
CONSIDERATION IN THE LAW OF CONTRACT: A COMPARATIVE ANALYSIS BETWEEN THE UK AND BANGLADESH

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Abstract: *From the 17th century the concept of consideration is considered as proof of an existing contract. If the contract is considered a bargain between the parties, then the consideration is the proof that the bargain existed and the contract was formed. In the contract law of Bangladesh, the definition of the doctrine of consideration is not specifically provided by the statutory laws or by the case laws. The only word by which it is implied is “something” which is used in Section 2 (d) of the Contract Act 1872. This definition includes anything as consideration of a contract. Therefore the term or application of the principle of consideration is much wider in Bangladesh than that is in English law. Moreover, it is time to think again about whether the concept of consideration is actually necessary to form a contract. As in the commercial contracts agreements of the parties are more valued than the formation of consideration in the agreements. Therefore, in commercial transactions, consideration has nominal practical implementations. The importance of consideration is the evidence that people like to be bound by their agreements rather than violating them. As such the unclarity of the concept of consideration should be clear in both Bangladesh and the UK.*

Keywords: Consideration, Contract Law, Agreements, Bangladesh, UK

Research Area: Law of Contract

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1. INTRODUCTION

Consideration is an essential part of a contract where the contract is nothing but an agreement that is enforceable by law. In English law, the interpretation regarding the law of consideration is at large confusing and the very concept of the law of consideration is not understandable by the laypersons. Regarding the interpretations of the law of consideration, the court of competent jurisdiction is playing a pivotal role as there is no existing statutory law in England to manage the law of consideration. Nowadays whether consideration is necessary or not to form a contract is under question.¹ From the 17th century, the concept of consideration is considered as proof of an existing contract. If the contract is considered as a bargain between the parties, then the consideration is the proof that the bargain existed and the contract was formed. As the consideration is the determining factor of the contract then if there was no consideration on the part of the parties then there is no contract. As such the principle of consideration is working as a “badge of enforceability”. In English law, the concept of consideration is generally linked with the idea of “reciprocity”.²

2. CONSIDERATION IN ENGLISH LAW

Regarding the concept of consideration, a poor definition has been provided by English law where it includes everything and there must be some move of benefit and detriment.³ The present definition of consideration is provided by the case of *Currie* 1875 as “a valuable consideration, in the sense of the law, may consist either in some right, interest,

profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".⁴ This classical definition is criticized by Professor Atiyah (1986) as consideration is not based upon the concept of reciprocity. According to Professor Atiyah, the term consideration was used by the competent court to give a reason for the enforceability of the contract. This concept only creates more practical problems as the courts only look for the reason for making a contract enforceable or unenforceable and this very concept is not understandable by the vast majority.⁵ However, the theory of Professor Atiyah was counter criticized by Professor Treitel. According to his argument, English law has acknowledged the existence of the doctrine of consideration and said that by using this term the competent court is using something more than giving a reason.⁶

3. CONSIDERATION IN BANGLADESHI LAW

In Bangladesh, the definition of consideration is different from that of English law. Section 2 (d) of the Contract Act 1872 "when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act abstinence or promise is called a consideration for the promise". Therefore, there is no specific provision for interest or benefit and loss or detriment on the part of the parties in the Contract Act 1872.⁷

The rules of consideration can be divided into three broad categories, they are: Firstly, consideration must be sufficient but need not be adequate; secondly, past consideration must not be a good consideration, and thirdly, the consideration must move from the promisee.⁸

4. COMPARATIVE ANALYSIS OF CONSIDERATION BETWEEN BANGLADESH AND UNITED KINGDOM

The test of adequacy and sufficiency is confusing, in respect of the principle of consideration, which implies that it should be sufficient but need not be adequate. Generally by the laypersons, adequacy and sufficiency are considered as the same principles. Therefore, a very clear cut definition is needed to determine the definitions of sufficiency and adequacy. In the case of *Ward V. Byham* a father of an illegitimate child promised his mother to pay a certain sum to look after her children and keep him happy. In law, the mother is obliged to look after her children but the court considered it as consideration of the contract to do something more than her legal obligation. As such in this case, making the children happy was considered as a good consideration and compelled the father of the illegitimate child to pay the payment.⁹ The second principle is that the consideration should not be in past which means that consideration should not be done before making any promise.¹⁰ If the promise is made after the consideration has been provided then it is not a good consideration in the eye of law.¹¹ The third rule of consideration is that consideration must move from the promisee. In English law who is not a party to a contract and has not provided any consideration may sue the promisor under the Contracts (Rights of third parties) Act 1999. Under section 1(1) the Contracts (Rights of third parties) Act 1999 a person who is not a party to the contract may sue if- (1) the contract expressly empower him with such power; (2) the term of the contract impose some benefit upon him; and (3) the third party must be an identified one (Section 1 (3) of the Contracts (Rights of third parties) Act 1999).¹²

In the contract law of Bangladesh, the definition of the doctrine of consideration is not specifically provided by the statutory laws or by the case laws. The only word by which it is implied is “something” which is used in Section 2 (d) of the Contract Act 1872. This definition includes anything as consideration of a contract. Therefore the term or application of the principle of consideration is much wider in Bangladesh than that is in English law.¹³ However, in Bangladesh, the concept of free consent is a vast determining factor for forming a contract. However, section 25 of the Contract Act 1872 specifies that “An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.” Therefore, in Bangladesh, if the consent of the parties is freely given then the contract is not void merely because the consideration is inadequate to the contract.¹⁴

In English law, the significant rule of consideration is that consideration must not be in past which means that past consideration is not a good consideration. However, in Bangladesh, in section 2(d) of the Contract Act 1872 the term “has done or abstained from doing” was used for consideration. This significantly shows that in Bangladesh past consideration is considered as good consideration.¹⁵ In the contract law of Bangladesh, there is no specific provision or requirement which shows that consideration must move from the promisee. Therefore, consideration is the requirement to form a contract and there is no requirement that it should move from the promise rather it may move to form a third party to the promisor to form a valid contract. As such in the contract law of Bangladesh, it is immaterial by whom the consideration is furnished but the formalities of consideration are the only material thing.¹⁶

To distinguish consideration from the pre-existing duties is the most significant and confusing area of the law of consideration. Pre-existing duties can be categorized into four basic parts: “(1) Performance of a duty imposed by contract with a third party; (2) Performance of a duty imposed by law; (3) Performance of a contractual duty owed to the promisor; and (4) Part payment of debt.”¹⁷

Performance of duty with a third party which is imposed by law has been considered as a good consideration for a long period of time. It is not always easy to determine which contractual duty with a third party will constitute consideration. In the case of *Ellen Nicholl* the court held that marrying someone relying on someone's promise can constitute a good consideration where a reversed decision is found in the case of *Tweddle V. Atkinson* where the court found that marrying someone relying on someone's promise cannot constitute good consideration.¹⁸ Therefore, it can be said that the court's intention in this regard is to ensure justice in the stated circumstances rather than deciding whether consideration is formed or not as in the case of *Foakes V. Beer* an obvious factual benefit of the creditor is ignored in respect of deciding consideration.¹⁹

It is always obvious in the law of consideration that the performance of a duty imposed under legal obligation cannot constitute good consideration. In the case of *Willims V. Roffey Bros & Nicholls* it was held by the court that performance of a pre-existing duty cannot be counted as good consideration.²⁰ In this regard, there is no consideration on the part

of the promisee as he has done nothing more than he is legally obliged to do. Extra work, which has done more than the person's legal obligation, can constitute good consideration.²¹The reason behind such applicability of the principle of pre-existing duty is public policy. This is imposed as a public policy so that the public officials under legal obligations cannot demand extra payment for their actions.²²

Performance of a contractual duty owed to the promisor is not good consideration, even if the promisor makes a fresh promise for the performance of the existing duty. This rule can be traced back to the case of *Stilk* where the claim of the case was failed because of a policy matter and the court did not accept the performance of an existing duty as good consideration.²³Moreover, the *Campbell* case considered *Stilk* case as it has not failed on the ground of policy rather the promisee of the contract did not provide any consideration for the promise and only complied with their legal duty.²⁴Professor Atiyah in this regard criticized the cases of *Stilk* and *Ward V. Byham* as those cases do not cover the concept of loss or detriment and gain or benefit principles of consideration. As the courts in these cases do not consider those principles for ensuring justice in these cases.²⁵

Promise to accept part payment of a debt in the discharge of the entire sum of debt cannot be considered as a good consideration in the eye of law. This principle is traced back to *Pinnel's Case* which has been affirmed later by the House of Lords in the case of *Foakes V. Beer*. This principle is rooted in the policy that it is better to have something than to have nothing.²⁶ And this policy ensures that part payment of debt is not a good consideration. However, part payment of debt may amount to good consideration in the following circumstances: (1) where a part payment is taken by the promisor as full consideration of the payment; (2) where the creditor accepts something other than money as consideration; (3) where the creditor accepts something in addition to money as consideration.²⁷

Regarding the pre-existing duties of the contract, there is no statutory law or case law in Bangladesh. The general principle of consideration is laid down in Article 25 of the Contract Act 1872, which provides, "an agreement made without consideration is void." As such in Bangladesh, generally, if there is no consideration in the contract then there should not be any existence of a contract at all. However, there may be some valid agreements without consideration. The agreement that can be formed without a valid consideration can be divided into three parts. They are: (1) if the agreement is made out of natural love and affection; (2) if the agreement is made to compensate a past voluntary service; (3) if the agreement is made to pay a time-barred debt.²⁸

5. CONCLUSION

In conclusion, it can be said that interpretation of the law of consideration is generous in English law.²⁹And the interpretation of the concept of consideration is making confusion for the laypersons. Generally, such confusion is being created because of the unclear and unidentified definition of the concept of consideration.³⁰To remove such confusion the technical terms like a legal benefit, practical benefit, pre-existing duty, should be defined and applied by the competent courts properly.³¹ Moreover, the court's autocracy in respect of determining the concept of consideration in the law of contract of both Bangladesh and the UK should be removed. Courts should only interpret the law and that law should be

understandable by the people at large. The law-making power should only be vested in the parliament and the judges should not try to make law in the name of providing interpretation. The parliament should interfere in the confusing matters of the concept of consideration and it is the responsibility of the parliament to identify the loopholes of the existing laws. Moreover, it is time to think again about whether the concept of consideration is actually necessary to form a contract. As in the commercial contracts agreements of the parties are more valued than the formation of consideration in the agreements.³² Therefore, in commercial transactions, consideration has nominal practical implementations.³³ The importance of consideration is the evidence that people like to be bound by their agreements rather than violating them. As such the unclarity of the concept of consideration should be clear in both Bangladesh and the UK.³⁴

Notes:

¹Ashley, C. D. (1913). The Doctrine of Consideration. *Harvard Law Review*, 26(5), 429-436.

²Hasian Jr, M., Condit, C. M., & Lucaites, J. L. (1996). The rhetorical boundaries of 'the law': A consideration of the rhetorical culture of legal practice and the case of the 'separate but equal' doctrine. *Quarterly Journal of Speech*, 82(4), 323-342.

³McKendrick, E. (1997). *Contract Law*. Palgrave, London.

⁴Richards, P. (2006). *Law of contract*. Pearson Education.

⁵Fuller, L. L., & Braucher, R. (1964). *Basic contract law*. West Pub. Co..

⁶Treitel, G. H. (2003). *The law of contract*. Sweet & maxwell.

⁷Haque, Muhammad Ekramul (2004), *Law of Contract*, Law Lyceum, Dhaka.

⁸Fuller, L. L., & Braucher, R. (1964). *Basic contract law*. West Pub. Co.

⁹Hasian Jr, M., Condit, C. M., & Lucaites, J. L. (1996). The rhetorical boundaries of 'the law': A consideration of the rhetorical culture of legal practice and the case of the 'separate but equal' doctrine. *Quarterly Journal of Speech*, 82(4), 323-342

¹⁰Ashley, C. D. (1913). The Doctrine of Consideration. *Harvard Law Review*, 26(5), 429-436.

¹¹McKendrick, E. (1997). *Contract Law*. Palgrave, London.

¹²McKendrick, E. (1997). *Contract Law*. Palgrave, London.

¹³Haque, Muhammad Ekramul (2004), *Law of Contract*, Law Lyceum, Dhaka.

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¹⁹McKendrick, E. (1997). *Contract Law*. Palgrave, London.

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²²Ashley, C. D. (1913). The Doctrine of Consideration. *Harvard Law Review*, 26(5), 429-436.

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