

CHAPTER THREE

CONSIDERATION

3.1 Introduction

Consideration is one of the basic requirements for a valid contract in common law jurisdictions. Consideration is basically the "legal detriment" to each party to a contract, which means what each party does or agrees to do that he was not required to do before. Contracts that do not have consideration on both sides are generally not enforceable in court in common law jurisdictions. This was briefly explained in Chapter 1 ("Basic Aspects of Contract Law").

In this Chapter, Section 3.2 explains what consideration is in more detail. Section 3.3 lists the basic types of consideration. Consideration need not be equal or "reasonably proportioned" within a contract, but it must be legally sufficient, as explained in Section 3.4. Section 3.5 discusses some types of activities that are generally not consideration: pre-existing duties, legally unenforceable promises, past consideration, illusory promises, and love and affection. Part payment of a debt is generally not consideration, although there are exceptions, as explained in Section 3.6. Modifications of existing contracts generally require new consideration on each side, although again there are some exceptions to that rule, as discussed in Section 3.7. There are also some special situations in which many common law jurisdictions do not require consideration in order for a contract or promise to be enforceable. These include: promises to make charitable donations; new promises to pay debts discharged in bankruptcy; contracts made under seal; new promises to perform contracts that were unenforceable because of statutes of limitations or failure to meet writing requirements; firm offers for and modifications of sale of goods contracts; and promises that meet the requirements of promissory estoppel. Section 3.8 discusses these special situations.

The contract laws of many free market jurisdictions do not require consideration for a contract to be valid. Specifically, civil law jurisdictions do not have this requirement. And it does not appear explicitly in the current contract law of Cambodia. These differences will be explained in further detail in Section 3.9, below.

This Chapter contains a more complete discussion of consideration than Chapter 1 did. However, because only common law jurisdictions explicitly require consideration, this Chapter will explain it somewhat more briefly than other Chapters in this text explain their subjects.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4b contains a more concise discussion of consideration.

3.2 Basic Definition of Consideration: Exchange of Legal Detriment

As noted above, common law jurisdictions generally require consideration on both sides of a contract in order for that contract to be enforceable.

*** **DEFINITION: Consideration** is the new legal detriment to a party to a contract, which generally means what each party does or promises to do in exchange for a promise or performance from another party.

Usually the consideration in a contract is fairly obvious. When the consideration is not obvious, one way to understand it is to think of it as the "**legal detriment**" to each party to the contract--or what each party now must do that he did not have to do before. This could be paying money, plowing a field, or agreeing never to drink beer. Legal detriment does not mean a party must actually suffer "harm" in the usual sense--it means only that the party does or promises to do something that he was not previously required to do.

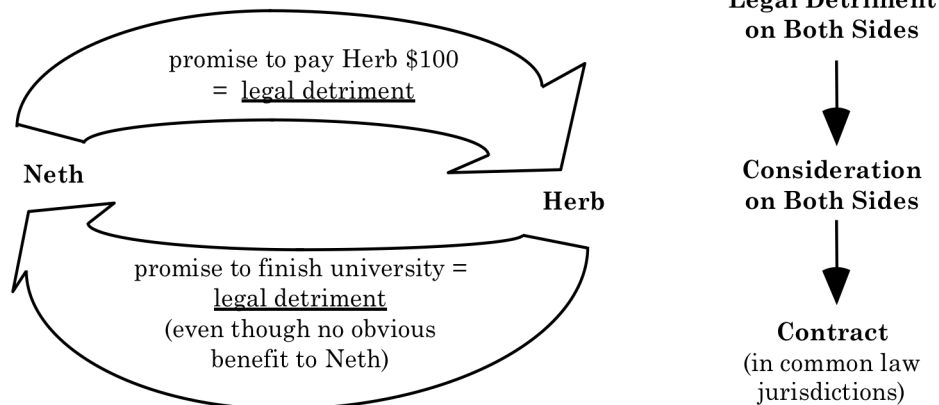
Consideration often directly benefits the other party to a contract, but in some cases it does not. For example, in a sale of goods contract, one party generally gives the other party goods, and the other party generally gives the first party money--so each party does get a benefit from the other party. But consideration can also be things such as a party's agreement to stop riding a bicycle, which would probably not directly benefit the promisee. So for consideration to exist, it does not matter whether there is any obvious benefit to the parties. The important thing for consideration to exist is that, before making the contract, neither party was required to perform the act he does or promises to do. But because of the contract, he now is required to perform that act. That is his "legal detriment."

So in order to see if there is consideration in any contract, simply ask the question: what is the legal detriment to each party? If there is legal detriment to each party, then there is consideration, and this common law requirement for a valid contract is met. But if there is no legal detriment to one (or more) of the parties, then there is no consideration, and this common law requirement is not met.

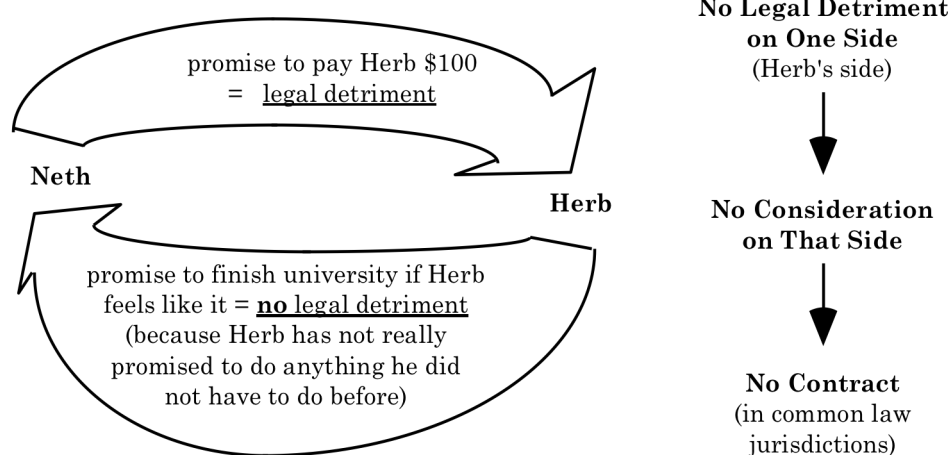
The following chart and Case Study illustrate this idea.

Illustration: How to See If There Is Consideration by Asking If There Is Legal Detriment to Each Party to a Potential Contract

EXAMPLE 1:



EXAMPLE 2:



CASE STUDY 91

FACTS Dara is very thirsty. He goes to Sarun's shop and promises to give Sarun 2,000 riels for a bottle of beer. In return, Sarun promises to sell the beer to Dara for 2,000 riels.

QUESTION OF LAW Is there a binding contract between Dara and Sarun which can be enforced in a court?

DECISION Yes. Both parties, Dara and Sarun, have provided consideration, so this is a binding contract, assuming there are no other formation problems.

Common law jurisdictions generally require consideration for a contract to be enforceable. In this case, Dara promised to pay Sarun 2,000 riels in exchange for a bottle of beer. Dara's consideration (legal detriment) is his promise to give 2,000 riels to Sarun. Sarun's consideration (legal detriment) is his return promise to provide a bottle of Angkor beer to Dara. Before the contract, neither Dara nor Sarun had any obligation to do these things. But once the contract was formed, each party's promise (consideration) supported the promise (consideration) of the other party. So there was consideration in this case, and there appears to be a valid contract between Dara and Sarun.

Some authorities say that consideration must generally be a "bargained for exchange." This does not mean that the parties must actually bargain back and forth many times, as might occur at the market! It means only that the act or promise on each side of the contract must be given in exchange for the act or promise on the other side. So in order for consideration to exist, it must be bargained for and given in exchange for a promise, act or forbearance (a promise not to do something) by the other party. For example, in Case Study 91 above, suppose Sarun did not charge Dara any money at all, or gave Dara money for some reason other than an act or promise by Dara. In that situation, there would be no bargained for exchange, and no consideration. So no exchange of promises to do anything = no legal detriment = no consideration. In general, it appears that if the requirement of real agreement is met, then there is probably a bargained for exchange. Real agreement was discussed in detail in Chapter 2 ("Real Agreement (Offer and Acceptance)").

As long as there is a voluntary agreement between the parties, it does not usually matter why each party agrees to the bargain. For example, in Case Study 91, suppose Dara had entered Sarun's shop and placed a 500 riel note on the counter for a bottle of Angkor beer. If Sarun normally sold that beer to his customers for 2,000 riels, but he still agreed to hand over the bottle to Dara for 500 riels because he liked Dara, then there would still be a bargained for exchange. This is because there was still an exchange of voluntary promises to do something between the parties. This is true even though Sarun normally charged more money for the beer, and even though part of his reason for agreeing was simply that he liked Dara.

It is also important to note that certain specific kinds of promises do not require consideration in order to be enforceable in court, even in common law jurisdictions. Some of these exceptions will be explained later in this Chapter in Sections 3.6-3.8.

***** WHY IS THIS IMPORTANT?** Why do common law jurisdictions generally require consideration for a contract to be enforceable?

Consideration is one tool common law jurisdictions use to distinguish between promises courts should enforce, and promises they should not enforce. The presence of consideration on both sides of an agreement usually shows that the parties were serious about their agreement--serious enough that they

both did or agreed to do something they did not have to do before. If one party does not meet this requirement, it suggests that the parties were not so serious, and probably did not wish to be legally bound. For example, this is considered to be the case with agreements to give gifts. Such agreements are generally considered to be "gratuitous" promises common law courts will not enforce.

Of course, consideration is a formal requirement, and formal requirements may not achieve justice in every situation. People do sometimes make serious promises without receiving anything in return. Therefore, as noted above, common law courts do not require consideration in every situation. Situations in which consideration may not be required will be discussed in some detail in Sections 3.6-3.8 below.

Although consideration is one way to measure whether the parties were serious enough about an agreement that the courts should enforce it, it is certainly debatable whether it is the best way! As noted earlier, many free market jurisdictions (notably civil law jurisdictions) do not use consideration as a tool to help them decide which contracts to enforce. This is further discussed in Section 3.9 below.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 1.4b contains further discussion of real agreement.

3.3 General Types of Consideration

As discussed to some extent above, consideration may exist in several different forms. In fact, there are at least three general types of consideration. These are:

- (1) a promise to do something (such as Vannath's promise to give two dragon fruit to Sotia in return for his promise to pay her \$1);
- (2) a promise to forbear, which means a promise to refrain from doing something that a person would otherwise have the right to do (such as when a government official promises to refrain from suing a newspaper for defamation if he has a reasonable right to bring such a lawsuit); and
- (3) an act other than a promise (such as Neam cleaning Saray's house in response to Saray's promise to pay Neam \$1 if he does so).

3.4 The Amount of Consideration Need Not Be Equal or "Reasonably Proportioned," But It Must Be Legally Sufficient

Generally, the amount of consideration need not be equal on both sides, nor "reasonably proportioned," in order for a contract to be valid. That means that whether the bargain agreed upon by the parties seems "fair" is almost always irrelevant to whether there is consideration, and usually irrelevant to whether the contract is valid. In fact, courts often enforce contracts even though they may not seem completely fair because of an apparent difference in the value of the consideration on each side! Of course, very unequal consideration may indicate that there is some other formation problem, such as duress or undue influence. And extremely unequal consideration may be the result of an unconscionable agreement, as discussed briefly in Chapter 1 ("Basic Aspects of Contract Law"). But those are not consideration problems.

The consideration in a contract need only be "legally sufficient." This really means only that the consideration must be enough that it is not obviously worthless--such as a piece of dirt from the street, or one old, worn-out shoe with no sole. Consideration like that would appear to be only a "sham," perhaps to disguise a gift, and not a real contract with legal detriment on both sides. Only in cases like that might the consideration be "legally insufficient" to form an enforceable contract in common law jurisdictions. But in general, even consideration with a value as small as a peppercorn--a famous common law example--is legally sufficient.

CASE STUDY 92

FACTS Vanna decides that she would like to buy a new moto, even though her old one still works fairly well. Vanna offers to sell her old moto to Narith for 10,000 riels. Narith is happy to buy Vanna's vehicle for this sum, and Narith accepts the offer.

QUESTION OF LAW Is Narith's consideration legally sufficient, and therefore good enough to form a valid contract?

DECISION Yes. The consideration here is legally sufficient, and the parties have a valid contract, assuming there is no other formation problem.

To exist, consideration only needs to be "legally sufficient" on each side--which is not necessarily the same as being economically valuable. All that is required is that the consideration constitutes some legal detriment. This detriment need not be large. And the value of the legal detriment to one party need not be equal to the value of the legal detriment to the other party.

In this case, both Vanna and Narith promised to do something--they exchanged promises for the purchase and sale of a moto. Of course, Vanna is not charging Narith very much money for the moto. And the value of the moto is probably not "equal" to the value of 10,000 riels. But the 10,000 riels Narith

agreed to pay still has some real legal value--it is not worthless. So it is legally sufficient, there is consideration, and the parties have a valid contract.

***** WHY IS THIS IMPORTANT?** Why do common law jurisdictions not require consideration to be equal or "reasonably proportioned?"

Free market contract law generally wants parties to be able to make their own contracts, without interference from the courts or anyone else. This is part of the "freedom of contract." One reason for it is that, as discussed elsewhere, parties might refrain from making (or not bother to make) good contracts if they knew that courts might rewrite them. This could discourage economic activity. In addition, courts might be overwhelmed with parties asking to have their contracts rewritten, simply because the parties wanted a better deal, or no longer liked the deal they made. For these reasons, courts generally do not wish to interfere in the contracts the parties make just because one party complains that the consideration (the bargain) is not fair. So courts generally will neither rewrite contracts nor refuse to enforce them on this basis, unless the consideration really has no value at all.

Of course, it is important to remember that an agreement with unequal consideration may be the result of some other contract formation problem. It might have been caused by duress or undue influence. And agreements with extremely unequal consideration may actually be the result of unconscionability. In situations like that, courts may refuse to enforce the agreement for other reasons, as will be explained in more detail in Chapter 7 ("Other Contract Formation Problems"). But these other problems are different from a lack of consideration.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law") discusses some formation problems that may exist where an agreement is unfair; and Chapter 7 ("Other Contract Formation Problems") contains a more detailed explanation of some of those problems.

3.5 Acts or Promises That Are Generally Not Consideration

As discussed above in Section 3.4, consideration need not have great or even equal value to be legally sufficient. However, in some situations there is no consideration no matter how great a value a party's act or promise may seem to have! Specifically, consideration does not generally exist where it is actually:

- (1) a pre-existing duty, which occurs where someone performs or promises to perform a duty he is already obligated to perform;
- (2) a legally unenforceable promise, where someone promises not to do what he has no right to do;

- (3) past consideration, which is an act done before the contract is made;
- (4) an illusory promise, where one of the parties makes a promise which actually promises nothing, because it leaves to the promisor the choice of performance or non-performance;
- OR (5) love and affection.

These five situations are discussed in the Sections below.

3.5a Pre-existing Duty

Sometimes a party to a potential contract does or promises to do something he is already legally obligated to do. An example would be a promise to perform duties under an existing contract. This is generally not consideration. The reason is that the person is not actually doing or promising to do anything new--anything that he was not required to do before. Instead, the person in such a situation is merely performing or promising to perform a "pre-existing duty."

*** CASE STUDY 93

FACTS A builder named Leang examines Munthit's property, then makes a contract with Munthit to build a fence around Munthit's house. The parties agree that Munthit will pay Leang the sum of \$75 for this work.

However, once Leang has examined the property more closely, he asks Munthit to give him an extra \$20 because the job will be somewhat harder than Leang expected. Munthit agrees to this, fearing that Leang will not do the work at all if Munthit does not agree to pay the extra money.

QUESTION OF LAW Will a common law court enforce Munthit's promise to pay Leang the additional \$20?

DECISION No. There is no consideration from Leang to support Munthit's promise to pay the extra \$20, and so the promise is not enforceable.

Promises to perform pre-existing duties are generally not consideration. In this case, Munthit promised to pay Leang an additional \$20, and this is additional consideration on his side. But Leang has promised to do no extra work, and so he has provided no extra consideration in return. In fact, Leang is already obligated to build the fence under the existing contract with Munthit. This is Leang's "pre-existing duty," for which Munthit has already agreed to pay \$75. So there is no consideration from Leang for Munthit's promise to pay \$20, and Munthit has no legal obligation to pay the \$20.

However, in Case Study 93, suppose Leang had promised to paint the fence for \$20, and Munthit had agreed to pay \$20 for that service. Then there would have been new consideration on both sides. That is because Leang

would have agreed to some new detriment. But in the Case Study above, there was no such arrangement.

Some common law jurisdictions make exceptions to this general rule, in limited circumstances, in order to respect the real desires of the parties. Some of these exceptions are examined in Sections 3.6-3.8, below. Because of these potential exceptions, it is important to examine the law in the relevant jurisdiction in order to know what courts of that jurisdiction would do in this situation. But the general rule is that performing or promising to perform a pre-existing duty is not consideration.

3.5b Legally Unenforceable Promises

In some cases a party promises not to do something he has no legal right to do anyway, such as commit a crime. This is not consideration because courts will not enforce promises based on violating the law. The reason is that this is really like another kind of pre-existing duty--the duty of all citizens not to violate the law.

A promise to not commit a crime should not be confused with a promise to commit a crime. Promises to commit crimes are not enforceable because they lack legality, as explained in Chapter 5 ("Legality").

*** CASE STUDY 94

FACTS Sophan tells widow Sok Cheng that if she promises to give him \$250, then he will promise not to steal any of her property, or harm her or her family. Sok Cheng agrees because she is frightened of Sophan.

QUESTION OF LAW Is there consideration and an enforceable contract in this case?

DECISION No. There is no consideration and no contract because Sophan's promise was one not to commit a crime, which is something he has no right to do anyway.

A promise not to do something that a party has no right to do anyway, such as to commit an unlawful act, is not consideration. In this case, Sophan would be breaking the law if he did not keep his promise not to steal from Sok Cheng or harm her or her family. In fact, Sophan is already obligated by law to perform what he promised: not harm Sok Cheng or her family. So Sophan's promise is not consideration and it cannot be enforced. Of course, there may also be other reasons (such as duress) that there is no valid contract in this situation.

*** **ADDITIONAL REFERENCE:** Chapter 5 ("Legality") contains further discussion of the requirement of legality.

3.5c Past Consideration

Sometimes people promise to do something in exchange for an act that happened before the promise was made. This is not consideration, because the party making such a promise is not really promising to do anything new--to undertake any legal detriment--if the act is already in the past. Obviously, people cannot generally go back and perform acts in the past!

CASE STUDY 95

FACTS Sola looked after her sick uncle for ten years. Then her uncle died. After her uncle's death, Sola's cousin Sokha (the uncle's son) promised to give Sola \$500, in recognition of her past services to his father.

QUESTION OF LAW Is there a valid contract between Sola and Sokha in common law jurisdictions?

DECISION No. Sokha's promise to pay Sola after her care for her sick uncle has ended is not enforceable because it is based on past consideration.

Past consideration--such as an act carried out before a promise is made--is not consideration. In this case, there is no consideration to support the promise of Sola's cousin to pay Sola for her past care for her uncle. To be consideration, the cousin's promise to pay must induce Sola to do something new, something she was not required to do before. But of course, this is impossible if the promise to do the work is made after the work is already completed!

WHY IS THIS IMPORTANT? Why do common law jurisdictions say that past consideration is not consideration?

In some cases, this rule about past consideration may seem unfair. One example might be when someone does something significant for someone else--like taking care of a person while he is ill--but receives nothing in return. In that kind of situation, even if the person who received the benefit later promises to compensate the other person, this rule says the person who benefited has no contract obligation to keep his promise! And the rule may in fact be unfair in certain cases.

But the rationale for the rule appears to be that, if a party wants to be compensated for his efforts, that party should decide and make some arrangement for that at the start of his efforts. Otherwise, the efforts will be considered a gift. The law wants to encourage parties to be clear about whether they expect payment for their goods or services. This helps both parties understand what their relationship really is, and should avoid at least some disputes after that relationship has begun. In addition, the law simply cannot solve all problems, especially where complex emotional relations and moral debts are involved, as in Case Study 95.

Of course, it is also important to remember that this text is only discussing what agreements the law will enforce. The parties are generally free to make whatever gifts they want, or perform whatever lawful promises they like, without the involvement of the law or the courts. So in Case Study 95, there is nothing to prevent Sokha from giving the \$500 to Sola if Sokha wishes to do so.

3.5d Illusory Promises

An "illusory" promise is one that appears to be a promise to do something, but in fact does not really commit the promisor to do anything. Illusory promises are generally not consideration.

*** CASE STUDY 96

FACTS Sambo offers to sell the New Hotel as many brooms as the hotel might choose to order at 3,000 riels apiece. The hotel quickly accepts her offer.

QUESTION OF LAW Is there consideration (and an enforceable contract) in this situation?

DECISION No. The hotel's promise to buy brooms is an illusory promise, so there is no consideration on the hotel's side, and no enforceable contract.

Illusory promises are not consideration. In this case, where the hotel has promised to buy all the brooms it "might choose to order," there is no consideration because the hotel has not really committed itself to do anything. In fact, the hotel "might" order no brooms at all! If the hotel actually chose to order no brooms, it obviously would have no obligation to pay any money, or do anything else. So the hotel's promise to buy brooms is illusory, and it cannot be consideration. In this situation, there is no enforceable contract.

(1) Output and Requirements Contracts Can Often Be Enforced Even Though They May Seem Illusory

It is important to note, however, that there are two types of commercial sale of goods contracts that may seem illusory, but in many cases are not considered to be illusory by common law courts. These special kinds of commercial contracts are called output contracts and requirements contracts.

An output contract occurs where a seller of goods agrees to sell all of a certain kind of goods that that seller produces in a certain period to a specific buyer. A requirements contract is one where a buyer of goods agrees to buy all of a certain kind of goods that that buyer needs in a certain period from a specific seller. Of course, in these cases, it is possible that no goods at all will be produced by the seller or required by the buyer. So the promises seem illusory.

But courts will generally enforce these contracts anyway! Several reasons may exist for this. First, consideration does exist in these situations in the sense that the buyer or seller has agreed to some legal detriment. This is because he has agreed to give up the right to buy or sell the goods from or to anyone else. And in many cases, if the seller actually produced no goods at all, or the buyer bought no goods at all, they might endanger or even lose their businesses. For example, if a restaurant in Phnom Penh agrees to buy all its requirements for rice from a certain supplier for one year at a certain price, it is possible that the restaurant will require no rice. However, if that happens, the restaurant will probably go out of business! This is possible, but it is not considered a likely way for the restaurant to escape its obligation. In addition, in commercial contracts like this, the parties generally know each others' businesses fairly well. They know the risks involved. So common law courts generally say that such promises are not really illusory, and that there is consideration.

CASE STUDY 97

FACTS The Enormous Construction Corporation needed a lot of iron for the many big new buildings it was planning to build in Phnom Penh over the next few years. So Enormous negotiated a contract with the Apsara Iron Corporation to get all the iron it would need. The parties signed a contract which said that Apsara would supply Enormous with all of the iron Enormous would need for its construction work in Cambodia for the next three years.

After the parties signed this contract, however, Apsara learned that the Even Construction Company would also need a lot of iron for its Cambodian construction contracts over the next few years. In fact, Apsara calculated that Even would need even more iron than Enormous would need. Apsara was very interested in supplying this iron! But Apsara did not have the capacity to supply both Enormous and Even.

Apsara decided it would prefer to have a contract with Even. So Apsara told Enormous that they actually had no enforceable contract together. Apsara claimed that Enormous' previous promise to buy all the iron it would require from Apsara was actually an illusory promise, because the promise did not really require Enormous to buy any iron at all from Apsara.

Now Enormous is asking the court to order Apsara to either honor the contract or provide a remedy.

QUESTION OF LAW Is there a valid contract between Apsara and Enormous?

DECISION Yes. The contract between Apsara and Enormous is a valid requirements contract even though it may seem illusory.

Parties can make valid contracts that require one party to sell another party all the goods of a certain kind that the other party will need during a certain time. These are requirements contracts. Such contracts are an exception to the general common law rule that contracts which do not necessarily obligate parties to do anything lack consideration.

In this case, there was a valid requirements contract in which Apsara agreed to sell Enormous all the iron Enormous would need over the next three years. Although it is possible that Enormous will require no iron, that is very unlikely in commercial contracts such as this. And in fact, Enormous has given up its right to buy iron from anyone else during the three year period in the contract. Therefore, consideration exists in this contract, and courts will enforce it. Apsara will have to honor the contract or provide a remedy to Enormous.

These output and requirements contracts may also seem too indefinite as to quantity, under the rules explained in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.3b. But such contracts are reasonably definite in the sense that the parties have said exactly the quantity they mean: whatever is actually produced or required! This is more specific than saying "whatever I might choose to sell" or "whatever I might choose to buy," as the New Hotel in Case Study 96 did. In addition, the parties are usually businesses that have calculated their needs and abilities, based on past situations. But despite this, sometimes such parties simply cannot say exactly how much they will produce or require in a given period, because of market conditions or other factors. These special contracts allow such parties the flexibility they need.

However, courts will generally not enforce these contracts where the amount produced or required turns out to be "unreasonably disproportionate" to any estimate the parties made, or if there is no estimate, disproportionate to any normal comparable quantity. In addition, many jurisdictions say that a duty of good faith and fair dealing is present in all contracts. This duty might require that parties to output and requirements contracts act honestly and reasonably in their performance. This duty was briefly discussed in Chapter 1 ("Basic Aspects of Contract Law"), and it will be explained in more detail in Chapter 8 ("Interpretation of Contracts"), Section 8.3j. So the parties do have some protection in these situations.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.3b discusses the requirement that offers (and contracts) be definite and reasonably clear; and Chapter 8 ("Interpretation of Contracts"), Section 8.3j explains the duty of good faith and fair dealing.

3.5e Love and Affection

Love and affection by themselves are generally not consideration. This is because they do not constitute legal detriment for which people typically bargain. For example, suppose a father promises a moto to his son because

he is a good son, and the son does nothing more than smile and promise to accept it. In that situation, there is no bargained for exchange and no legal detriment to the son--all he must do is accept a free moto! In fact, this is basically a gift, without any legal detriment on the son's side. This is true even though the son may actually feel some increased "love and affection" for his father because of the gift. Therefore, in common law jurisdictions, there is no consideration to make this kind of agreement enforceable.

In contrast, love and affection can be a motivation for a contract--so long as there is some legal detriment on each side of the contract. If the same father promised a moto to his son provided that the son graduated from the University of Phnom Penh, the contract would be supported by consideration. In this example, the son would be doing more than just accepting the moto. By going to university, the son is doing work and forgoing other possibilities in his life. That is a legal detriment. Another example would be if the same father agrees to sell the moto to his son for only one tenth of its market value. Although the son is getting a very good deal, there is still some legal detriment (and thus consideration) on both sides.

3.6 Part Payment of a Debt Is Generally Not Consideration

Sometimes a debtor pays or promises to pay only part of the debt he owes to another person under a contract. The general rule is that such a promise or partial payment of a debt is not consideration to support the creditor's promise to cancel the remainder of the debt. So paying or promising to pay only part of one's debt does not generally mean that one has provided consideration which will excuse one from paying the remainder--even if the creditor agrees!

The reason for this general rule is that the creditor is already entitled to the part payment--and to the rest of the amount due. The debtor's giving or promising to give something to which the creditor is already entitled is not new consideration. It is really just a pre-existing duty of the debtor.

CASE STUDY 98

FACTS Several months ago, Channo borrowed \$100 from his uncle. Channo has managed to repay \$30 of the debt since then. But Channo is a student, and he is struggling to finish his studies and repay his uncle at the same time. In fact, Channo is thinking of leaving university before he is finished and taking a job, so he can repay his uncle more quickly.

But when Channo's uncle finds out that Channo may abandon his studies, the uncle is very worried. So the uncle goes to see his nephew and tells him that he will accept the \$30 Channo has already paid as full payment of the debt. The uncle says that this means that Channo will not have to repay the remaining \$70 to his uncle.

QUESTION OF LAW Is Channo still legally obligated to repay the remaining \$70 to his uncle?

DECISION Yes. Under the general common law rule, Channo is still obligated to repay the remaining \$70 he borrowed from his uncle.

The part payment of a debt is generally not consideration to support the creditor's promise to cancel the balance of the debt. In this case, Channo's uncle has made such a promise to Channo. This is not an enforceable promise. The reason is that Channo has no new legal detriment, despite his uncle's promise to accept the \$30 Channo had already paid as full payment of the \$100 debt. In fact, while the uncle promised something new--to accept only \$30 instead of the full \$100 Channo owed--Channo did not promise anything new. In fact, Channo has provided no new consideration. So in this case, Channo still owes his uncle \$70.

3.6a Exceptions to the General Rule about Part Payment of a Debt

However, there are some exceptions to the general rule that part payment of a debt is not consideration to support the creditor's promise to cancel the rest of the debt. In some of these situations, there actually is some kind of legal detriment to each party, though there may not seem to be. But in other exceptions, it appears that there really is no new legal detriment to one of the parties. Instead, in these latter exceptions, the courts are trying to achieve some other important goal of public policy--despite the lack of any new legal detriment.

Specifically, many jurisdictions make exceptions to the general rule about part payment of a debt in situations where:

- (1) there is a good faith dispute about the correct amount of the debt;
- (2) the debtor promises a substitute performance;
- (3) there is a composition of creditors who all agree to accept some portion of what the debtor owes them;
- (4) the creditor cancels the written evidence of the debt; or
- (5) the creditor provides a receipt in full and some indication that he is making a gift of the balance.

These exceptions are explained below.

(1) Good Faith Dispute -- If the amount of the debt is in dispute in good faith between the parties, the debt is canceled if the creditor accepts a lesser sum in full settlement of the debt. The basic idea behind this exception is that the law wants to encourage parties to resolve genuine disputes as quickly and easily as possible.

***** DEFINITION:** **Good faith** is almost impossible to define exactly, but it generally includes a party's honest belief and conduct, and a lack of malice or intent to seek an unfair advantage.

In this situation involving a debt, "good faith" would basically mean that the parties have an honest difference of opinion about the correct amount of the debt. But if one party knows that the other party is correct about the amount of the debt, yet continues to claim otherwise, then there is no good faith dispute.

For example, in Case Study 98, suppose Channo and his uncle had a genuine, good faith dispute as to the amount of the debt. In that case, there would be consideration for the uncle's agreement to accept a sum less than he claimed was due as the final amount. The reason is that, in agreements like this, one party (the creditor) gives up the legitimate right to take his claim to court, and often accepts less money than he originally claimed. In return, the other party (the debtor) often gives new consideration, by promising to pay some amount he did not previously admit to owing. Of course, if either party agrees to settle the dispute on exactly the terms the other party wants, there does not appear to be any legal detriment to the party who is getting everything he wants! In that situation, it appears the settlement would generally still be enforceable despite the lack of consideration, presumably because the law simply wishes to promote the settlement of disputes.

This kind of settlement and payment may actually be a "substitute contract" or an "accord and satisfaction," at least in some common law jurisdictions. These are both types of later agreements of the parties which substitute a different duty for one owed under the original contract. They can actually result in the discharge of the prior contract duties. The basic difference between these two is that a substitute contract immediately discharges the duties owed in the contract it replaces, whereas an accord agreement merely suspends the prior duties until it has been performed (the satisfaction). Many jurisdictions say that where it is not clear which of these two types of agreements the parties have made, and the subject of the new agreement is a disputed debt, the court should assume the parties created a substitute contract. These ideas will be discussed in more detail in Chapter 9 ("Performance and Discharge of Duties"), 9.7c and 9.7d.

(2) Substitute Performance -- If a debtor promises a new, substitute performance that is different from the one already owed, and the creditor agrees to accept that performance in full satisfaction of the existing debt, there is consideration. In this case, there is new consideration on each side.

Of course, this kind of agreement would actually be a substitute contract or an accord and satisfaction. These two potential later agreements were just discussed with regard to good faith disputes. They are explained in more detail in Chapter 9 ("Performance and Discharge of Duties"), Sections 9.7c and 9.7d.

For example, suppose Saray still owes Phally \$10 of a \$20 debt. If Saray promises to drive Phally to Kompong Som instead of paying the last \$10, and Phally agrees, there is consideration. This is because each party has actually agreed to do something new: Saray has agreed to provide a different performance, and Phally has agreed to accept that different performance instead of the old one. At least in theory, this is different from Phally's agreeing to accept only part of the old performance that Saray already owed. So in this case, if Saray performs by actually driving Phally to Kompong Som, he has fully performed the new agreement.

(3) Composition of Creditors -- Sometimes several different creditors are owed money by a debtor, and each creditor agrees to accept a percentage of the amount due in full settlement of the debt. This kind of agreement is known as a composition of creditors. It seems that such an agreement will cancel the additional unpaid balance due to these creditors, in some jurisdictions. It appears that there may actually be an agreement here among the creditors. So there may be a kind of consideration (legal detriment) on the part of each creditor to support the consideration of the other creditors, even though the debtor has apparently promised nothing new.

For example, suppose Vanna operates a coconut stall in the market. Vanna owes a total of \$1000 to four different creditors, \$250 to each creditor. So far Vanna has managed to repay a total of \$600 (\$150 to each creditor). However, Vanna knows that she cannot pay the remaining \$400 and still stay in business. The four creditors are also aware of this fact. So the creditors meet and decide that if Vanna promises to repay 50% of the \$400 she still owes--that is, \$200, or \$50 to each creditor--then they will accept that sum in full settlement of the amount due. This would be consideration, even though Vanna has not agreed to anything new.

(4) Written Evidence -- If the debt is documented by a note or other written evidence, cancellation by the creditor and return of the written evidence to the debtor cancels the debt. "Cancellation" in this situation means that the effect of the note or other written evidence is destroyed or made invalid. A note is basically a document containing a promise from the signer (the maker of the promise) to pay a specified person (the holder of the note) a definite sum of money at a specified time.

For example, suppose Sathya holds a note which contains a promise by her neighbor Sethik to pay Sathya \$25 for a sewing machine she sold him before. Sethik still owes \$20 of this debt. Last month, Sethik's wife helped Sathya in many ways when Sathya was ill, and couldn't feed her children or run her household properly. Sathya is grateful and wishes to cancel the remainder of the debt between Sethik and herself. So Sathya writes the word "canceled" on the note and returns it to Sethik. Now Sethik no longer owes Sathya any money for the sewing machine. Sathya has effectively canceled the debt.

This kind of cancellation of a debt is comparable to a release. A release is basically a document signed by a party in which that party discharges a duty owed to him. Releases will be discussed in more detail in Chapter 9 ("Performance and Discharge of Duties"), Section 9.7b.

(5) Receipt in Full and Indication of Gift -- If the debtor pays a smaller sum than is due, and then the creditor provides a receipt in full (such as a promise to "cancel the balance") and some indication that a gift is being made of the balance, the debt is canceled. This kind of document could also be similar to a release, as discussed above.

For example, suppose Nara owes his mother \$18. So far, he has been able to repay only \$12. But it will be the New Year soon, and Nara's mother decides that as a New Year's present Nara will not have to pay her the balance (\$6). Therefore, Nara's mother sends him a receipt for the full amount and writes a letter explaining that he can consider the balance to be a gift to celebrate the New Year. In this situation, Nara no longer owes his mother any money.

As you can see, these exceptions to the general rule about part payment of a debt reduce the effect of the general rule a lot! But the general rule still applies in common law jurisdictions: in general, partial payment of a debt is not consideration for a creditor's promise to cancel the rest of the debt.

*** **ADDITIONAL REFERENCE:** Chapter 9 ("Performance and Discharge of Duties"), Section 9.7b contains further discussion of releases, Section 9.7c contains further discussion of substitute contracts, and Section 9.7d contains further discussion of accord and satisfaction.

3.7 Modifications of Existing Contracts Generally Require New Consideration on Each Side

When parties discuss changes to an existing contract, the general rule in most common law jurisdictions is that they are actually negotiating a new contract--which requires new consideration on both sides. The reason for this general rule is that, if there is no new consideration on each side, then not every party is actually agreeing to do something he did not have to do before! This would violate the pre-existing duty rule.

CASE STUDY 99

FACTS Late one dark and stormy night, a moto driver named Samnang agrees to take Sapor to Wat Phnom for 1,000 riels. However, on the way to the Wat, while the moto is traveling through a deserted part of the city, Samnang politely asks Sapor if she would not mind paying 2,000 riels for the ride. Sapor agrees.

QUESTION OF LAW Is Sapor's promise to pay 2,000 riels for the moto ride enforceable in common law jurisdictions?

DECISION No. Sapor's promise to pay the extra money is a modification of an existing contract that lacks consideration on one side, and so it is probably not enforceable.

Most common law jurisdictions require new consideration for modifications of contracts. In this case, Sapor agreed to do something new--pay an extra 1,000 riels to Samnang for her moto ride. But Samnang did not agree to do anything new. In fact, his only obligation remained his original one: to take Sapor to Wat Phnom. So there is no new consideration on Samnang's side, and no enforceable change to the existing contract. Unenforceable change = contract remains at 1,000 riels.

This general requirement of new consideration reduces the possibility of unfair demands being placed on a party. In particular, courts look closely at agreements to modify existing contracts for indications of conduct which shows a lack of real agreement, such as duress. For example, one party might agree to make a larger payment for the same performance from the other side if the first party fears the other side will not perform otherwise. This occurred in Case Study 93, and perhaps Case Study 99, above. This is especially true in situations where the first party might have trouble getting anyone else to perform the contract, without great trouble or expense. Contract law does not wish to encourage such situations. So most common law courts will generally refuse to enforce the contract as modified.

However, it appears some common law jurisdictions no longer require consideration in order for parties to make enforceable modifications of contracts. These jurisdictions have decided they want to give parties more flexibility to make modified agreements than the rule explained above would give. In such jurisdictions, as long as modified agreements have no other formation problem--such as duress--it appears that new consideration is not required.

In addition, many jurisdictions do not require consideration for contract modifications in certain special situations. Some of these are discussed in Section 3.7a below.

3.7a Exceptions to the General Rule about Modifications of Existing Contracts

However, sometimes this general rule about "new consideration" might actually hinder the parties from making contract modifications of their own free will. Therefore, courts will make exceptions to the general rule in certain circumstances.

As with the exceptions relating to part payment of a debt, some of these exceptions are actually situations where consideration (legal detriment) exists but is hard to see. Others are situations where there really appears to be no consideration, but instead some other public policy goal motivates the law to make the exception. Of course, it is important to remember that these exceptions apply only if both parties are making the modification of their own free will.

Specifically, many jurisdictions say that modifications of contracts may not need to be supported by new consideration where:

- (1) there is a mutual rescission;
- (2) the parties encounter substantial and unforeseen difficulties; or
- (3) there is a sale of goods contract, under certain commercial laws.

These exceptions are explained below.

(1) Mutual Rescission -- Some courts will find consideration in a modified agreement if they find that the parties have rescinded the original contract, so long as the original contract has not been fully performed on either side.

***** DEFINITION: Mutual rescission** basically means the cancellation of a contract by agreement of the parties.

In this situation involving a modified agreement, to rescind the contract means that the parties freely agree together to cancel the original contract. A mutual rescission can be express, or implied, as might occur where the parties show through their actions that they do not intend to perform the contract.

Common law jurisdictions generally say mutual rescission is possible only where the contract is not fully executed on either side. The reason for that rule is that, if either party has fully performed, the other party has no new legal detriment--since he would have already received full performance. After a mutual rescission, the parties generally have no right to be paid under the contract. However, they generally still have the right to restitution, under the doctrine of quasi-contract. Rescission will be explained in more detail in Chapter 9 ("Performance and Discharge of Duties"), Section 9.7a, and Chapter 10 ("Remedies").

(2) Unforeseen and Substantial Difficulties -- Some courts will enforce a modified agreement which seems to have no new consideration if one party has unforeseen and substantial difficulties in performing the contract, and these difficulties cause an additional burden on the party's performance.

However, it appears that these difficulties must generally be so severe that the original contract duties could actually be discharged under the doctrines of impracticability or impossibility. Impracticability and

impossibility are fairly complex subjects. They will be discussed in much more detail in Chapter 9 ("Performance and Discharge of Duties"). In any event, there is new consideration in this situation--one party is refraining from asking the court to excuse him from performance, and in return the other party is giving some new consideration! But it is not usually enough that the performance merely turns out to be more difficult than the party thought it would be, as with the fence building contract in Case Study 93, above. An example of a difficulty that would be severe enough would be if the government, in Case Study 93, actually banned the construction of fences around houses.

(3) Sale of Goods -- Some jurisdictions also make an exception with respect to the sale of goods. The commercial laws of these jurisdictions say that new consideration is generally not required for a valid modification of a contract for the sale of goods, as long as the modification is made in good faith by both parties. An example is the Uniform Commercial Code in the United States.

In general, this exception helps buyers and sellers adjust quickly to the changing nature of commercial transactions in the business world. Such parties can modify sales contracts as they see fit, without worrying about consideration. For example, a buyer and seller might agree that the price the buyer must pay for some cigarettes should actually be lower than they previously agreed. The reason might be that the cigarettes became of a lower quality on the way to the buyer's address. In a situation like that, the laws of some jurisdictions wish to allow the parties the flexibility to modify their contracts freely, to reflect the realities of the modern business world.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.5 discusses quasi-contract in more detail; Chapter 9 ("Performance and Discharge of Duties"), Section 9.7a contains further discussion of mutual rescission, and Section 9.8a contains further discussion of impracticability; and Chapter 10 ("Remedies") contains further discussion of remedies such as rescission and restitution.

3.8 Situations Where Consideration May Not Be Required

Although common law jurisdictions generally require consideration in order for a contract or promise to be enforceable, such jurisdictions do not require consideration in certain limited situations. In these situations, the law has some special reason to enforce the contract or promise despite the lack of consideration. These special reasons include the promotion of trade or charitable giving, or even moral obligation.

This text will briefly discuss seven of the special situations where many common law jurisdictions do not require consideration. These situations are where there are:

- (1) promises to make charitable contributions (voluntary subscription);
 - (2) new promises to pay debts discharged in bankruptcy;
 - (3) contracts under seal;
 - (4) new promises to fulfill contract obligations which are unenforceable because of statutes of limitation;
 - (5) new promises to fulfill contract obligations which are unenforceable because of failure to meet writing requirements;
 - (6) firm offers for and modifications of sale of goods contracts;
- AND (7) promises that meet the requirements of promissory estoppel.

These exceptions are explained in the Sections below.

3.8a Promises to Make Charitable Donations (Voluntary Subscription)

Sometimes people make promises to donate money (called pledges) to institutions that work for the public good--without receiving any apparent consideration from the institutions in return for their promises. Examples of such institutions are religious, educational, cultural or aid organizations such as The Asia Foundation. Most common law courts will enforce pledges to such institutions, even though there is no obvious consideration given in return for the pledges.

Several explanations exist for this exception to the general rule requiring consideration. One is that there actually is consideration to support each contributor's promise: it is the promises of other contributors. This may be similar to one explanation for the "composition of creditors" exception to the general rule about part payment of a debt, as discussed in Section 3.6a above. In effect, this theory says that each contributor is actually making a contract with all the other contributors, instead of with the institution that actually receives the money! But it is not clear that such an "agreement" would meet the other requirements for a valid contract, such as real agreement. Another theory might be that the charitable organization, by accepting the pledge, is actually making an implied promise to continue its good work--which might be a form of "legal detriment." Another theory is that the promise to donate is actually an offer for a unilateral contract, which the charity accepts when it incurs liabilities or spends money. Still another theory is similar to promissory estoppel, and says that charitable organizations justifiably rely on such promises in making their plans and commitments. Perhaps the best

(or most honest) explanation is that charitable pledges do not require consideration simply because the law wishes to promote charitable giving.

CASE STUDY 100

FACTS Sophornnara pledged 5,000 riels towards the building of Wat Thingy. Before Sophornnara actually gave the money to the charitable organization responsible for building the Wat, he went to take a look at the work in progress. But when he arrived at the building site, he was horrified to see that the Wat's architecture would not be classical Cambodian architecture. Instead, the new Wat would be futuristic! This was not Sophornnara's favorite style of architecture. Sophornnara regretted that he had not accepted the builders' invitation to see the construction site before he made his pledge.

Sophornnara decided that he would rather spend his 5,000 riels on a good meal than on this wat, and that he would not allow any of his money to be used for this project. He told the wat building organization that he would not fulfill his pledge.

Now the wat builders are asking the court to order Sophornnara to pay the amount he pledged.

QUESTION OF LAW Can Sophornnara avoid paying the 5,000 riels he pledged on the grounds that there was no consideration from the wat builders?

DECISION No. Sophornnara's pledge to the charitable organization responsible for building the wat created an enforceable obligation, and most courts would order Sophornnara to pay the 5,000 riels he promised.

Charitable contributions are an exception to the general common law rule requiring consideration in order for promises to be enforceable. So even though the charitable organization in this case did not explicitly promise Sophornnara that it would do anything, and even though there is no obvious consideration on the organization's side, Sophornnara's promise to the organization is still enforceable. He has a legal duty to pay 5,000 riels for the construction of the new wat.

3.8b New Promises to Pay Debts Discharged in Bankruptcy

The laws of some jurisdictions say that a debt discharged (or ended) after a court declares a person bankrupt can be renewed--that is, made enforceable again--by the debtor, even though there is no new consideration to support the debtor's promise.

In bankruptcy proceedings, courts often say that a bankrupt debtor does not have to pay some or even all of his debts. Courts do this in order to resolve the debtor's obligations and give him a chance to make a new financial start. However, under this exception to the general rule about consideration,

a bankrupt debtor's new promise to repay a debt can become enforceable against the debtor again--even though the bankruptcy court has already released the debtor from the obligation, and there is no new consideration. In many jurisdictions, this kind of obligation becomes enforceable again only where the debtor voluntarily agrees to pay the debt and the court approves.

3.8c Contracts under Seal

Contracts made under seal traditionally did not require consideration in order to be enforceable. It appears that contracts under seal are no longer used frequently in many common law jurisdictions. But they were used more frequently before the doctrine of consideration developed. It appears that a sealed writing required no consideration because the seal indicated by itself that the parties were serious about making an enforceable contract together.

Some jurisdictions have abolished the distinction between sealed (formal) and unsealed (simple) contracts completely, or at least done so with respect to certain kinds of contracts. For example, as noted in Chapter 1, ("Basic Aspects of Contract Law"), Section 1.3d, the Uniform Commercial Code in the United States has abolished this distinction as to the sale of goods.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3d contains further discussion of formal and simple contracts.

3.8d New Promises to Perform under Contracts Unenforceable Because of Statutes of Limitation

Sometimes people promise to pay a debt which, before the promise was made, could no longer be enforced because the relevant statute of limitations had expired. Such new promises to pay old debts do not require consideration in order to be enforceable.

*** **DEFINITION: Statutes of limitation** are laws which specify how much time a party has to make a certain kind of legal claim in court after the claim arises.

In general, these statutes are designed to promote finality in the law and in people's lives, and to force parties to make their legal claims while evidence is still useful. For example, under such a statute, parties may have a certain number of years to bring a claim for breach of contract. After that time passes, courts in that jurisdiction will generally not enforce that contract obligation even if it was valid before, because the time specified in the statute of limitations has passed.

However, if a debtor makes a new promise (express or implied) to the creditor to pay all or part of such a debt--after the statute of limitations has expired--no consideration is needed to make the new promise enforceable. Some jurisdictions require that the new promise be in writing. Other jurisdictions say that a promise to repay the debt may be implied merely

from the fact that the debtor makes a partial payment after the statute of limitations has expired, unless the debtor actually states that he is not promising to pay the rest of the debt!

***** CASE STUDY 101**

FACTS Samen and Sorit live in a jurisdiction where the statute of limitations for breach of contract actions is five years. Samen and Sorit make a valid contract for the sale of a new generator. Sorit delivers the generator soon after the time the contract is made, but Samen does not pay for it! Sorit asks for the money several times, but soon he becomes so busy with work that he forgets completely about the money.

One day six years later, Sorit sees Samen on the street and asks Samen for the money. At first, Samen refuses to pay, arguing that she no longer has any legal obligation to do so. But after speaking with a good friend about the matter, Samen decides she should pay for the generator after all. So she gives Sorit a signed document stating that she will in fact pay the full price of the generator within the next month.

QUESTION OF LAW Is Samen's new promise to pay for the generator enforceable?

DECISION Yes. Samen's new promise to pay Sorit for the generator is enforceable, because new promises to perform under contracts unenforceable because of statutes of limitation do not require new consideration.

In many jurisdictions, no consideration is required to support promises to perform under contracts that would otherwise be unenforceable because the statutes of limitation have expired. In this case, Sorit could no longer enforce Samen's obligation to pay for the generator she bought from him under the original contract after the five year statute of limitations had expired. However, Samen's new promise to pay for the generator revived her old legal obligation to pay for it--even though there was no new consideration! So Samen's new promise is enforceable.

3.8e New Promises to Perform under Contracts Unenforceable Because of Failure to Meet Writing Requirements

New promises to meet obligations which, before the promises were made, could no longer be enforced because of failure to meet writing requirements do not require consideration in order to be enforceable.

The laws of many jurisdictions say that certain kinds of contracts must be in writing in order to be enforceable. One common example is contracts for the sale of land. The general rule is that contracts which do not meet such writing requirements cannot be enforced, although there are limits on that general rule. This was briefly explained in Chapter 1 ("Basic Aspects

of Contract Law"), Section 1.4e, and will be discussed more fully in Chapter 6 ("Formality").

In any case, sometimes a party who has failed to meet a writing requirement later signs a memorandum or note which is sufficient to meet the writing requirement. In that situation, the new promise becomes enforceable, even though there is no new consideration.

*** **ADDITIONAL REFERENCE:** Chapter 6 ("Formality") contains a more complete discussion of writing requirements.

3.8f Firm Offers for and Modifications of Sale of Goods Contracts

Commercial laws in some jurisdictions make exceptions to the general rule requiring consideration with respect to certain situations related to sale of goods contracts. An example is the Uniform Commercial Code in the United States. Two of these exceptions are discussed below.

The first exception is that many jurisdictions say that firm offers do not require consideration in order to remain open for a reasonable time, even if the offeror wants to revoke before the end of that time. "Firm" or "irrevocable" offers for the sale of goods occur where the offeror signs a written offer containing a statement that the offer is "irrevocable," or that it "will be held open," or other similar language. The promises made in such firm offers really operate like option contracts--except that, unlike option contracts, no consideration is required for these offers to remain open! These kinds of offers were discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4c.

The second exception is that a valid modification of a contract for the sale of goods does not require new consideration, as long as the modification is made in good faith by both parties. This exception as to the sale of goods is discussed in more detail in Section 3.7a, above.

*** **ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4c contains further discussion of firm or irrevocable offers for the sale of goods.

3.8g Promises that Meet the Requirements of Promissory Estoppel

The doctrine of promissory estoppel basically says that if one person makes a promise to another person, and that other person justifiably relies on the promise, the promise may be enforced to the extent necessary to avoid injustice--even if there is no consideration! So if a promise meets the difficult requirements of promissory estoppel, then no consideration is required to make the promise enforceable by in court. This was already discussed in Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and is explained in more detail in Chapter 7 ("Other Contract Formation Problems"), Section 7.8.

***** ADDITIONAL REFERENCE:** Chapter 2 ("Real Agreement (Offer and Acceptance)"), Section 2.4e, and Chapter 7 ("Other Contract Formation Problems"), Section 7.8 contain more complete discussions of promissory estoppel.

3.9 Consideration in the Cambodian Legal Tradition and the Civil Law Tradition

Current Cambodian contract law and the civil law tradition do not require consideration in order for a contract to be valid. This Section will briefly describe this important difference between these legal traditions and the common law tradition.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia, Decree #38D (1988), does not require consideration in order for a contract to be valid. Cambodia's formal legal tradition has been influenced by the civil law tradition, particularly French law, and this appears to be reflected in its current law with regard to consideration. One potential result of the lack of a requirement of consideration under Cambodian law is that promises to make gifts could be enforceable.

Several articles in the Cambodian contract law do seem relevant to common law ideas about the role of consideration in contracts. These provisions are briefly examined below.

First, Article 3 of Decree #38D states that:

"Every contract is valid provided that it:

- arises out of a real and free agreement;
- is made by parties who have capacity to enter into a contract;
- has a subject matter that is certain, possible to perform, lawful and consistent with public order and good custom."

So Article 3 does not require consideration for a contract to be valid. Instead, it requires a real and free agreement, and also requires some of the other basic elements of a valid contract which this text has discussed.

However, Article 12 of Decree #38D does at least seem to acknowledge the idea of consideration. In fact, Article 12 appears to suggest that if the value of what each party gives in a contract is not equal, then the aggrieved party can sue to rescind (cancel) the contract. Article 12 states:

"When making a contract, if there is a difference between the agreed value of the subject matter and the value of the consideration in return, then the aggrieved party can sue to rescind the contract on the ground that he never intended the difference to be a gift."

This provision appears to allow parties to ask a court to rescind a contract on the grounds that there is a "difference" in the values of the consideration (i.e. a "bad deal"). The provision might be used to protect parties from contract formation problems such as fraud or duress, which certainly might result in "unequal" consideration. However, the provision would also arguably allow the rescission of contracts which are considered to be unfair--even slightly unfair.

If this latter situation occurred, it would be different from contract law in most free market jurisdictions. Free market courts generally will not intervene in this way with regard to contracts the parties made of their own free will, except in very limited cases where the agreement is considered so extremely unfair that a doctrine like unconscionability would apply. It seems likely that many if not most contracts arguably have some "difference" between the values of the consideration. Article 12 would appear to be designed to protect weaker parties from contracts that do not favor them, which is certainly a positive general goal. In practice, it might not always be the weaker party to a contract who would benefit from the court's protection under Article 12. In addition, as explained above, some parties might be reluctant to invest in a jurisdiction if they thought that they could not generally rely on their contracts, or that contracts might be canceled to benefit a particular party. This could have a negative effect on economic development.

Another relevant provision of Decree #38D is Article 5. Article 5 says contracts are void if they are not consistent with, among other things, "social interests" or "principles of social ethics." (Of course, Article 3 provided that such agreements are not valid.) It is not exactly clear what these phrases mean. As with Article 12, they state worthy general goals. A party could arguably use Article 5 to try to avoid a contract on the basis of unequal consideration. For example, a party might argue that it is against "social ethics" for a certain company to get a good deal, for a tenant to pay a very low rent, or for rice to cost so much. Article 5 raises some of the issues that are discussed above as to Article 12.

***** CIVIL LAW PERSPECTIVE:** As noted above, civil law jurisdictions do not require consideration in order for a contract to be valid. In fact, such jurisdictions generally enforce agreements without regard to whether there is any "consideration" or "legal detriment" on all sides of the agreement. So promises to make gifts may be enforceable in civil law jurisdictions.

The approaches of the civil law tradition and the common law tradition to substantive contract law are generally compatible. The lack of a consideration requirement in the civil law tradition may be the single most significant difference between the civil law approach and the common law approach to contract law.

3.10 Questions for Review

CHAPTER 3 -- QUESTIONS FOR REVIEW

1. Define consideration.
2. What is "legal detriment?"
3. Why do common law jurisdictions generally require consideration in order for a contract to be valid?
4. Must consideration be equal or "reasonably proportioned" on each side of a contract?
5. Name and explain five types of activities that are not generally consideration.
6. Explain what output contracts and requirements contracts are.
7. Is partial payment of a debt generally consideration for the creditor's promise to cancel the remainder of the debt?
8. What are some exceptions to the general rule above about partial payment of a debt?
9. Do modifications of existing contracts generally require new consideration?
10. What are some exceptions to the general rule above about modification of existing contracts?
11. Name and explain seven types of contracts or promises that do not require consideration to be enforceable, in many common law jurisdictions.
12. Does current Cambodian contract law require consideration in order for a valid contract to exist? What does it require?
13. Does the civil law tradition require consideration in order for a valid contract to exist?
14. Do you think it is a good idea to require consideration in order for a valid contract to exist?

