

© The Author(s), 2023. Published by Cambridge University Press on behalf of the British Institute of International and Comparative Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives licence (<http://creativecommons.org/licenses/by-nc-nd/4.0>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided that no alterations are made and the original article is properly cited. The written permission of Cambridge University Press must be obtained prior to any commercial use and/or adaptation of the article.

A BIDIRECTIONAL ANGLO-GERMAN COMPARISON OF CONSIDERATION IN CONTRACT LAW

JOHANNES UNGERER* 

Abstract This article explores the concept of consideration in contract law from a comparative perspective, looking at how English law and German law distinguish bargains from gifts. Contrary to the orthodoxy that consideration is unique to Common Law and absent from Civil Law, the bidirectional analysis in this article shows how English law and German law can be understood to fulfil a comparable function and can thus inform and benefit each other. The sophisticated English doctrine can be used to refine the rather imprecise German definition of gifts, whilst the understanding of English authorities can profit from reflecting inversely on the criterion of gratuitousness in German law.

Keywords: comparative law, contract law, English law, German law, consideration, gifts.

I. INTRODUCTION

The requirement of consideration in English contract law¹ is commonly seen as one of its most distinctive elements in comparison to contract law in Civilian legal systems.² However, this article seeks to explore the concept of consideration in contract law from a comparative perspective by looking at both English Common Law and Civil Law as applied in Germany.³ These two jurisdictions are chosen because they supposedly represent opposite positions in the purest form: insistence on versus ignorance of consideration. Yet taking a functional approach, it can be demonstrated that both jurisdictions deal with similar issues and pursue similar objectives, albeit by different means.

* Erich Brost Lecturer in German Law and EU Law, Faculty of Law and St Hilda's College, University of Oxford, johannes.ungerer@law.ox.ac.uk.

¹ The law of England and Wales will be referred to as English law for the ease of reading.

² See, for instance, A Burrows, *A Restatement of the English Law of Contract* (2nd edn, OUP 2020) 63; J Cartwright, *Contract Law: An Introduction to the English Law of Contract for the Civil Lawyer* (3rd edn, Hart 2016) 125; E McKendrick, *Contract Law: Text, Cases, and Materials* (9th edn, OUP 2020) 143.

³ This comparison between Common Law and Civil Law is very different from comparisons across Common Law jurisdictions only, such as KCT Sutton, *Consideration Reconsidered: Studies on the Doctrine of Consideration of the Law of Contract* (University of Queensland Press 1974).

First, it will be established that the function of consideration in English contract law is to distinguish between promises which form part of a bargain and promises of gifts. It will then be shown that making such a distinction is comparable to German law's inverse approach of separating promises of gifts from any other promises which form part of a bargain.⁴ A bidirectional approach will then be used to examine, in one direction, how the highly sophisticated English doctrine of consideration can be used to improve the rather imprecise definition of gifts in German law, particularly when it comes to the supposedly separate category of 'mixed gifts'. Looking in the opposite direction, it will be argued that the understanding of English law can profit from German legal doctrine and its criterion of gratuitousness. This will help to rectify how English law treats supposedly voluntary promises of additional payment. Moreover, the article will support the case against the view that the doctrine of consideration should be abolished.

The comparison will not include those promises which—whether made gratuitously or not—become enforceable by meeting special formal requirements such as deeds or notarisation; their enforceability is solely dependent on meeting the formal requirements satisfactorily, and not on their characterisation as bargains or gifts. Nor will the article address aspects of the law of gifts which are outside the range of comparison with the doctrine of consideration.⁵

II. ESTABLISHING FUNCTIONAL COMPARABILITY

In the words of Pollock,⁶ the House of Lords⁷ defines consideration as an act, forbearance, or promise by one party to a contract that constitutes the price for which the promise of the other party is bought. Where no good consideration is provided, an agreement not made by deed is said not to be binding; it is a naked agreement (*nudum pactum*) for 'want of consideration'. Looking beyond the conceptual definition, it is not easy to establish the precise function of consideration. Some have even argued that consideration no longer serves any useful function and should be abolished,⁸ yet consideration continues to

⁴ To clarify one terminological issue at the very beginning, the entire debate concerns *promises* of some performance which either is part of a bargain or is a gift. For the ease of reading, the article will however not always refer to promises but will sometimes simply refer to bargains and gifts instead.

⁵ For instance, excluded are the specifics of retracting a promise to make a gift due to disgraceful conduct by the promisee; the impoverishment of the promisor; or the death of a gift promisor.

⁶ F Pollock, *Principles of Contract* (13th edn, Stevens & Sons 1950) 133 and in previous editions.

⁷ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 855. See also *Currie v Misa* (1875) LR 10 Ex 153, 162.

⁸ Law Revision Committee, *Sixth Interim Report: Statute of Frauds and the Doctrine of Consideration* (Law Com Cmd 5449, 1937) para 26ff; AG Chloros, 'The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis' (1968) 17 ICLQ 137; Wright, 'Ought the Doctrine of Consideration to Be Abolished from the Common Law?'

have a practical relevance and application in England, which necessitates understanding its purpose.

Consideration ensures that the gratuitous promise of a gift, in contrast to the promise to make an exchange as a bargain, is not a legally enforceable contract, (1) unless the strict formal requirements of a deed are met or (2) until the promise is fulfilled.⁹ Whilst this ‘distinguishing’ function, which essentially separates enforceable promises of bargains from unenforceable promises of gifts, is by no means the only suggested purpose of consideration, it is arguably the most convincing one. Although it has been argued that consideration also serves as evidence for the existence and seriousness of the promise made,¹⁰ consideration alone is insufficient to prove that.¹¹ In the economic analysis of law, the requirement of consideration is seen as a tool to maximise welfare;¹² however, whilst consideration might contribute to promoting bargains over gifts, welfare is neither maximised by all bargains nor diminished by all gifts.¹³ Thus, in line with the general idea that reciprocity underlies many concepts in private law,¹⁴ the function of consideration in English Law is best explained by the distinction between bargains and gifts.

Consideration is thought by some to have moved away from this. Chloros has alleged ‘that English law does not use consideration in order to distinguish between gratuitous and onerous promises except in a very formal sense’, suggesting that ‘the English test of consideration is unreal’.¹⁵ Yet there are ways for English law to refocus the doctrine of consideration on its core function, and it will be shown below how insights from a functional comparison with German law can contribute to achieving this end.

In German law, at first sight, there is no equally clear distinction between enforceable bargains and unenforceable gifts. Because German law does not require a positive confirmation of the bargain character of every contract which does not meet special formal requirements, one might have the impression that the idea of consideration is unknown in Civil Law and, thus, unique to Common Law. Indeed, German law does not screen all promises for a positive confirmation of their character as a bargain in order to make

(1936) 49 HarvLRev 1225, and a response by EW Patterson, ‘An Apology for Consideration’ (1958) 58 ColumLRev 929.

⁹ Burrows (n 2) section 8(1), 8(2); Cartwright (n 2) 132.

¹⁰ LL Fuller, ‘Consideration and Form’ (1941) 41 ColumLRev 799; AT von Mehren, ‘Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis’ (1959) 72 HarvLRev 1009, 1015ff focuses on these aspects in his comparison during the second third of his article; SA Smith, *Contract Theory* (OUP 2004) 216–18, 232.

¹¹ M Chen-Wishart, *Contract Law* (6th edn, OUP 2018) 110. Thus, promises lacking the intention to create legal relations are excluded from the scope of this article.

¹² RA Posner, *Economic Analysis of Law* (9th edn, Wolters Kluwer 2014) section 4.2; see also RA Posner, ‘Gratuitous Promises in Economics and Law’ (1977) 6 JLegStud 411.

¹³ Chen-Wishart, *Contract Law* (n 11) 110–11.

¹⁴ P Benson, ‘The Idea of Consideration’ (2011) 61 UTLJ 241, 242; M Chen-Wishart, ‘Reciprocity and Enforceability’ in M Chen-Wishart, L Ho and P Kapai (eds), *Reciprocity in Contract* (University of Hong Kong 2010).

¹⁵ Chloros (n 8) 155.

them enforceable.¹⁶ Rather, German law inverts the process: where it detects simple promises of gifts, it denies their enforceability. So, instead of a provision establishing the requirement of consideration, the German Civil Code stipulates in section 518 that for the enforceability of a promise of a gift (1) strict formal requirements have to be met (notarisation), (2) unless the promise is fulfilled.¹⁷ The functional equivalence with consideration becomes obvious when one compares these conditions with those in English law, according to which a promise without consideration is unenforceable, (1) unless strict formal requirements are met or (2) the promise is fulfilled. These conditions are functionally identical, which means that English law and German law distinguish between bargains and gifts in the same way. As Chen-Wishart has put it, in practice Common Law and Civil Law ‘draw essentially the same line between gratuitous undertakings and reciprocal undertakings’.¹⁸

The German approach of denying the enforceability of promises of gifts which are made for reasons of altruism or affection,¹⁹ ‘outside the self-interested realm of market exchange’,²⁰ can work just as well as the English approach of screening for bargains and making them enforceable. If, however, the manner in which gifts are identified was to be too imprecise and prone to errors, then this would undermine the trust and solidarity which underlies a gift and it would pose the difficult question of how to enforce them.²¹ Therefore, successful screening for gifts requires a very precise definition. Yet the German Civil Code defines gifts in section 516(1) in a rather circular manner by stipulating solely that a gift is a disposition which is intended to be made ‘gratuitously’²² or, as it is sometimes translated, ‘without recompense’.²³ The precise meaning and application of this definition, particularly its key criterion of gratuitousness, can certainly benefit from further refinement. To this end, as will be shown, a comparison with English law will prove useful.

Before moving on, it is worth anticipating a potential objection to the approach taken in this article. The understanding that promises to lend

¹⁶ von Mehren (n 10) 1018.

¹⁷ Section 518 must not be confused with section 118 of the German Civil Code (declaring promises void if they are not seriously made), which is an issue of seriousness, not of consideration; misleadingly discussed by M Hogg, *Promises and Contract Law: Comparative Perspectives* (CUP 2011) 278. See also B Markesinis, H Unberath and A Johnston, *The German Law of Contract: A Comparative Treatise* (2nd edn, Hart Publishing 2006) 87ff.

¹⁸ Chen-Wishart, *Contract Law* (n 11) 111; see also Chen-Wishart, ‘Reciprocity and Enforceability’ (n 14) 6; M Chen-Wishart, ‘In Defence of Consideration’ (2013) 13 OJCLJ 209, 231.

¹⁹ MA Eisenberg, ‘The World of Contract and the World of Gift’ (1997) 85 CLR 821, 849. Similarly R Hyland, *Gifts: A Study in Comparative Law* (OUP 2009) para 228.

²⁰ Hyland (n 19) para 224.

²¹ Chen-Wishart, ‘In Defence of Consideration’ (n 18) 220–7.

²² R Schulze and G Dannemann, ‘§ 516’ in G Dannemann and R Schulze (eds), *German Civil Code: Bürgerliches Gesetzbuch (BGB)*, vol 1 (CH Beck 2020).

²³ R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (OUP 1996) 502.

something or to keep something safe are enforceable without recompense could potentially be seen as undermining the general proposition that the law separates enforceable from unenforceable promises by screening for bargains or, inversely, gratuitousness (ie promises without recompense). However, this general proposition remains true since lending and safekeeping without recompense are specific and limited exceptions to the principle that gratuitous promises are unenforceable. The exceptional character of lending a physical object to somebody²⁴ or of keeping somebody's physical object safe²⁵ is true both for German law and for the English law of bailment.²⁶ This affirms the similarities of English and German law—not only with regard to the general rule (distinguishing the enforceability of bargains and gifts) but also with regard to these specific exceptions.

To summarise, the English concept of consideration can be construed as requiring that enforceable contractual promises must be supported by consideration, demonstrating that they are part of a bargain rather than being a gift. German law does not generally require this but it distinguishes between promises of gifts and bargains by dealing with promises of gifts separately. Yet the underlying function of distinguishing bargains from gifts is the same, reflecting the need for such a distinction in transaction-based market economies.²⁷ Due to this comparability it will be possible to gain insights bidirectionally, ie from one legal system to the other and vice versa, into how the distinguishing function can be better fulfilled.

III. REFINING THE GERMAN CRITERION OF GRATUITOUSNESS: INSIGHTS FROM THE ENGLISH LAW OF CONSIDERATION

Looking first at insights that might be learnt by German law from English law, the key issue concerns the definition of gifts. As pointed out above, there is a lack of sufficient precision regarding the definition of what counts as 'gratuitous' in German law. This section will demonstrate how a comparison with English law can help improve this shortcoming: German courts appear to have followed ideas similar to the English doctrine of consideration, but they have not established clear principles concerning their interpretation and application. The well-crafted principles governing consideration in English case law can be used to shape the interpretation and application of the criterion of gratuitousness in German law. This analysis will focus on two of the most important English principles of consideration, namely that

²⁴ Sections 598ff German Civil Code.

²⁵ Sections 690ff German Civil Code.

²⁶ NE Palmer, 'Gratuitous Bailment—Contract or Tort?' (1975) 24 ICLQ 565; N Palmer, *Palmer on Bailment* (3rd edn, Sweet & Maxwell 2009) 1-034. See also *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd* [1975] AC 154 (PC) at 167. Bailment is the transfer of possession—in contrast to ownership—of goods by the owner to somebody else for a specific purpose; the goods are eventually to be returned to the owner or to be kept until they are reclaimed.

²⁷ See also Hyland (n 19) para 212.

consideration must be of value but need not be adequate, and that consideration must not be past. These two principles have been chosen because they reflect the paradigm that legally enforceable contractual promises must be part of bargains, and not gifts.

A. Value and Adequacy of Consideration

The first principle, for which the House of Lords decision in *Currie v Misa* is usually quoted, stipulates that consideration must be of value and requires that there is a benefit to the promisor or a detriment to the promisee.²⁸ Yet the value of consideration need not be adequate. English courts established this in cases where almost worthless consideration was offered, but it was seen as good consideration nonetheless. Prominent examples are wrappers of chocolate bars in *Chappell v Nestlé*,²⁹ or a guarantee document of doubtful validity in *Haigh v Brooks*.³⁰ The reason for affirming that consideration which is of little value is nevertheless good consideration is that it is a logical corollary of freedom of contract and ultimately of private autonomy.³¹ The irrelevance of the adequacy of consideration by objective standards is further demonstrated by the fact that English courts have emphasised that they do not make bargains for the parties because it is for the parties to determine the adequacy of the value of their promised performances at the time of their agreement.³² If the law were to require adequate consideration, every contract could be challenged on the basis of unfairness,³³ and subjected to ‘objective’ review by the courts or another state entity. However, the function of consideration is to ensure that courts enforce promises that are parts of bargains, rather than gifts, but this must not be (ab)used and become a means of examining how the contract came into being and of the fairness of what was agreed. There are separate legal doctrines that have been specially designed, and are therefore better suited, to consider issues such as duress or mistake.³⁴

Turning to German law, the courts have had to deal with the same issue, albeit couched differently. In the context of the definition of a gift, the German courts have had to decide whether a promise is made gratuitously where what is provided is inadequate in the light of the other party’s promise. The short answer given by the German courts is that the promise of something inadequate in return for the other’s promise does not establish

²⁸ *Currie v Misa* (n 7).

³⁰ *Haigh v Brooks* (1839) 10 A & E 309.

³¹ The consequence that inadequacy cannot deny enforceability is not tantamount to the deduction by Chloros (n 8) 155 that ‘nominal consideration may be used to support what amounts in effect to a donation’.

³² *Bolton v Madden* (1873) LR 9 QB 55, at 57.

³³ M Furmston, E Mik and GJ Tolhurst, ‘Formation of Contracts’ in M Furmston (ed), *The Law of Contract* (6th edn, LexisNexis 2017) para 2.38.

³⁴ J Cartwright, *Formation and Variation of Contract* (2nd edn, Sweet & Maxwell 2018) para 8-25.

gratuitousness.³⁵ The relevant case on this was decided by the Federal Court of Justice (*Bundesgerichtshof*) in 1981.³⁶ The issue was whether a promise by the claimant to pay the defendant's debt of almost 100,000 German marks if the defendant succeeded in obtaining a preliminary decision in principle from the planning authority that building a house on the claimant's land was permissible was a gratuitous promise and thus unenforceable. A preliminary decision in principle was not the same as permitting the building to go ahead, and permission for this could still be refused. In other words, the defendant's performance could potentially turn out to be almost worthless. However, the court held that, despite the potential inadequacy, the claimant's promise was not gratuitous.³⁷ Had the court used English legal terminology, it could have said that the defendant had provided good consideration. For the avoidance of doubt, even if the claimant's promise were to be understood as establishing a condition that the defendant had to fulfil in order to be entitled to the reward, the performance of this condition would equally constitute consideration. This is because the promisee fulfilled the condition upon request of the promisor,³⁸ which renders this an enforceable contract rather than a gratuitous promise to confer a benefit upon the promisor if a certain event simply happened to occur.³⁹

The reasoning of the German court concerning the 'consideration issue' (the debt payment in exchange for obtaining the preliminary decision in principle) was surprisingly short. It failed to explain the basis for the requirements which it applied to determine the issue of gratuitousness, stating only that 'whether there is adequacy between the promised performance and counter-performance is irrelevant to the question of gratuitousness'.⁴⁰ What the court should have clarified, drawing by comparison on the English doctrine of consideration, was that, provided there is some valuable consideration, it is irrelevant whether the consideration provided is adequate because all that matters for distinguishing enforceable promises of bargains from unenforceable promises of gifts is that the parties agree on something of value in return for the other's promise. Otherwise, as noted earlier, courts would trespass upon the private autonomy of the parties by judging the fairness of the bargain rather than whether the promise forms part of a bargain instead of being the equivalent of a gift.

³⁵ It should additionally be clarified that the cases discussed here have to be distinguished from instances of 'fictitious (or sham) transactions' which are void according to section 117(1) German Civil Code; cf Federal Court of Justice (*Bundesgerichtshof*), judgment of 25 October 1961, case V ZR 103/60, *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 36, 84, at 87–88. As indicated above (n 11), promises lacking the intention to create legal relations are excluded from the scope of this article.

³⁶ Federal Court of Justice, judgment of 11 November 1981, case IVa ZR 182/80 [1982] *Neue Juristische Wochenschrift* (NJW) 436.

³⁷ And (see n 35) certainly not a fictitious transaction.

³⁸ E Peel, *Treitel: The Law of Contract* (15th edn, Sweet & Maxwell 2020) para 3-011.

³⁹ J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, OUP 2020) 95–6; Cartwright (n 34) para 8-18; Chen-Wishart, *Contract Law* (n 11) 122.

⁴⁰ Federal Court of Justice (n 36), translated by the author.

When another opportunity presented itself to the Federal Court of Justice in a case decided in 2009,⁴¹ it simply referred to an earlier decision and did not take up the opportunity to discuss the ‘consideration issue’ as a matter of principle. The question was whether a promise made by the defendant, who was the main sponsor of a wrestling team, to pay the claimant, who was the team’s coach, 5,000 euros if the team won the German championship, and which it later did, was gratuitous and thus unenforceable. The value of the coach’s promise was questionable because his actions alone could not determine whether his team won or not. The court held that the promise to pay was not gratuitous and simply added that adequacy was not a requirement. The court should, however, have explained that it enforced the agreement because the coach undertook additional efforts as a result of the offer of the additional payment and the adequacy of that must not be judged by having regard to the uncertain prospect of the team’s success. This line of reasoning would have been comparable to the idea that the coach provided good consideration by offering additional training, albeit that this alone was insufficient to ensure that the team won and so was not ‘adequate’ in that sense. As a result, the promise to pay was part of an enforceable bargain and not merely the promise of an unenforceable gift.

B. ‘Mixed Gifts’

The finding that adequacy is not required to distinguish gifts from bargains under both English and German law might be questioned by the way in which German law deals with ‘mixed gifts’.

Mixed gifts (in German *gemischte Schenkung*, in Latin *negotium mixtum cum donatione*) are partly gratuitous and partly reciprocal because the promised performance and counter-performance are inadequate in comparison with each other. The parties know that the performance exceeds the counter-performance to some extent. The essential characteristic of a mixed gift is that the transaction is intended to be reciprocal to the extent that the performance and the counter-performance are comparable, whilst the additional element of the promised performance is understood as being given gratuitously. This makes a mixed gift different, for instance, from a very favourable bargain among family or friends which would be treated as enforceable.⁴² Typically, a transaction is regarded as a mixed gift when a very low price is agreed upon for much more valuable goods or services and the parties, fully aware of the inadequacy, want the goods or services to be provided partly gratuitously. In cases of such mixed gifts, it is difficult to

⁴¹ Federal Court of Justice, judgment of 28 May 2009, case Xa ZR 9/08 [2009] NJW 2737.

⁴² S Schlinker, ‘Sachmängelhaftung bei gemischter Schenkung – Aktuelle Fragen nach der Reform des Schuldrechts’ (2006) 206 *Archiv für die civilistische Praxis (AcP)* 28, 30 with further references.

decide whether the Civil Code provisions for reciprocal contracts or for gifts apply; in other words, whether to treat the promises, which do not meet the special formal requirements, as legally binding or not.⁴³ German law ordinarily treats them as gifts instead of bargains, but, as it will be argued, this treatment is unrealistic and unnecessary.

German jurisprudence and scholarship usually posit that the formal requirement of notarisation for promises of a gift also applies to promises of mixed gifts.⁴⁴ According to an early view, mixed gifts were to be construed as a whole, and it was assumed that the provisions for gifts ought to be applied.⁴⁵ This meant that, in principle, the reciprocal element of a mixed gift did not mean that they were to be treated as bargains. Another view, which was taken by the Court of Justice of the German Reich (*Reichsgericht*), differed in theory by contending that mixed gifts should be divided and the gratuitous element should be treated in line with the provisions for gifts, separately from their reciprocal elements.⁴⁶ However, recognising that this artificial separation did not work well in practice, particularly with regard to the question of whether or not the provision on the formal requirement of notarisation was applicable, the *Reichsgericht* did not treat mixed gifts as separable and decided that the formalities necessary to make a gift enforceable applied to them.⁴⁷ This line of jurisprudence seems to have been affirmed by the German Federal Court of Justice,⁴⁸ and the outcome coincides with the modern view entertained by German scholars which, whilst emphasising the need to appreciate the purpose of each individual mixed gift, tends nonetheless to subject mixed

⁴³ Although the category of mixed gifts seems to naturally suggest a third option, namely to apply a mix of provisions (and potentially contradict the binary understanding of how gifts and bargains are distinguished), mixed gifts must be binarily constructed regarding the issue of whether the above-mentioned German formal requirement of notarisation for enforceable gratuitous promises is said to be applicable to mixed gifts or not. It is appreciated that for other issues, such as which set of remedies is available, the analysis might yield different results.

⁴⁴ For the drafters of the German Civil Code in the 19th century, it seemed clear that mixed gifts were to be construed as gifts (B Mugdan, *Die gesamten Materialien zum Bürgerlichen Gesetzbuch für das Deutsche Reich - Recht der Schuldverhältnisse*, vol 2 (R v Decker 1899) 159). Therefore, they decided against including a provision to this extent into the eventually adopted Civil Code.

⁴⁵ O von Gierke, *Deutsches Privatrecht - Schuldrecht*, vol 3 (Duncker & Humblot 1917) 434; W Müller, 'Die gemischte Schenkung' (1904) 48 *Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts* 209; A von Tuhr, *Der Allgemeine Teil des Deutschen Bürgerlichen Rechts*, vol II/2 (Duncker & Humblot 1918) 77–8.

⁴⁶ Court of Justice of the German Reich (*Reichsgericht*), judgment of 27 June 1935, case IV 28/35, *Entscheidungen des Reichsgerichts in Zivilsachen (RGZ)* 148, 236; judgment of 22 February 1940, case VIII 9/40, *RGZ* 163, 257.

⁴⁷ This was achieved by employing section 139 German Civil Code, which assumes that the whole transaction is void where a part of the transaction does not meet the formal requirements, unless the intentions of the parties suggest otherwise. The *Reichsgericht* followed this assumption, which was usually not found to be rebutted by the parties' intentions, and therefore effectively construed mixed gifts as gifts; *Reichsgericht*, judgment of 27 June 1935, case IV 28/35, *RGZ* 148, 236, especially at 242–243.

⁴⁸ Federal Court of Justice, judgment of 29 July 2007, case IX ZR 12/06, para 3 (juris database). The court however focused on the notarisation requirement for contracts over land (section 313 of the German Civil Code before the 2002 reform = section 311b(1) in the current German Civil Code).

gifts to the formal requirements of gifts.⁴⁹ Although controversy remains over the correct approach, mixed gifts are ultimately construed and treated as requiring the formalities necessary for gifts in order to be enforceable.

Yet treating promises of mixed gifts as promises of gifts which, due to inadequacy, are required to be notarised in order to be enforceable is at odds with how bargain promises and gift promises are otherwise distinguished, regardless of the question of adequacy. The only distinguishing characteristic of mixed gifts when compared to favourable bargains is that, appreciating the inadequacy, the parties are said to have *intended* the ‘excessive’ element of the transaction to be promised gratuitously, which thus results in the entire transaction becoming subject to the formal requirement of notarisation for gifts.

However, there are several reasons why this cannot explain the departure from the principle that adequacy is irrelevant. First and foremost, if it really is the intention of the parties to treat one part of their transaction as gratuitous, rather than it being a part of a very good but fully enforceable bargain for one of them, then it is unrealistic to believe that this also means that the parties intend their entire transaction to be unenforceable without notarisation. Indeed, since the parties could have simply agreed that their entire transaction was an enforceable bargain, their failure to do so should not result in it being assumed that they intended it to be wholly non-binding. In any case, the (allegedly) chosen construction of the arrangement as a mixed gift should at least be considered in the light of the Civil Code’s provision that, if a void legal transaction fulfils the formal requirements of another legal transaction, the latter is deemed to have been entered into when it can be assumed that it was intended to be valid.⁵⁰

Secondly, it is the ‘intentions’ of the parties that matter when distinguishing mixed gifts from pure bargains. However, these intentions are more often than not those which are attributed to the parties, rather than being their actual ones, because, despite their supposedly personal nature, intentions are neutrally determined by the court when in doubt. Therefore, it is often not the actual and express intentions of the parties that makes their transaction unenforceable, but the decision of the courts, arrived at by assessing the actions and the context, as in the above-mentioned decision of the Reichsgericht.⁵¹ This suggests that basing the distinction between mixed gifts and pure bargains on the parties’ intentions is in fact unsuitable when, in the absence of express intentions, it requires assumptions to be made about their

⁴⁹ TJ Chiusi, ‘§ 516 BGB’ in S Herrler (ed), *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Recht der Schuldverhältnisse §§ 516-534 (Schenkungsrecht)* (Sellier/de Gruyter 2021) para 77; M Gehrlein, ‘§ 516 BGB’ in W Hau and R Poseck (eds), *Beck’scher Online-Kommentar BGB* (59th edn, CH Beck 2021) para 14; J Koch, ‘§ 516 BGB’ in HP Westermann (ed), *Münchener Kommentar zum BGB*, vol 4 (8th edn, CH Beck 2019) para 39; K Larenz and CW Canaris, *Lehrbuch des Schuldrechts*, vol II/2 (13th edn, CH Beck 1994) section 63 III.1b; D Medicus and J Petersen, *Bürgerliches Recht* (27th edn, Vahlen 2019) paras 380–381; W Weidenkaff, ‘§ 516 BGB’ in C Grüneberg (ed), *Bürgerliches Gesetzbuch* (81st edn, CH Beck 2022) paras 14–15.

⁵⁰ Section 140 German Civil Code.

⁵¹ Reichsgericht, judgment of 27 June 1935 (n 46).

intentions and, hence, to ultimately make the distinction for them—potentially contrary to what their actual intentions regarding enforceability were.

Thirdly, the parties are neither any better protected nor are they in need of greater protection from inadequate bargains where courts find that they intended to treat one part of their transaction as gratuitous. The parties require protection in cases in which they *unintentionally* accept inadequacy, potentially because of duress, undue influence, or unconscionability. However, in such situations, determining whether promises—of any kind—are or are not enforceable should be left to the specific doctrines, which are now well established. Thus, there is no need for, and no benefit from, misapplying and overstretching the tools used for distinguishing enforceable bargains from unenforceable gifts in order to provide protection against duress, for example.

Therefore, promises of mixed gifts ought to be treated as promises of bargains which are not required to be notarised.⁵² This would align German law with Common Law, whose doctrine of consideration is not confused by anything like the concept of mixed gifts, which are sensibly treated as bargains.⁵³

C. Past Consideration

Having discussed valuable consideration and the irrelevance of adequacy, the other very important principle of English law on consideration needs to be addressed, namely that past consideration is not good consideration. Where consideration is subsequent to and independent from the promise of the other party to the contract, it is not provided in return for that promise and thus is not part of the bargain.⁵⁴ This reflects the underlying understanding that a bargain must be distinguished from ‘mere sentiment of gratitude for benefits received’.⁵⁵ The courts have established that where an agreement is ‘purely voluntary, and as a gratuitous reward for past services’,⁵⁶ there is no good consideration provided and therefore there is no enforceable bargain. If such voluntary rewards were enforceable, it would create a ‘preference of

⁵² W Ernst, ‘Entgeltlichkeit - Eine Untersuchung am Beispiel des Tauschs, der gemischten Schenkung und anderer Verträge’ in T Lobinger, R Richardi and J Wilhelm (eds), *Festschrift für Eduard Picker* (Mohr Siebeck 2010) 166 similarly argues that mixed gifts are actually (a variation of) bargains because he considers them a downgraded variation of entirely reciprocal transactions which however does not change their nature. In respect of the formal requirement, he conversely suggests (172–4) that mixed gifts require notarisation in order to be enforceable (unless they are fulfilled).

⁵³ On US Common Law: JP Dawson, *Gifts and Promises: Continental and American Law Compared* (Yale University Press 1980) 179–80; EA Farnsworth, ‘Promises to Make Gifts’ (1995) 43 *AmJCompL* 359, 366; von Mehren (n 10) 1031; M Rheinstein, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht* (De Gruyter 1932) 86; with further references to case law.

⁵⁴ Beatson, Burrows and Cartwright (n 39) 98; Peel (n 38) para 3-017.

⁵⁵ Beatson, Burrows and Cartwright (n 39) 98.

⁵⁶ *Dent v Bennett* (1839) 4 *My & Cr* 269, at 273.

voluntary undertakings to claims for just debts [...], and voluntary undertakings would also be multiplied, to the prejudice of real creditors'.⁵⁷ In English law, past consideration is only acceptable, as an exception, if it was provided at the promisor's request, and if the parties intended the performance to be rewarded at the time when it was undertaken and that the reward must have been legally recoverable.⁵⁸

In substance, German law is very much in line with English law in this regard, but it has not yet acknowledged this, nor has it acknowledged the benefit of drawing by comparison on the ideas underlying the doctrine of consideration. Looking again at the German case considered earlier in which the claimant promised to pay a significant sum of money to the defendant for attempting to obtain a preliminary planning decision, the Federal Court of Justice made clear that if 'one party promises remuneration for an act, which is yet to be performed, this party does not make a promise of a gift' but rather concludes an enforceable contract.⁵⁹ The court rejected the suggestion that the promise had been made by the claimant as a voluntary reward for past services and it held that the promises of both parties were not made gratuitously. This corresponds with the English principle on past consideration. Justifying its finding, the court could have benefitted from referring by comparison to the reasoning given by English courts, as outlined above.

An even better example is the agreement, also considered earlier, between the coach of a wrestling team and its main sponsor. In this case, the Federal Court of Justice acknowledged explicitly that 'a reward for special efforts by the recipient of the benefit, which will become visible in the future achievement of a certain success (here: winning the championship)',⁶⁰ can be construed as a non-gratuitous payment. The court said that 'whoever promises a benefit for such [special] efforts does not intend—at least as a rule—to make a gift, but concludes a contract for remuneration for a special service yet to be rendered'.⁶¹ This latter statement resembles the Common Law conception that, even if consideration is past, there is good consideration if it was made at the request of the promisor; in this case, the special efforts were made by the coach at the request of the wrestling team's sponsor in the light of the intention that they would be rewarded, and thus be recoverable. Again, the German court could have acknowledged that its approach was comparable with the English doctrine of consideration, which would have been helpful when explaining its finding.

⁵⁷ *Eastwood v Kenyon* (1849) 11 A & E 438, at 450–451.

⁵⁸ *Lampleigh v Brathwait* (1615) 80 ER 255; *Re Casey's Patents* [1892] 1 Ch 104; *Pao On v Lau Yiu Long* [1980] AC 614 (PC).

⁵⁹ Federal Court of Justice (n 36), translated by the author.

⁶⁰ Federal Court of Justice (n 41), translated by the author. ⁶¹ *ibid.*

D. Benefits of the Comparison with English Law for the German Criterion of Gratuitousness

German law appears to follow substantively the most important principles of the English doctrine of consideration, namely that consideration must be of value but need not be adequate, and that consideration must not be past. Both principles are more widely observed than previously thought because both English law and German law employ them to distinguish enforceable promises of bargains from unenforceable promises of gifts. The English doctrine has been the subject of greater critical analysis and as a result is more thoroughly reasoned, and German courts would benefit from openly appreciating the parallels with the doctrine of consideration when addressing the criterion of gratuitousness in the future.

More fundamentally, the comparability in approach is important because it shows that, from a functional perspective, the doctrine of consideration is not unique to Common Law and unknown and unnecessary in Civilian legal systems such as German law. If German courts positively acknowledged the use of functionally comparable principles, this would help them explain and strengthen their reasoning in cases concerning the criterion of gratuitousness, and would affirm both the need and the method used for distinguishing bargains from gifts. It would also help clarify the contradictory treatment of the enforceability of mixed gifts in German law; in line with Common Law, mixed gifts should be treated as bargains, and hence be enforceable without the need to meet any special formal requirements.

IV. GRATUITOUSNESS IN ENGLISH LAW: INSIGHTS FROM GERMAN LEGAL DOCTRINE

In line with the aim of pursuing a bidirectional comparison, consideration in English law must now be looked at against the background of German law. A question which has been the subject of controversy in English law but which is clear in German law concerns the treatment of supposedly voluntary promises for additional payments. These or similar benefits could either be regarded as unenforceable gifts, which are promised gratuitously, or as enforceable promises, which would require that something is promised in return in order to make it an enforceable bargain. More generally, this raises the question of what constitutes a pre-existing duty of the promisee, which cannot be regarded as good consideration for a promise of an additional payment, and what, by contrast, amounts to a fresh bargain.

This is an area where English law seems to be stuck and inconsistent when seen in the light of German legal doctrine and its criterion of gratuitousness. It is suggested that, drawing on insights from a comparison with German law, English law would benefit from refocusing on the core function of consideration, which would result in a more realistic and balanced solution.

A. Additional Remuneration in the German Employment Law Context

It is now well established in German law that any additional benefits are in principle not gratuitous.⁶² This has mainly developed during the 20th century in the context of employment law.⁶³ Previously, additional remuneration was not much of a subject of academic debate.⁶⁴ The first German court case dealing with this appears to have been decided in 1905,⁶⁵ and reportedly many employees had been granted additional benefits since before the First World War.⁶⁶ After the Second World War, the Federal Labour Law Court explicitly held that such additional benefits are not gifts,⁶⁷ and it was generally accepted that employers are indeed legally obliged to honour their promises of additional pay.⁶⁸ Today, in one of the leading commentaries, Chiusi⁶⁹ argues that the additional benefit is directly or indirectly related to the employment relationship and is not to be regarded as a gift, even where the additional benefit is promised for services already performed or still to be performed by the employee. This includes all kinds of additional benefits offered by the employer which are not a part of the regular remuneration but which are granted on certain occasions or on certain dates and which are not due in an accounting period. Such benefits are not gratuitous precisely because of their conditional or at least causal connection with the employee's performance. What the employer might choose to call such benefits is not relevant: they are not gifts. Benefits in the employment context only become gifts if there is no relationship with the employee's performance, such as an occasional gift for personal reasons.⁷⁰

B. Reconsidering *Stilk v Myrick*

In English law, where the common law of contract applies in the absence of any specific provisions of employment law,⁷¹ the situation is quite different. This is

⁶² Chiusi (n 49) paras 179–180; Gehrlein (n 49) para 8; Koch (n 49) para 33; Weidenkaff (n 49) para 9a.

⁶³ U Preis, 'Sonderzahlungen im Wandel von Praxis und Dogmatik' [2012] *Soziales Recht* 101, 103.

⁶⁴ For instance, there is no discussion of it in the seminal work of P Lotmar, *Der Arbeitsvertrag* (Duncker & Humblot 1902).

⁶⁵ Commercial Court (*Kaufmannsgericht*) Berlin, judgment of 27 March 1905, *Jahrbuch des Kaufmannsgerichts Berlin*, vol 1 (1908) 279–80.

⁶⁶ A Hueck and HC Nipperdey, *Lehrbuch des Arbeitsrechts*, vol 1 (7th edn, Vahlen 1963) 306.

⁶⁷ Federal Labour Law Court (*Bundesarbeitsgericht*), judgment of 29 June 1954, case 2 AZR 13/53, *Entscheidungen des Bundesarbeitsgerichts (BAGE)* 1, 36, at 39. See further, for instance, judgment of 30 November 1955, case 1 AZR 217/54 [1956] *Juristenzeitung* 322; judgment of 6 March 1965, case 3 AZR 175/55, *BAGE* 2, 302.

⁶⁸ A Nikisch, *Arbeitsrecht*, vol 1 (3rd edn, JCB Mohr (Paul Siebeck) 1961) 410.

⁶⁹ Chiusi (n 49) para 179.

⁷⁰ Koch (n 49) para 33.

⁷¹ See for instance A Emir, *Selwyn's Law of Employment* (21st edn, OUP 2020) para 3.6, 10.20ff; M Freedland, *The Personal Employment Contract* (OUP 2005) 253; S Honeyball, *Honeyball & Bowers' Textbook on Employment Law* (14th edn, OUP 2016) 48, 78–9.

evident from the still leading and infamous case decided at the beginning of the 19th century, *Stilk v Myrick*.⁷² As is well known, Stilk was employed to work on Myrick's ship. After some of the crew deserted, Myrick promised to give the wages of the deserters to the remaining crew members if they fulfilled the duties of the deserters as well as their own. At the end of the voyage, however, Myrick refused to do so. The court held that the additional promise made by the employer, Myrick, was unenforceable for want of consideration. The prevailing interpretation of the ratio decidendi, following the report by Campbell,⁷³ is that Stilk and the other crew 'had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed.'⁷⁴ Accordingly, Stilk was unable to offer any additional benefit to Myrick beyond that which he had already made, and had offered nothing additional when he agreed to continue working after the desertion of some of the crew. Thus the additional promise given by the employer was unenforceable for want of consideration.

It is suggested that *Stilk v Myrick* can be seen in a new perspective if one analyses it with the German criterion of gratuitousness in mind rather than through the English doctrine of consideration. Taking this perspective, the court could only have arrived at the conclusion that the promise was unenforceable if it had affirmed the gratuitous character of Myrick's promise to make additional payments. In other words, the court would have had to see the additional payment as a mere gift. Yet, the reasoning of the court does not consider this notion.⁷⁵ It would have been quite strange for the court to say that the remaining crew should have been prepared to continue working understaffed while the promise of additional remuneration for doing so was gratuitous and unenforceable. It is extremely hard to imagine that, on the facts of the case, the promise of additional remuneration was the promise of a gratuitous gift.

Under German law it is clear that in an employment context it is unrealistic to think that employees would be happy with employers making them promises which turn out to be unenforceable gifts. The rationale of German law is that promises of benefits in an employment relationship are always conditional on, or at least causally connected to, the employee's performance. This is particularly true for situations such as in *Stilk v Myrick*. In German law, it is only where the additional benefit promised by the employer has no relationship with the employee's performance that it can be considered as a genuine gift, such as an occasional gift given for personal reasons. In *Stilk v Myrick*, given that there was no suggestion that this was the offer of a

⁷² *Stilk v Myrick* (1809) 2 Camp 317.

⁷³ In contrast to the probably less accurate report by Espinasse, (1809) 6 Esp 129; P Luther, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law' (1999) 19 LS 526.

⁷⁴ *Stilk v Myrick* (n 72) 319.

⁷⁵ For instance in contrast to the exceptional findings of the court in *Grieve v Imperial Tobacco Co (GB and I) Ltd* (*Guardian*, 30 April 1963).

personal gift, Stilk and his fellow crew should have had every right to treat their employer's promise as an enforceable promise and the court should have decided in their favour.

Whilst it might be objected that, in English law, Stilk was unable to offer anything in return in order to make it a reciprocal bargain, this is based on the view that the crew 'had sold all their services till the voyage should be completed'⁷⁶ and no-one can promise to work more than 100 per cent. However, this did not stop the English courts from changing their approach towards the end of the 20th century, which will be examined next.

C. Reconsidering *Williams v Roffey*

In *Williams v Roffey*⁷⁷ the court recognised that there can be an enforceable promise of an additional benefit if this results in a 'practical' benefit for the promisee.⁷⁸ Whilst the court did not sideline *Stilk v Myrick*,⁷⁹ it modified the law significantly. Roffey had subcontracted carpentry work to Williams, who did not fulfil the work as promised and so was offered additional payment as an incentive for completing the work on time. Technically, Williams was a subcontractor and not an employee, but for the purposes of the discussion of consideration, the difference between an employment and subcontracting relationship (in particular who has control over how the agreed work is to be conducted) does not matter. Like an employee, Williams did not promise to do anything more than he had already promised, yet the court was satisfied that, akin to an employer, Roffey had obtained practical benefits in return for the promise of an additional payment.

The court found that the employee, having run into difficulties, continued to work because of the promise of additional remuneration, and that the employer had benefitted from this by not having to find somebody else to complete the work. Yet this is not any different from the situation in *Stilk v Myrick*; in fact, in *Stilk v Myrick* the employer enjoyed the exact same benefits by being able to sail back home as planned and without having to find an alternative crew. The only significant difference between the cases is that in *Williams v Roffey* the employer was a contractor and liable to a penalty clause under the main contract. However, it is difficult to accept that the characterisation of agreements between the employer and the employee should depend on agreements that the employer made with a third party which the employee need not have known nor had any influence upon; moreover, the enforceability of such a penalty clause is highly questionable under English

⁷⁶ *Stilk v Myrick* (n 72) 319.

⁷⁷ *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

⁷⁹ *ibid* 16, 19, 20.

⁷⁸ *ibid* 15–16.

law.⁸⁰ In other words, it would be striking if it were true that the employee in *Stilk v Myrick* was effectively refused the additional payment only because the employer was not themselves subject to a doubtful penalty regime by agreement with a third party.

The court in *Williams v Roffey* should have openly acknowledged, as did German law in the 20th century, that it is unrealistic to think that an employee would be, and ought to be, happy with unenforceable promises of gifts by the employer. As argued earlier, German law recognises that promises of benefits in an employment relationship are always conditional or at least have a causal connection with the employee's performance. By contrast, employers can only be considered to offer a genuine gift where the benefit has no relation to the employee's performance, mostly because it is an occasional gift for personal reasons. As in *Stilk v Myrick*, the employer in *Williams v Roffey* can be understood to have made a non-gratuitous promise to their employee in order to ensure that the employee's performance fulfilled the employer's expectation (and, indirectly, in order to avoid having to potentially face a penalty by a third party). In turn, the employee had every right to treat their employer's promise as an enforceable promise. From the perspective of the doctrine of consideration, there is additional practical benefit for the promise of additional pay and so there is an enforceable bargain. If one sets formalism aside, and focuses on the function of consideration, it is clear that an employer's promise of additional pay is part of the bargain with the employee and must be distinguished from a mere gift.

In *Williams v Roffey*, then, the English court was right to recognise the employee's enforceable entitlement. It also recognised the development of the doctrine of duress,⁸¹ which removes the risk of employees refusing to carry out their originally promised performance in order to blackmail the employer into agreeing to pay them a higher sum. In turn, recognising the non-gratuitous nature of the employer's promise would avoid concerns that this might allow promises which are indeed wholly gratuitous and not made by deed potentially becoming enforceable, too.⁸²

D. Benefits of the Comparison for Establishing Consideration in English Law

Acknowledging that English law can benefit from German legal doctrine challenges the view that promises of additional payment to employees and similar creditors would be unenforceable for want of consideration. Whilst this position might have been acceptable in the past, it disregards the question of whether the promise of additional remuneration in an employment context can realistically be considered as gratuitous. As has been demonstrated, German

⁸⁰ For the current position of the law see *Cavendish Square Holding BV v Talal El Makdessi, ParkingEye Ltd v Beavis* [2015] UKSC 67.

⁸¹ *Williams v Roffey* (n 77) 13–17.

⁸² On this issue see M Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (OUP 1997) 139.

legal doctrine has developed a clear and coherent position on this point, namely that promises of additional benefits in an employment relationship are always conditional or at least causally connected to the employee's performance. Therefore, additional remuneration is not voluntary and the promise is not gratuitous but should be regarded as supported by good consideration. The exception to this is where employers offer a genuine gift that has no relation to the employee's performance, such as an occasional gift for personal reasons. Taking account of these comparative reflections, cases like *Stilk v Myrick* should today be decided differently, with a finding that the employers made enforceable, non-gratuitous promises.

V. CONCLUSION

This bidirectional comparison of consideration in English and German contract law has yielded several results.

First, it has confirmed that the Common Law doctrine of consideration serves the function of distinguishing an enforceable promise to enter into a bargain from an unenforceable promise of a gift in English law. This, secondly, means that, contrary to orthodox belief, consideration is not unique because the way in which German law, a Civil Law system, treats promises of gifts as, in principle, unenforceable fulfils the same function.

Thirdly, it has been shown that both German law and English law can benefit from learning from each other: on the one hand, it has been possible to demonstrate that, in German law, the definition of a gift, which lacks comprehensive theorisation, can be refined by drawing on the English principles that consideration must be of value but need not be adequate, and that it must not be past. German courts can benefit from acknowledging these principles comparatively when they consider gratuitousness as the key criterion for distinguishing gifts from bargains. Furthermore, German courts should reconsider how they address the enforceability of 'mixed gifts', which are currently treated as gifts but which should, in line with Common Law, be treated as bargains.

On the other hand, English law can benefit by drawing on the more coherent German legal doctrine concerning promises of additional remuneration in an employment context and similar situations. Such promises made by employers cannot realistically be considered gratuitous because the promises are conditional or at least causally connected with the employees' performance.

Beyond these immediate findings, this bidirectional comparison is useful in that it underpins the case against the abolition of the doctrine of consideration in English law. Since consideration serves, possibly in addition to other aims, to distinguish bargains from gifts, abolishing consideration would be pointless: if consideration were to be abolished, one would need to introduce an alternative to fulfil the very same function. What consideration does is neither unique to Common Law, nor superfluous.