitting him to a deluge of rapidly-fired questions one can never be sufficiently prepared for. This process is especially useful to gain a deeper understanding of the materials and the nuances involved.

This comparative study has been structured and conceived to mirror the two different teaching methods used in both sides of the Atlantic: the sections on American contract law have been explained following the case-by-case Socratic American method. In contrast, the parts about Spanish law have been explained using the otherwise analytical method of parsing down the articles.

The legal systems of the western world are divided into two groups, as referring to the two traditions: the civil law tradition, to which Spain belongs; and the common law tradition, to which the United States belongs. Contracts from these two systems have been traditionally seen as distinctive and diverse. The aim of this study focuses on certain comparisons of Spanish and American contract formation. Because this book will be read by the civil law scholar and lawyer, the study's structure follows the Spanish contract formation scheme, which I have compared and contrasted to the American one.

To this end, this study has been divided into five parts: this study starts by examining the historical background of both traditions. Then, I have briefly addressed the main distinctive features of the notion of contracts. Next, I have delved into a comparative analysis of the elements of contract formation: firstly, the notion of consent, which under Spanish law encompasses capacity to consent and the contractual process of offer and acceptance. Secondly, the common features of consideration and cause, with special emphasis on the American element of consideration and its substitute. Third and last, the element of *objeto*, which has no American equivalent and has thus been tackled independently.

2. BRIEF INTRODUCTION TO THE CIVIL LAW & COMMON LAW TRADITIONS

2.1 Historical Background

This chapter is by no means an exhaustive history of the traditions, it is a mere overview of the historical background and legal influences of both systems. Understanding the historical differences and general features will help the reader understand the different approaches both systems have taken to Contract Law.

The civil law system is a modern legal system based on Roman law. Its origin dates back to the sixth century BC, when Justinian[1] ordered an extensive compilation of Roman law. The work was forgotten for centuries, being rediscovered in Italy, in the eleventh Century for the purpose of teaching law. In the sixteenth century, the compilation was coined *Corpus Juris Civilis* ("Body of Civil Law"). Justinian's *Corpus* was spread into most of the countries of the Continent during the 18th century Enlightment, when rulers sought to produce comprehensive legal codes.[2]

The common law system refers to the judicial tradition that was born in England. The impact of the revival of Roman law that took place in the European countries did not reach England, that at that time was already developing what is now known as common law.

Until the Norman invasion in 1066, the different regions of the country had used their own rules and customs.[3] But after the Norman invasion, monarchs set out to unite both the country and its laws, using the King's court. It was termed "common" because of its general use.[4] As oppose to the civil tradition, which was highly academic and taught at university; in its origins, common law was not taught at university, but by using the guild

[1] Eastern Roman Emperor that ruled from 527 to 565.
[2] John CARTWRIGHT, *Contract Law*, p.8.
[3] Manuel Guillermo ALTAVA LAVALL, Lecciones de Derecho Comparado, p.49.
[4] CARTWRIGHT, p.8.

system. The legal rules in the common law system, as opposed to its counterpart, were developed organically and were rarely written down. [5]

English influence is undeniable but not the only source of American Law. American law has been influenced by more sources of law than exclusively pre-1776[6] English common law.[7] In 1776 Americans shared the territory of North America with the French and the Spanish. "The early explorers, settlers and colonists (…) (in order to create laws) cherry picked some of the best parts of both the common law and civil law traditions together with the laws they had created along the way."[8]

Countries using the common law system have drawn their legal systems from England, typically as former colonies of the English Empire. Some countries using common law in the present are: Australia, Canada (except Quebec[9]), India, the Republic of Ireland, Hong Kong, New Zealand, Singapore, the United States (except for Louisiana[9]), among many others.[10]

The civil law system was spread in the same way, during the colonization of countries in South and Middle America, and most of East Asia by countries like Belgium, France, Portugal and Spain. Civil law is currently used in those countries, and in most of the European Union states (except for the UK, Ireland, and Cyprus).[11]

The civil law system is more widespread than its counterpart: 150 countries follow the civil tradition, as opposed to 80 for common law.[12]

[5] ALTAVA LAVALL, p.38.
[6] United States Declaration of Independence.
[7] Jean STEADMAN, Steven SPRAGUE, *Common Law Contract Law: A Practical Guide for the Civil Lawyer*, p.23.
[8] Ibídem, p.38.
[9] Both Quebec and Louisiana's private law has a civil law character.
[10] CARTWRIGHT, p.8-9.
[11] Íbidem, p.38.
[12] FBI World Factbook. https://www.cia.gov/library/PUBLICATIONS/the-world-factbook/fields/2100.html

2.2 The Source of Law and the Role of the Judge

The defining feature of "civil law" is that its law is based on a systematic set of general rules of law contained in legislative enactments, typically a "code".[13] The role of the written laws is pivotal, and as oppose to the common law system, the role of the judge is not that of creating the law, but rather that of applying it. In Montesquieu's words, «*Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur*»[14]. Judges were not expected to be but «la bouche de la loi»; the law was «la volonté générale»[15]. In yesteryear, the role of the judges was that of applying the law, as it came from the legislative power, representative of the people's sovereignty. Leaving the judges some room for interpretation was akin to an attack on democracy.[16]

Montesquieu's eighteenth-century words are not in accord with the role of today's judges, nor the expectations we have of them. Today, the judges have room for interpretation, and are expected to interpret the law's words, as long as they do not trail off from their meaning, as "Magistrates of the Judiciary (are) subject only to the rule of law"[17].

By definition, the margin of interpretation judges in the civil law tradition is of course, far less than that offered to their counterparts, as the source of law was is judge-made, and there has never been an attempt at systematization.[18]

The perception citizens have of judges in both systems also differs. Judges in common law have a more significant and individual status than those in the civil tradition. In the common law their status is conferred to them by their role as a substantial source of law. In many instances, judges will have a celebrity-like status as they will be known for their

[13] CARTWRIGHT, p.8.
[14] MONTESQUIEU, Esprit des Lois, p.327. «*The judges of the nation are but the mouth that pronounces the words of the law; inanimate beings who cannot moderate the forcé nor harshness* »
[15] An expression attriubted to Rousseau.
[16] ALTAVA LAVALL, p.37.
[17] Article 117.1 CE.
[18] ALTAVA LAVALL, p.49.

individual judgments and contributions. The same does not happen in civil law, where they will play a minor, more mechanic role.[19]

Judges in the common law will solve legal disputes by comparing the facts of the case before them with previous cases—called precedents—and solve looking for similarities. Judges in the civil law will not pay as much attention to the precedents, and will solve using generalized statements of principles. Although in common law the applicable law will be found in case law, in some instances controversies are decided on statutory law. American statutory law can be enacted by federal, state and local governments and can encompass a variety of subjects.

2.3 The Value of Judicial Precedent

Both systems have had to find a solution to a unique problem: giving certainty to the law and giving the actors of any controversy a sense of foreseeability. Whilst the common law system solves this problem through the rule of *stare decisis*; civil law choses to do that by giving the players a comprehensive and stable body of rules, by which the judges have to abide.[20]

"The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."[21] The doctrine of the binding precedent is the one that has allowed the common law system to be comprehensible and stable; where it not to for this rule, judicial decisions would offer no certainty or sense of foreseeability.[22]

[19] CARTWRIGHT, p.12.
[20] FRANCESCO GALGANO, Atlas de Derecho Privado Comparado, p.76-78.
[21] William M. Lile et al., *Brief Making and the Use of Law Books*, p.321
[22] GALGANO, p.29-31.

Whereas in the common law system, judicial decisions have an imperative value, and are the single-most important tool for lawyers, and judges; in the civil law system, they are also very important, but not because judges and courts are bound by previous cases, but because of their persuasive value, especially those of higher courts.[23]

In Spain, case law will not be binding, but it is still considered to be an integral part of the sources of law: "case law shall complement the legal system by means of the doctrine repeatedly upheld by the Supreme Court[24] (…)"[25] Case law will be considered as such in Spain when two judgments have been rendered on one rule.

[23] Íbidem, p.76-78.

[24] "The Supreme Court, with jurisdiction over the whole of Spain, is the highest judicial body in all branches of justice, except with regard to the provisions concerning Constitutional guarantees". (Article 123.1 CE)

[25] Article 1.6 CC.

3. THE NOTION OF CONTRACTS

3.1 Historical Background

Thus far, the introductory chapters have focused on the civil and common law traditions; henceforth, I will focus specifically in the Spanish and American law of contracts. Despite the similarities American contract law may bear with English common law; or similarly, Spanish with French law, contract law is shaped by the social and economic context of every country, and this results in a *sui generis* regulation.

The principles of the Spanish law of contracts are compiled in the *Código Civil*. The Spanish Civil Code, formally the Royal Decree of the 24th of July of 1889, was enacted in that year, and after numerous modifications it remains in force to this day. The Spanish Civil Code, one of the latest Civil Codes of continental Europe, was inspired by the *Code Civil des Français*, the French Civil Code, enacted by Napoléon Bonaparte in 1804.[26] The principles of American contract law have been developed by judges through case law. The American equivalent to the CC is the Restatement of Contracts, a non-binding yet highly influential authority that covers the fundamental principles of contract law. This Restatement was compiled by the American Law Institute and published for the first time in 1932. The latest edition is the Restatement Second of Contracts, published in 1979, and the one I will refer throughout this work[27].

In Spain, the term *civil* (law) is used to describe what is known in the US as private law. *Civil* also refers to the legal tradition, for this reason and with the aim of avoiding confusion, the term civil will be used to describe the legal system; *contract* or *private* law to describe the discipline.

[26] JOSÉ LUIS LACRUZ BERDEJO, *Derecho de Obligaciones Vol. I Teoría General del Contrato*, p. 335.
[27] https://contract-law.laws.com/contract-law/restatement-of-contracts

3.2 Contract Defined

The *Código Civil* establishes that a "contract exists from the time where one or several persons consent to bind themselves vis-à-vis another or others to give something or to provide a service."[28] The Restatement Second of Contracts, on the other hand, defines a contract as: "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." [29]

From the literal wording of the preceding articles, as well as other connected articles from the two texts, one can observe the distinct approaches to contract formation. In Spain, for an agreement to qualify as a contract it will have to fit the legal definition, which means satisfying the three elements set out in article 1261 CC (consent, subject-matter and object). In contrast, American law—as a result of not having a body of principles—proves to be much more flexible, with a broader definition that will be easily crafted to fit the transaction. Whereas in the CC "every concept must fit into distinct legal categories that define the principle's relationship to other legal precepts"[30], the judge-made American law is more "concerned with predicting the impact and potential binding consequences of a party's promises."[31]

Accordingly, the CC and legal scholars classify Spanish contracts into several categories.[32] The most important categories to understand the main differences between Spanish and American law are the following: unilateral and bilateral contracts; and onerous and gratuitous. [1]

[28] Article 1254 CC
[29] § 1 R2.
[30] CHRISTOPHER MELDRUM, Civil Law Contracts, Article from Association Corporate Counsel
[31] Íbidem
[32] According to Díez-Picazo: consentual, real and formal; unilateral, bilateral and plurilateral; onerous and gratuitous; tipical and atipical; negotiated or by adhesión.
LUÍS DIEZ-PICAZO, ANTONIO GULLÓN, *Sistema de Derecho Civil, Volumen II, El Contrato en General*, p.24-28.

3.3 Categories of Contracts

3.3.1 Unilateral & Bilateral

Although this classification is used in both jurisdictions, the meaning differs. Common law will focus on the irrevocable *promises* of the contracting parties because the law of contract revolves around the concept of consideration.[33] The lack of mutuality of obligations has forced the American contract law to develop theories that strive to uphold this type of contracts, finding an alternative to consideration. In contrast, the Spanish CC will focus on the parties' *obligations* to each other, which will depend on the type of contract.[34] Both in unilateral and bilateral contracts, parties have obligations to each other. This means that both are equally enforceable. Because in America, parties to unilateral contracts do not have obligations to each other, they are not generally enforceable.

In civil law, the unilateral-bilateral classification refers "not to the number of parties (involved in a contract), but rather on the number of obligations that the contract creates, and its structure."[35] A unilateral contract will create obligations only for one of the parties, and despite the lack of reciprocity, in Spanish law, it will still be enforceable. A paradigmatic example of a unilateral contract is a donation, "an active liberality whereby a person gratuitously disposes of the thing in favor of another person, who accepts it."[36] Civil law will focus on imposing obligations on both parties, this means that for the donation contract—although there is no reciprocity—the law will create obligations both for the donor and the donee, and will in this way guarantee its enforceability.[37]

In stark contrast, donations in common law are generally unenforceable. The judiciary has however created doctrines that strive to make them enforceable in some instances.

A bilateral contract in civil law will arise when it creates reciprocal obligations on both

[33] MELDRUM
[34] Íbidem
[35] DÍEZ-PICAZO, GULLÓN, p.24.
[36] Article 618 CC.
[37] LACRUZ BERDEJO, p.487.

parties.[38] An example of a bilateral contract would be a contract of sale and purchase, where "one of the contracting parties undertakes to deliver a specific thing and the other to pay a certain price for it, in money or something which represents it."[39] In this type of contract, both systems will impose burdens on both parties. Whereas in a unilateral contract, the Spanish law imposes burdens on both parties, but the US does not; in bilateral contracts, both jurisdictions will. American law is essentially a bilateral contract oriented system.

3.3.2 Onerous & Gratuitous

Another classification relates to the advantage each party expects to receive from the agreement. In an onerous contract, both parties expect to receive an advantage. Such as in a sale of goods, where "the seller transfers or agrees to transfer the property in goods to the buyer for (…) money ..."[40] Conversely, a contract will be gratuitous, such as in a donation, where one of the parties provides an advantage to the other, without receiving anything in return.[41] This is a very important distinction when comparing both systems: in civil law, gratuitous contracts are as enforceable as onerous ones; in American law, they are not.

In civil law, gratuitous promises are enforceable because as mentioned, the law focuses on the parties' obligations to each other. In the case of the donation, the CC establishes that "A gift is an active liberality whereby a person gratuitously disposes of the thing in favor of another person, who accepts it."[42] The CC also includes the enforceability regime: "Gifts are perfected from the time when the donor becomes aware of the donee's acceptance."[43] Under civil law, because a gratuitous promise can be enforced, a party can be obligated to deliver on the basis of that donation act. In addition, what gives a donation its enforceability is that the element of "cause" in the CC is contemplated for both onerous and gratuitous promises. It is also for this reason that they are both

[38] Íbidem, p.487.
[39] Article 1445 CC.
[40] § 6 (1) Sale of Goods Act, 1979.
[41] MELDRUM.
[42] Article 618 CC.
[43] Article 618 CC.

enforceable.[44]

In contrast, under American law, and following the example of the donation, a gratuitous promise will be unenforceable because it will lack consideration, and the law will not impose a burden on the donor, as the donee will not have given any consideration in exchange. To make certain unilateral contract enforceable, the courts have developed the doctrine of promissory estoppel.

[44] LACRUZ BERDEJO, p.483.

4. INTRODUCTION TO CONTRACT FORMATION

From the outset, we must understand that the different approaches both legal systems take to contract formation affect the general scheme of contract law. Civil law focuses on the several elements that have to be met to demonstrate that the agreement results from the parties' free will.[45] These elements are: (1) *consentimiento*: "consent of the contracting parties"; (2) *objeto*: *"*object which is the subject matter of the agreement"; and (3) a lawful *causa: "*cause of the obligation established."[46]

Conversely, common law seeks to establish the point in time the promise was made and the time at which the resulting legal implications arose.[47] These different points in time are: (1) offer given by the offeror[48]; (2) acceptance given by the offeree[49]; and the (3) consideration exchanged by both parties.[50]

Whereas in civil law, all three elements have to be met for contractual obligations to arise, and the timing doesn't play an important role. The opposite happens in common law, where the time at which the offer and acceptance is given is crucial to determining the contractual implications. A fourth element will be added to the requirements that have to be met for contractual obligations to arise: (4) capacity, common to both systems.

[45] DÍEZ-PICAZO, GULLÓN, p.46.
[46] Article 1261 CC.
[47] MELDRUM.
[48] §24 - §51 R2.
[49] §52 - §69 R2.
[50] Chapter 4 R2.

5. CONSENT

"Consent is manifested by the coincidence between the offer and the acceptance over the thing and the cause which are to constitute the contract."[51] In the CC, consent is attained when offer and acceptance meet over the two other required elements (subject-matter/thing and cause). For consent to be given, the parties must have the legal capacity[52]. The vitiating factors of capacity will result in a null and void contract.[53]

In American law for valid consent to be given, the parties must also first have legal capacity. In the same way, American law also regulates vitiating factors of consent, these however are different from those in the CC and will have different consequences. [54]

5.1 Capacity

The CC distinguishes incapacities to contract, from legal prohibitions. Certain persons will not have the capacity to enter into a contract because of their insufficient civil capacity. Legal prohibitions, conversely, will affect certain persons who despite having the legal civil capacity cannot enter certain contracts because of their circumstances or ties to the transaction or to the other party.[55]

Non-emancipated minors and incapacitated persons "legally declared incapacitated through a judicial judgment" [56] cannot give their consent because they are incapacitated to contract.[57] A legal prohibition to acquiring things by purchase will be imposed on "persons who exercise any position of guardianship, in respect of the property of the person/s who are under their custody or protection."[58]

What the CC strives to avoid by establishing this legal prohibition is a conflict of interest. The guardian, as "representative of the minor or incapacitated person"[59] has the duty to

[51] Article 1262 CC.
[52] Article 1263-1264 CC.
[53] Article 1265-1270 CC.: error, duress, intimidation and fraudulent misrepresentation.
[54] Mistake; misrepresentation and non-disclosure; duress, undue influence and unconscionable bargains.
[55] DÍEZ-PICAZO, GULLÓN, p.31.
[56] Article 1263 CC.
[57] Íbidem.
[58] Article 1459 CC.
[59] Article 267 CC.

be the "legal administrator of the patrimony of the ward and is obliged to exercise such administration with the diligence of an orderly *paterfamilias*"[36], as such it would be a clear conflict of interest to allow the guardian to acquire property of someone who is under his or her guardianship.[60]

American law regulates capacity in a very different way. Persons who under the CC cannot give consent, under American law can. They will, however, only incur in voidable contracts. Whereas in the CC, someone who lacks capacity may not incur in a contract, voidable or unavoidable; in American law, someone who lacks capacity will be able to incur in contractual obligations, but only in voidable contractual obligations, which means that that person can give consent but will be not be bound by the contract if he later demonstrates lack of capacity.[61]

The first difference we can observe concerns the types of persons who cannot give their consent: in the CC it is limited to non-emancipated minors and legally incapacitated persons; in the US, the types of persons affected are substantially more, including persons under guardianship, infants—the concept differs[62]—, mentally ill or defective, or intoxicated. *Mentally ill* or *defective* persons will only be considered incapacitated under the CC if they have been judicially incapacitated.

American law adopts a more expansive notion of freedom of contracts, by choosing to allow these types of persons to enter voidable contracts—as oppose to what happens under the CC—but at the same time leaving it to the contracting weak party to disaffirm it, by creating a system to protect him or her: the power of avoidance and affirmance. Additionally, American law offers a more extensive list of types of persons, as well as more flexible, by not demanding judicial incapacitation and leaving determination of incapacity to the cognitive test.[63]

A contract will be voidable due to minority, if that person is under 18, regardless of

[60] DÍEZ-PICAZO, GULLÓN, p.31.
[61] G.H. TREITEL, *An Outline of the Law of Contract*, p.188.
[62] A person remains an infant until the first moment of the day preceding his or her 18th birthday and remains an infant despite emancipation and despite marriage.
[63] TREITEL, *The Law of Contract*, p.514

whether it was known or unbeknownst to the other party. Under American law, contracts entered into by a mentally ill, defective, or intoxicated person will be voidable following a test consistent in verifying whether the lack of capacity affected the understanding of the transaction, and the other knowingly took advantage of it.[64]

The law gives some prerogatives to the person who because of his lack of capacity has incurred in a voidable contract. The mentally incapacitated person can both avoid and ratify the contract, but not the other party. The power of avoidance, however, will terminate once the contract has been performed in part or full.[65] US contract formation is based on the contractual intent. Following this principle we will understand that a contract will be voidable when a party has not given his real contractual intent because he has not understood the nature and consequence of the transaction at the time of contracting. Because this person did not have an intent to contract, he cannot be held to his apparent agreement. Mental incompetence, in the case of mental illness or defect, and intoxicated persons, will be determined at the time of contracting using the cognitive test.[66] The cognitive test will strive to determine whether the party was able to understand the nature and consequence of the transaction. Many states have decided that a contract will be void *ab initio*, and not voidable, when they are incurred by someone who has been found judicially mentally incompetent. In this latter case, we can see the similarity with the CC.

A contract entered into by an infant is not automatically void, it is voidable, and only at the option of the infant or his guardian. Another big difference, which surprises comparatively because of the high burden imposed on the infant, is that an infant may avoid the contract but will be liable for torts. An infant by avoiding, will be putting an end to the contract, and he may do that at any time prior to ratification.[67] The infant can avoid at any time during the period of infancy and once made is irrevocable. In the case of real property, the infant may only avoid after majority.[68]

The alternative to avoidance is ratification. By ratifying the contract, the party will be

[64] Íbidem, p.515.
[65] J.C. SMITH, *The Law of Contract*, p.208.
[66] G.H. TREITEL, p.198.
[67] SMITH, p.210.
[68] Íbidem, p.210.

surrendering his right to disaffirm it. Ratification can only be given after reaching majority, and can take place in three different ways: express ratification, when the minor promises to adhere to the contract once majority is attained; ratification by conduct, when the minor uses, keeps, or obtains property for more than a reasonable time after reaching majority; and lastly, by paying the items.[69]

Both systems follow the same approach when it comes to minors' liability for the purchase of necessaries.[70] Necessaries are "those items, such as clothes or food, whose purchase appropriate considering the infants status in life"[71]. Liability is based on quasi contract theory. In the CC, minors can give their consent, and will thus be liable regarding those "goods and services of normal life appropriate for their age and their status in life."[72]

5.2 The contractual process: The Rules of Offer and Acceptance

Following article 1262 of the CC, "the coincidence between the offer and acceptance"[73] will result in consent. American law will focus more on the offer and acceptance, as individual and separate elements, rather than as a whole unit. In American law, the offer will have to show real intent to contract, and the acceptance will have to conform to the terms of the offer.[74]

Although the CC regulates the acceptable means of offer and acceptance, it is not regulated to the extent the US case law has over the decades. At any rate, for both systems, the contractual process can be reduced to the manifestation of will in the offer and in the acceptance.

[69] G.H. TREITEL, p.195.
[70] SMITH, p.210.
[71] "Things that are indispensable to living <an infant's necessaries include food, shelter, and clothing>. NECESSARIES", Black's Law Dictionary (10th ed. 2014)
[72] Article 1263 CC.
[73] Article 1262 CC.
[74] G.H. TREITEL, p.44.

The meeting of offer and acceptance is described in the US as *mutual assent* on the terms of the contract. Terms that were proposed by the offeror, and accepted by the offeree. The *assent policy* seeks to not impose an obligation on someone who did not wish to be legally bound, while at the same time tempering this principle with the goal of protecting the expectations for the person who has relied on the apparent assent given by the offeree.[75] Determining whether assent has or not been given is tricky and delicate, as in many instances one of the parties will claim to not have given assent.[76] To determine assent, a pivotal element of consent, the US transitioned from the subjective to the objective theory. The subjective theory required the *meeting of the minds*: "whatever the outward appearance of the conduct of the parties, no contract is made if the parties are not in agreement"[77], and "the agreement of the minds of the parties is the only thing the law respects in contract"[78]. The subjective theory pursued to ascertain the party's mental state. The parties' *actual* intentions can never be ascertained, and because of this, and the goals of protecting expectations and upholding contracts, the subjective theory shifted to the objective theory. More on the objective theory in *Acceptance*.[79]

The American analysis on contract formation through the offer and acceptance process is artificial, as in many cases, at the end of a long and complex negotiation, it will be difficult to explicitly say who made the offer and who accepted it.[80] Spanish law does not focus to the extent American law does, on who is the offeror and who is the offeree. The American dogmatic and formal approach is useful, however, when it comes to identifying whether there is a contract as the role of the parties, the times and agreed upon terms will have been closely examined.

Spanish law does not need this scheme because it focuses more on consent than on offer and acceptance. Whereas in the US the offer will be effective upon the offeree's

[75] CARTWRIGHT, p.86-88.
[76] Íbidem, p.11, 16, 21.
[77] Browning v. Beston, Plowd, 140 (Chancery 1553).
[78] Íbidem.
[79] CARTWRIGHT, p.86-88.
[80] Íbidem, p.94.

dispatch, in Spain, consent will be analyzed.

5.3 Offer

5.3.1 Notion of Offer

The American and Spanish definitions of *offer* are conceptually idential.[81] "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."[82] "An offer is a declaration of intent emitted by one person, directed at another or others and whereby he or she proposes to celebrate a particular contract".[83] "The offer has to be specific and concrete enough so as to not require the manifestation by the offeror once the offeree has accepted. By accepting, the contract is perfected, and no further actions are required."[84]

The terms *contract formation* are used in both sides of the Ocean to describe the acts that precede contract formation. In Spain, however, no written rules govern this process. American law, on the other hand, dedicates substantial literature to this.

5.3.2 Invitations to Deal

We must distinguish offers from invitations to deal, such as newspaper advertisements, products advertised in shop windows, or supermarket shelves.[85] They are invitations to deal and not offers because they are not specific or serious enough to be taken as offers, as they will usually not contain words of commitment. American case law has left great examples of this. It is interesting to contrast when offers to the public have been deemed definite enough to produce valid offers, and when they have not. The offer both in Spain and US can be made to the general public or to a certain individual, but it cannot be a simple generic indication of a future possibility of contracting. It has to be "precise,

[81] Íbidem, p.100-101.
[82] §24 R2.
[83] DÍEZ-PICAZO, GULLÓN, p.59.
[84] Íbidem.
[85] CARTWRIGHT, p.99-100.

complete, definitive, and show the unequivocal desire of the offeror to become contractually bound."[86] Publicity will generally be considered an invitation to deal and not an offer, except in certain cases, such as the following.[87]

> In **Carlill v. Carbolic Smokeball Co.**[88], the defendants, manufacturers of a flu remedy called Carbolic Smokeball, claimed it prevented influenza and offered to pay £100—by means of an advertisement—to any person who used the smokeball and nevertheless caught influenza. Their intention to be bound was made particularly clear by the statement that they had deposited £1,000 in their bank "shewing our sincerity." The plaintiff followed the instructions, and nevertheless caught influenza. She then claimed payment of the £100.
>
> This case considered whether an advertisement gimmick could be considered an express contractual promise to pay, or rather a sales puff and had no meaning. The Court acknowledges that in the case of vague advertisements, language regarding payment of a reward is generally a puff, which carries no enforceability. In this case, however, Defendant noted the deposit of £1000 in their advertisement, as a show of their sincerity. Because Defendant did this, the Court found their offer to reward to be a promise, backed by their own sincerity.

Spanish law also distinguishes offers from invitations to deal. It will be an offer to deal when the offer does not meet the requirements that would make it an offer. Under the CC, the requirements are "completeness, definitiveness and non-ambiguity over the desire of being contractually bound…"[89]

5.3.3 Preliminary Negotiations and Price Quotations

Preliminary negotiations and price quotations are the communications exchanged between the parties prior to the offer. They are not offers *per se* because of their lack of definitiveness and explicitness.[90, 91]

5.3.4 Revocable and Irrevocable Offers

The general principle for Spanish and American law is the revocability of offers. The offeror has the freedom to revoke the offer at any time before acceptance, as he will not

[86] TREITEL, p.13.
[87] CARTWRIGHT, p.100.
[88] Carlill v. Smoke Ball Co., 1 Q.B. 256 (Court of Appeal 1893).
[89] LACRUZ BERDEJO, p.382.
[90] Íbidem.
[91] CARTWRIGHT, p.100.

yet be contractually bound.[92] By revoking the offer, the offeror leaves the offer without effect.[93] Revocation in the US can be direct or indirect: it will be *direct* when the offeror indicated to the offeree that he no longer had the power of accepting the offer. In most States, the communication of revocation will be effective when received by the offeree, but in some, upon dispatch. An *indirect* revocation, on the contrary, will occur when the offeree acquires reliable information from a third party that would indicate that the offeror no longer wishes to make the offer. This is analyzed from the perspective of the reasonable person. The information has to come from a reliable source and has to be in fact true.[94]

Whereas policy to revocability is the same, it is in stark contrast regarding irrevocability. In Spain, the general principle is that offers are revocable, but the offeror can expressly and conclusively renounce to the right of withdrawal, and if this is expressed by the offeror, the offeree will have time to accept, without the offeror being able to withdraw the offer.[95] The opposite happens in the US, where offers can be withdrawn even when the offeror had expressly told the offeree he would renounce to the right of withdrawal. The only way of binding the offeror to his offer is through an option contract.

An *option contract* is "a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer."[96] It is in essence the promise to keep an offer open for a specified period of time supported by consideration. Consideration is a requirement for its irrevocability; if there is no consideration, it is a revocable offer that can be withdrawn before acceptance. Once the option contract has been accepted, the offeror is undertaking to not revoke the offer for a specified and agreed upon period of time.[97]

[92] DÍEZ-PICAZO, GULLÓN, p.60.
[93] STEADMAN, p.323.324, 327.
[94] Íbidem.
[95] DÍEZ-PICAZO, GULLÓN, p.60.
[96] §25 R2.
[97] STEADMAN, p.323.324, 327.

5.4 Acceptance

Earlier in this study, I was contrasting the subjective and objective theories of assent. As mentioned, in American history there has been a shift from the subjective to the objective theory. "The objective test will determine assent by asking whether a reasonable person in the position of the party that seeks to uphold the contract would believe the words and conduct of the other party constituted assent. If the words and conduct would indicate such a thing, the contract will be legally enforceable."[98]

In the following precept, Sir William Milbourne James QC of the English Court of Appeal, sums up another reason for this shift in theory: "It is not enough for a purchaser to swear, 'I thought the farm sold contained twelve fields which I knew, and I find it does not include them all', or, 'I thought it contained 100 acres and it only contains eighty'. It would open the door to fraud if such a defense was to be allowed." [99] "There is an inevitable problem of proof in a subjective test."[100]

A benchmark case that shaped the objective theory of assent is Lucy v. Zehmer.

> In **Lucy v. Zehmer**[101], both parties agreed to the sale of land, which they memoralized in a napkin. When Lucy tried to enforce it, Zehmer claimed he was only joking at the time of making the offer. The court looked at different factors that would create the appearance of a contract: Lucy's objection to the first draft because it was written in the singular and he wanted Mrs. Zehmer to sign it also; the rewriting to meet that objection and the signing by Mrs. Zehmer; the discussion of what was to be included in the sale; the provision for the examination of the title; the completeness of the instrument that was executed; the taking possession of it by Lucy with no request or suggestion by either of the defendants that he give it back. The court concluded that all of these facts "furnish persuasive evidence that the execution of the contract was a serious business transaction rather than a casual, jesting matter as defendants now contend."[102] A person cannot claim he was joking when his words and conduct would result in a reasonable person believing it was a valid agreement.

If a party to a contract has a reasonable belief that the other party has the requisite intent

[98] CARTWRIGHT, p.100.
[99] Tamplin v. James (1880) 15 ChD 215, 221.
[100] CARTWRIGHT, p.87.
[101] Lucy v. Zehmer, 196 Va. 493; 84 S.E.2d 516 (1954).
[102] Íbidem.

to enter into the agreement when he does not, the contract is still enforceable.[103] The mental assent of the parties is not a requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party.[104] Hence, the test to determine whether the parties have given assent is objective, rather than subjective.

An acceptance of an offer is a manifestation of assent to the terms of an offer, in the manner prescribed or authorized in the offer by the person in whom the offeror intended to create the power of acceptance. Acceptance has to be a volitional act performed freely, deliberately and with the intent to enter a contract.[105]

5.4.1 Mirror Image Rule

Both in Spain and in the US, the offeree, by not accepting the exact terms set out in the offer, is doing a counter-offer. The counter-offer, which is done by the initial offeree, has to be accepted by the initial offeror, now offeree. In the US, once a counter-offer has been proposed, the original offer no longer stands and is irrevocably terminated.[106] The offeree that has made the counter-offer can no longer accept the original offer.

For acceptance to take place, the offeree's response operates as acceptance only when it is the precise mirror image of the offer. From this follows that acceptance has to be the mirror image rule of the offer. [107] If the offeree's response deviates even as slightly from the terms set out in the offer, the acceptance will not take place and it will be considered a counter-offer, as the initial offer will have been rejected. For example, if A writes to B "I'll sell you my house for $200k, closing to take place January 1", and B writes back, "That's fine; let's close January 2." Because B's response deviates in relation to the date from the offer, A's offer will have been forever rejected, and B's acceptance will be a counter-offer, which will move the power of acceptance to A.

[103] STEADMAN, p.334.
[104] CARTWRIGHT, p.100.
[105] TREITEL, p.16.
[106] G.H. TREITEL, p.10.
[107] TREITEL, p.39.

Acceptance in Spain has a very similar meaning. “It is a statement of intent that the offeree emits conforming to the offer.”[108] This declaration, the same way as in the US, can be tacit or express. The big difference in acceptance relates to when acceptance will become a counter-offer. The common law system follows the mirror image rule; Spain does, but not to such an extent. The offeree has to accept the terms, and cannot introduce changes, however, very slight changes will not turn the acceptance into a counter-offer. Whereas the US has found an absolute rule, Spain has not. The courts have not consistently agreed on whether no changes can be tolerated, or slight changes will not affect the content of the offer for its acceptance. According to Díez-Picazo, Spain follows the regulation of the Vienna Convention: “*a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.*”[109]

5.4.2 Acceptance in Unilateral and Bilateral Contracts

Acceptance will depend on whether it is a unilateral or a bilateral contract. A unilateral contract will be accepted by full performance of the requested act, or in the case the offeror proposes to make communication part of the act, by communicating acceptance. In the former case, when communication is not required, acceptance will be given upon completion of the required act.[110]

In the US, it is said the offeror is the “master of the offer”, which means that he can prescribe the method by which the offer may be accepted. If the method is specified, the offer will only be validly accepted if it has been accepted through the means prescribed. However, if it is not prescribed, acceptance may be given in any reasonable method that is customary. [111]

[108] DÍEZ-PICAZO, GULLÓN, p.59.
[109] Article 19 (2) Vienna Convention.
[110] STEADMAN, p.341.
[111] TREITEL, p.29.

5.4.3 Acceptance by Silence

American and Spanish law follow the same rule. Acceptance by silence will generally not give rise to an acceptance of an offer nor a counter-offer, and courts will generally not infer acceptance. This rule follows from the general approach to contract formation: "before there is an agreement sufficient to form a contract, there must be some communication between the parties and each must be in a position reasonably to understand the other's intentions."[112] "Silence and inaction are of their nature equivocal, for the simple reason that there can be more than one reason why the person concerned has been silent and inactive."[113]

In certain instances, however, because of special circumstances of the parties to the contract, it will be an acceptable mode of acceptance. It will be possible when the offeror has given the offeree reason to believe that silence is an acceptable mean of acceptance, or when prior course of dealings would indicate that silence has come to mean assent.

5.4.4 Mailbox Rule

Under the common law, in bilateral contracts, an offer is effective at the time the offeree receives it. Acceptance, however, following this rule, "is effective when it is sent by the offeree, not when it is received by the offeror."[114] Acceptance will be effective upon dispatch of the letter, even if the letter of acceptance is lost or delayed. It will not be effective, however, if it has not been properly transmitted (incorrectly addressed to the offeror). Although this is a default rule, it can be totally rejected by the offeror.[115]

In Spain, if the person who made the offer and the person who accepted it are in different places, there is consent from the time that the "offeror becomes aware of the acceptance, or from the time when, after the (offeree) has sent his acceptance, the offeror cannot be unaware of it without lacking in good faith."[116] If the letter, for argument sake, reached the

[112] CARTWRIGHT, p.104.
[113] Allied Marine Transport Ltd v. Vale do Rio Doce Navagacao SA (The Leonidas D) (1985) 1 WLR 925 (CA) 941 (Robert Goff LJ).
[114] STEADMAN, p.342.
[115] G.H. TREITEL, p.12.
[116] DÍEZ-PICAZO, GULLÓN, p.62.

home of the offeror, and he was aware that there is a letter sitting in the mailbox accepting his offer, he will be breaching the duty of good faith, and the law will presume he was aware of it.

Spain has adopted the “reception theory”, rejecting the mailbox rule or “issuing rule”. The issuing or mailbox rule has only been adopted in Spain for contracts entered into by means of automatic devices, where the time of consent will be when acceptance is manifested, not received. [117]

5.4.5 Revocability

Both systems treat revocability the same way: an acceptance is revocable before it reaches the offeror. From that moment onwards, both parties will be contractually bound to each other.[118]

[117] GALGANO, p.150-151.
[118] Íbidem, 143.

6. THE NOTIONS OF CONSIDERATION AND *CAUSA*: INDICIA OF SERIOUSNESS

6.1 Consideration

"Consideration sets up the requirement of reciprocity for the enforceability of contractual promises."[119] "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."[120] For a promise to be enforceable, it must be supported by consideration, and for this to happen, two elements must concur: not only must the promise entail a legal benefit to the promisor or a legal detriment to the promisee, but this detriment must be bargained for.[121]

Right, interest, profit or benefit accruing to one party

For example, if A agrees with B to pay $10,000 in exchange for the car: A's consideration will be the $10,000, and B's consideration will be the car. In this example, consideration will be represented by reciprocal benefits. Another example would be if A agrees to paint B's house for $1,000: A's consideration will be the service of painting the house, and B's consideration will be paying $1,000 to A.

Forbearance, detriment, loss or responsibility,
given, suffered or undertaken by the other

Following the painted house example. If A instead, agrees with B to paint his own home only white, and no other color, in exchange for $1,000 a year, consideration will also be present although A did not agree to affirmatively do anything. In this case, A's consideration will be the forbearance, having refrained from painting his home any color but white. B's consideration will be the $1,000 annual payment.

[119] CARTWRIGHT, p.122.
[120] Curie v. Misa (1875), 10 Exch 153, 162 (Lush J.).
[121] STEADMAN, p.345.

In **Hamer v. Sidway**[122], Story (deceased whose estate was executed by Sidway) promised William Hamer, his nephew, that if he refrained from drinking, using tobacco, swearing and playing cards or billiards for money until he became 21, he would pay him $5,000. When Hamer turned 21 he informed his uncle that he had performed his part of the agreement and he had earned the $5,000. Story agreed, but before he was able to pay, he died. Sidway then demanded his uncle's estate to pay him.

The issue the court was presented with was whether abstention from legal conduct was sufficient consideration. "Valuable consideration may consist (…) (in) some forbearance (…) undertaken by the other party."[123] Under the bargain test for consideration, the youngster's forbearance was a benefit to the uncle—as he had his nephew refraining from certain prejudicial activities—and a detriment to himself, as he denied himself "from the enjoyment of that conduct."[124]

In essence, a waiver of any legal right at the request of another party is sufficient consideration for a promise. Certain waivers, following the pre-existing duty rule, will however not constitute valid consideration.[125]

Consideration has a broad meaning. A contract may exist where at first sight there is no such direct exchange. In Carlill v. Carbolic Smokeball, what was the consideration? Carlill only bought and used the drug. But using the smoke ball was a detriment and therefore consideration: "Inconvenience sustained by one party at the request of the other is enough to create a consideration."[126] And in this case there was also a benefit to the other party through the promotion of their product.

[122] Hamer v. Sidway Citation, 124 N.Y. 538, 27 N.E. 256.

[123] Íbidem.
[124] Íbidem.
[125] STEADMAN, p.346. A party who does or promises to do only what the party is legally obligated to do is not suffering a legal detriment because the party is not surrendering a legal right.
[126] Carlill v. Smoke Ball Co., 1 Q.B. 256 (Court of Appeal 1893).

6.1.1 Nominal Consideration

If A agrees with B to buy the car from him for $0: B's consideration will be the car, but A will not have given any consideration. $0 does not signify a legal detriment, even if it has been a bargained-for exchange. These promises would be clearly not enforceable.

A more difficult question is presented to us, however, if A and B agree to the sale of the car not for $0, but for $1. Is this a legally enforceable contract? Is $1 sufficient consideration? The mutuality of obligations doctrine prescribes that the exchange of mutual promises must be real and meaningful on both sides.

There is a variety of opinions as to what will constitute adequate consideration. While "it is an elementary principle that the law will not enter into an inquiry as to the adequacy of consideration,"[127] "there is authority for the position that a consideration so small that it negates any notion of a bargain will be treated as an "absurdity"[128] or as a "joke"[129] unable to support the obligation."[130]

The Restatement of Contracts has at different times adopted different approaches. Restatement First ventured:

> A wishes to make a binding promise to his son B to convey to B Blackacre which is worth $5000. Being advised that a gratuitous promise is not binding, A writes to B an offer to sell Blackacre for $1. B accepts. B's promise to pay $1 is sufficient consideration.[131]

[127] Westlake v. Adams, 5 C.B. (N.S.) 248 (1858).

[128] White v. Bluett, 23 L.J. Ex. ***36*** (1834).

[129] Fisher v. Union Trust Co., **132** Mich. 611, ***101*** N.W. 852 (1904).

[130] Edmund Polubinski Jr., The Peppercorn Theory and the Restatement of Contracts, 10 Wm. & Mary L. Rev. 201 (1968).

[131] Restatement (First) § 84, illustration 1.

Restatement Second reversed this position:

> A desires to make a binding promise to give $1000 to his son B. Being advised that a gratuitous promise is not binding, A offers to buy from B a $1 book. B accepted the offer knowing that the purchase is a mere pretense. There is no consideration for A's promise to pay $1000.[132]

"The justification for this change is that a mere pretense of a bargain will not constitute consideration-there must be a true bargain."[133] "As the consideration concept developed, some courts abandoned this theory when the consideration became so small that it negated any idea that a "price" had been paid for the promise. These courts felt that a nominal consideration could not result from a bargain and therefore adopted a theory which apparently negated the peppercorn concept.[134] Accordingly, it was held that a nominal consideration could not be used to support a promise for a larger sum."[135]

It is today's view that a court can inquire into adequacy of consideration if the promise and the consideration are in the same medium, i.e., $1 paid in hand for a promise of $5000. This problem surfaces from the unenforceability of gratuitous promises.[136] If gratuitous promises were enforceable—such as in Spain—parties would not be forced to exchange a "peppercorn" to make the promise enforceable.

6.1.2 Sham consideration

Nominal or token consideration has to be distinguished from sham consideration. Sham consideration will exist when an instrument falsely recites that consideration has been given when in fact it has not. The majority view is that such a recital does not make a promise enforceable.[137]

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[132] Restatement (Second) § 75, illustration 5.

[133] Restatement (Second) § 75, comment b.

[134] Peppercorn Theory: 'A contracting party can stipulate what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn.' Chappell & Co. Ltd v Nestle Co. Ltd [1960] AC 87 House of Lords

[135] POLUBINSKI, 203.
[136] STEADMAN, p.346.
[137] Íbidem.

6.2 Causa

> "In contracts for valuable consideration, the supply or promise of a thing or service by the other party shall be deemed to constitute the cause applicable to each contracting party; in remunerative contracts, the service or benefit which is remunerated, and in contracts for pure beneficence, the mere liberality of the benefactor."[138]

Causa (subject-matter) can be defined as the "proposition to reach a determinate empirical result with the business."[139] "For the proposition to be relevant, it must be shared by both parties, or at least, if one of the parties has had it, the other must recognize it and not reject it."[140] In a contract of sale, the *causa* will be present when one of the parties "deliver(s) a specific thing and the other (…) pay(s) a certain price for it[141]; in the contract of lease when "one of the parties undertakes to give to the other the enjoyment or use of a thing for a specific time and at a certain price."[142]; and in the donation, the gratuitous disposal "of the thing in favor of another person"[143]

When Pothier[144] enumerated the elements of a contract, he did not require cause, assuming its implicit existence; he considered that it was the lack or illicity thereof that made its existence necessary. The CC rejects the illicit, inexistent or false causes.[145] Their presence "will entail the nullity thereof."[146]

6.2.1 Absence and false *causa*

A contract without a cause is different from a contract with a false cause. A contract without cause produces no effect. Because there is no contract, there is no need to impugn it.[147] A contract will have no cause when it lacks one of the elements set out in

[138] Article 1274 CC.
[139] DÍEZ-PICAZO, GULLÓN, p.38.
[140] Íbidem.
[141] Article 1445 CC.
[142] Article 1543 CC.
[143] Article 618 CC.
[144] French jurist, and writer of *Traité des Obligations* (1761).
[145] Article 1275 CC.
[146] Article 1276 CC.
[147] DÍEZ-PICAZO, GULLÓN, p.37.

article 1261.[148]

However, a contract with a false cause can be impugned. García Goyena understands that a "false cause on a contract exists when there is an error on the substance that was the base of the contract."[149] For example, if A sells a house that does not exist, thinking it does, the obligation will be nonexistent because it will be based on a false cause or inexistent cause. A contract without cause is a contract where there is either consent or object missing at the deliberate intention of the parties, that choose to emulate a contract where there is really not one. For example, a contract of sale which is really a donation, because no real price is payed. In this example, there will be a defect of will and object.[150]

6.2.2 Illegal *causa*

The cause will be vitiated if it is illegal. A cause will be illegal when it is against "the law or good morals."[151] Whilst the CC regulates illegality as a vitiated cause, in American law it appears as a vitiating factor. Both countries have found different approaches to refusing to recognize this type of contract. Spain does it through the element of cause, and the US does it through the doctrine of illegality and public policy. What sort of agreements are considered null and void because of their illegal or immoral content will of course depend on the notions of illegality and morality the country has.[152]

The motives have never been relevant at determining whether the parties had in fact agreed to be bound by a contract, as we have seen that both systems opt for an objective test. Motives would of course open the door for a subjective assessment. The motives will thus only be relevant to determine whether the contract is in fact illegal or against public policy.[153]

[148] Article 1261 CC: consent, object, cause.
[149] DÍEZ-PICAZO, GULLÓN, p.37.
[150] LACRUZ BERDEJO, p.429.
[151] Article1275 CC.
[152] LACRUZ BERDEJO, p.430.
[153] Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 Tulsa J. Comp. & Int'l L. 357 (2005), p.382.

6.3 Distinctive Features of Consideration: Comparative Analysis

What follows is an enumeration of distinctive features of consideration which have no place under the Spanish equivalent of *causa*.[154]

6.3.1 Past Consideration does not Constitute Consideration; Past Cause does Constitute *Causa*

Consideration is something of value that is promised to enter into a contract. The legal benefit received has to be bargained for, and the bargaining will not be present if the consideration is preexistent to the contract, as one cannot make an exchange for something that has already occurred, and would hence not have the power of inducing the exchange, which is was consideration strives to do.[155, 156]

A leading case regarding past consideration is Harrington v. Taylor.

> In **Harrington v. Taylor**[157], Harrington saved Taylor from death during a marital fight. Harrington sustained personal injuries in savind the defendant from an attack by his wife with an axe. Taylor promised orally to pay her for damages. Taylor paid a small sum, but refused to pay the rest.
>
> The court determined that "a humanitarian act of this kind, voluntarily performed, is not such consideration as would entitle her to recover at law."

From this case, a twofold analysis of the element of consideration is possible: past consideration and moral obligations, which we will study next. It is a good example of *past consideration* for the following reason. If Harrington, just before intervening and saving Taylor's life, had asked him whether he accepted being saved in exchange for a price, valid consideration would have been given. In this case, this did not happen and the exchange was not bargained-for, for this reason it was not exchanged. Harrington's life was not saved in exchange for anything.[158] Spanish contract law does not sustain the same solution: a past action can constitute a valid cause for an obligation.

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[154] Íbidem, 387-397.
[155] CARTWRIGHT, p.124-125
[156] SMITH, p.66, 67.
[157] Harrington v. Taylor, 36 S.E.2d 227, 227 (N.C. 1945)

[158] G.H. TREITEL, p.74-76.

This case also explores enforceability of moral obligations. We will now contrast Harrington v. Taylor's outcome to Webb v. McGowin, which is factually very similar.

6.3.2 Moral Obligations do not Constitute Consideration; Moral Obligations do Constitute *Causa*

A voluntarily executed act followed by a promise is unenforceable. This rule is related to the past consideration rule. When a promisor because of an antecedent moral obligation promises the promisee a compensation, this promise will be unenforceable because of the rule that past consideration is not consideration.[159] The American courts have found their way around this rule, developing the material benefit rule.

> In **Webb v. McGowin**[160], Webb's heroic act saved McGowin's life when diverting a block that was about to fall on him. This act left Webb crippled for life. McGowin then promised him to a certain amount of money for the rest of his life.
>
> The court determined that "appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him…"[161] "Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered."[162] "Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received."[163]

The Restatement Second of Contracts § 86(1) recognizes that a moral obligation, can be a basis for enforcement "to the extent necessary to prevent injustice."[164] The reader will notice that despite the cases are factually identical, the rulings are very different.

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[159] TREITEL, p.31.
[160] Webb v. McGowin, 168 So. 196, 197 (Ala. Ct. App. 1935).
[161] Íbidem.
[162] Íbidem.
[163] Íbidem.
[164] § 42 R2.

Here is where lies the interest of common law. Whereas in a civil law country, the judge would have had to abide by the code (past consideration is not consideration, or moral obligation does not constitute consideration), because of the judge's wide scope of interpretation in common law, they sometimes find ways of interpreting the law in a way there is a different and more just outcome can be produced.

6.3.3 Gratuitous Promises

Gratuitous promises, in American law are not enforceable because following the consideration doctrine there has been no exchange.[165] "The bargain-for exchange is the test to decide whether or not a promise, which can appear gratuitous at first sight, can be actually enforced."[166] In the case of Hamer v. Sidway, the bargain-for-exchange upon closer examination shows how what appears as a gratuitous promise at first sight can actually be enforced because there has been an exchange: a benefit accrued to the uncle (seeing his nephew abstain from certain vices), and a forbearance suffered by the nephew (denying himself the enjoyment of those vices). In this case, we can observe there is an exchange. If there is no exchange at all, however, the promise is merely gratuitous and unenforceable.

As we have already discussed, American contract law focuses on onerous contracts; Spanish law, however, conceives both onerous and gratuitous promises, and makes them both enforceable: "in contracts for pure beneficence, the mere liberality of the benefactor (shall be deemed to constitute the *cause* applicable to each contracting party)."[167] As we can see, enforceability follows from a cause being prescribed for gratuitous promises.

6.3.4 Rewards

"Three elements constitute the promise of reward: notice to the public, the object of reward and the prize offered. These elements appear in all legal systems. The difference is principally regarding the enforcement of a promise when the performer did not know (or even did not rely

[165] G.H. TREITEL, p.79-81.
[166] PHILIPPE, p.390.
[167] Article 1274 CC.

upon) the notice."[168]

> In **Broadnax v. Ledbetter**[169], Ledbetter offered a $500 reward to anyone who recaptured an escaped prisoner. Broadnax captured him unaware of the reward. Ledbetter refused to pay on the grounds that Broadnax did not allege knowledge of the reward. The issue was whether the performance had to be based on the offer in order to be valid.
>
> The Supreme Court of Texas wrote the following ruling: "Such an offer as that alleged may be accepted by anyone who performs the service called for when the acceptor knows that it has been made and acts in performance of it, but not otherwise. (…) There is no such mutual agreement of minds as is essential to a contract. The offer is made to anyone who will accept it by performing the specified acts, and it only becomes binding when another mind has embraced and accepted it. The mere doing of the specified things without reference to the offer is not the consideration for which it calls."

The difference between the two systems will be determined by the notion of consideration. A comparable case would have been differently resolved under Spanish contract law. The reward would be an offer to the members of the public or a unilateral promise subordinated to a condition. The fulfilment of the condition would be acceptance, and thus all requirements for a binding contract would be met.

In the US, the person who realizes the condition must have known of it before, so as to claim the reward. In Spain, where all the requirements are met, time of acceptance is of no relevance.[170] Once again, the basic principle of consideration requires the action to be bargained for. Because the claimant was not aware of the offer, and thus did not bargain for it, and did not act on the offer, he was not entitled to the reward.

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[168] PABLO LERNER (2004), *Promises of Rewards in a Comparative Perspective*, Annual Survey of International & Comparative Law: Vol. 10, Iss. 1, Article 4, p.61.

[169] Broadnax v. Ledbetter, 99 S.W. 1111, 1111–12 (Tex. 1907).

[170] LERNER, p.61-66.

6.4 Substitute of Consideration: Promissory Estoppel

"Under the doctrine of promissory estoppel, certain limited effects are given to promises without consideration."[171] The article of the restatement of contracts reads as follows:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
>
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.[172]

The element of consideration and doctrine of mutuality of obligations require that consideration be given by the parties to enforce the promise. Because the doctrine of consideration is very rigid, promissory estoppel seeks to overcome some of the defects. "Reliance is an alternative to the bargain-for exchange, and acts as a basis for the enforcement of promises."[173]

> In **Feinberg v. Feiffer Co.**[174], Feinberg had been working for 37 years. In recognition of Anna Feinberg's loyalty, she saw her salary increased and was offered a pension plan which she would get paid when she saw fit to retire. 2 years after that promise she retired, and after receiving her pension for some time, the employer discontinued the payments.

Was the promise of life-time pension payment by the employer enforceable? Under the doctrine of consideration Feinberg should not be able to enforce the promise, as there is no mutuality of obligations. However, under the doctrine of promissory estoppel she can. "Promissory estoppel allows courts to enforce a gratuitous promise if the promisor should have reasonably expected the promisee to rely on the promise, and act or refrain from acting, and the promisee justifiably relied upon the promise to his detriment."[175]

In this case, the promisor "actually"[176] induced reliance on the promisee, who would not

[171] TREITEL, p.44.
[172] § 90 R2.
[173] PHILIPPE, p.391.
[174] Feinberg v. Pfeiffer Co., 322 S.W.2d 163, 168 (Mo. App. 1959).
[175] King v. Trustees of Boston University, 420 Mass. 52, 647 N.E.2d 1196 (1995). ILIPPE
[176] Íbidem.

have retired had it not been for the promise of a life-time pension. Secondly, the promise was made with the reasonable expectation that the promisee would rely on it: the Pfeiffer Co. could have expected Feinberg to retire on account of the promise. And thirdly, the enforcement of the promise was necessary to avoid injustice.

> "Generally speaking, whenever there is a valuable consideration in the American sense, the contract will be valid also under the doctrine of *cause.* But many agreements, which cannot be supported in American Law for want of consideration, can be enforced under the broader doctrine of *cause* in Spanish Law. There is no doubt that the existence of consideration indicates in the great majority of cases that the parties seriously contemplated a legal relation, but the lack of consideration does not necessarily indicate the absence of such an intention. Nevertheless, the will of the parties to create a legal relation, however clearly expressed, will be ignored by American courts in the absence of a technical consideration to support the agreement."[177]

[177] PHILIPPE, p.392.

7. OBJETO

The third element in Spanish Law is *objeto*, the object or subject matter of the contract.

> "All things which are not beyond the bounds of commerce between men may be the subject matter of a contract, even future things. (…) Likewise, all services which are not contrary to the laws or to good customs (…)"[178] "Impossible things or services may not be the subject matter of a contract."[179] "The subject matter of any contract must be a thing determined as to its species."[180]

The object will be a "good which can be economically appraised (and) which is of interest to the parties"[181] This object, however, must meet some requirements.

7.1 Features

7.1.1 Possibility

According to article 1272, the subject-matter must be *possible*. Impossibility of the subject-matter will result in an inexistent or null contract.

There is no equivalent to *objeto* under American law. Possibility or impossibility is regulated in American law as a ground for contract termination. Impossibility, together with impracticability and frustration of purpose are excuses for non-performance.[182] The excuse for non-performance is regulated under Spanish law as supervening impossibility: "In obligations to do something, the debtor shall also be released when the undertaking should be legally or physically impossible."[183]

7.1.2 Futurity

The subject-matter of the contract can be future. A future thing would be that that does not exist at the time of contracting but that will exist because of human or natural intervention, or both.[184] When contracting about future objects, the parties will have to do

[178] Article 1271 CC.
[179] Article 1272 CC.
[180] Article 1273 CC.
[181] DÍEZ-PICAZO, GULLÓN, p.33.
[182] STEADMAN, p.507-509.
[183] Article 1184 CC.
[184] DÍEZ-PICAZO, GULLÓN, p.33.

anything that leads to its creation and refrain from doing anything that would stop that from arising.

7.1.3 Legality

"*Cannot be contrary to the laws or to good customs."*[185] Only objects in commerce can be contracted to. In Spanish Law, a contract will not have subject-matter, and will thus be void when it is over a *res extra commercium.*[186] These types of *res* are prescribed in the CC, and include properties of public domain[187], things that cannot be appropriated because they are common to all and they are outside the power of the individual[188], and goods where there is no right of disposal (civil status of persons, …).[189] If a contract is on a good that is *extra commercium*, the necessary element of *objeto* will not be present and the contract will not be valid.

A different matter is contracts whose subject-matter is illegal, such as a contract on illegal drugs for an illegal use. A contract that has this subject-matter will still have an object—this element will still be satisfied—but it can be considered a contract with an illegal cause, with the resulting nullity.

7.1.4 Determination

The object must be a determinable thing. Determination of the thing to the extent necessary for it to not be confused with a different one.[190] The thing can be perfectly determined at the time of contracting, or relatively undetermined. If it is undetermined, it will be a generic obligation which will have to be further defined. Generic obligations have to be sufficiently determined to be acceptable (one ton of flour).

[185] Article 1271 CC.
[186] Latin for *a thing out of commerce.*
[187] Article 339 CC.
[188] Article 333 CC.
[189] DÍEZ-PICAZO, GULLÓN, p.33.
[190] S. 27/10/1952.

8. CONCLUSIONS

I. As we have seen, there are significant differences between Spanish and American law. These are mainly due to the sources that inspire these systems, the conceptions of the role of the judge, and the purpose of the legal system. Civil law is inspired by sets of general principles that derive mainly from codes, and to a much lesser extent, from case law. In contrast, common law rules are mainly articulated by the judges, who are bound by the *stare decisis* doctrine. When applying the law, we can observe that civil law tends to have a more abstract body of principles, whereas in common law they usually are more precise and specific. At a practical level, whereas I have been able to illustrate common law principles through cases and examples, I cannot say the same for civil law.

II. In the realm of contract law, the concept of agreement in Spanish law is taken from a more consensualistic approach; whereas American law revolves around the bargain theory. From this follows that the Civil Code focuses on the parties' *obligations* to each other, and American law in the parties' *promises*.

III. The foregoing paragraph provides us with the *why* gratuitous promises are unenforceable under American law. Because unilateral promises create unilateral benefits, they call into question the mutuality of the obligation and the ever-present element of consideration.

IV. Both systems share a similar sequential scheme for contract formation: a succession of offers and counter-offers which upon acceptance should result in a binding contract. What gives it the binding character, differs: in American law, we could probably say it comes from consideration; whereas in Spanish law, it depends on the fulfillment of the three elements (consent, object and cause).

V. Despite the similarities in contract formation, it isn't without its differences: American offers are not irrevocable, unless consideration has been provided; and

acceptance must be the mirror image of the offer. A rule followed by the Spanish counterpart, but not to such a rigid extent. Furthermore, Spain follows the *Receipt Theory*; America, the *Emission Theory*, or mailbox rule.

VI. In Spain, the concept of consideration does not exist. A contract that fails the bargained-for-exchange test will still be valid as long as intent is clear, the cause is legal, and the object is possible. The theory of *causa* and the doctrine of consideration do share their *raison d'être*: to serve as indicia of seriousness, to serve as a confirmation of the party's intent.

VII. Albeit the important differences, these should not obscure the extent to which both systems share many values. The similar socio-economic conditions and the comparable economic needs have led to many similarities. These bring the two systems closer to each other in functional terms, but through separate routes.

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