MIXED LEGAL SYSTEMS: VALUE, *CAUSA*, CONSIDERATION AND THE HOLDER IN DUE COURSE

ALEJANDRO NIETO VINCENTY*

INTRODUCTION

Puerto Rico adopted parts of the Uniform Commercial Code ("U.C.C.") by enacting the *Ley de Transacciones Comerciales* ("LTC") or Commercial Transactions Law in 1995.[1] Although the articles of the LTC are based on articles of the U.C.C., some of the translations have caused confusion. This is mainly due to the fact that contract concepts in Puerto Rico are based on civil law, not common law doctrines. Among the concepts that have cause this confusion are value and consideration as related to the Holder in Due Course ("H.D.C.") concept of Article 3 of the U.C.C.

This paper will discuss the controversy that results from the translation of the articles governing the concepts of value and consideration in the LTC. First, it will explain the definitions of value and consideration as stated in Article 3 of the U.C.C. Then, it will analyze the impact that the notion of value has as a requisite for qualification as an H.D.C. Lastly, it will study the similarities and differences between the terms *causa* in the civil law doctrine and consideration in the common law doctrine.

I. VALUE AND CONSIDERATION UNDER THE UNIFORM COMMERCIAL CODE

Under general contract law, when there is consideration, there is value and vice versa. That is, both concepts are deemed to be the same under general contract law.[2] Confirming this theory, the definition of value in Article 1 of the U.C.C. —

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[1] Exposición de Motivos, Ley de Transacciones Comerciales, Ley Núm. 208 de 17 de agosto de 1995, 1995 (Parte 1) LPR 1012.

[2] U.C.C. § 3-303, cmt.1(AM. LAW INST. & UNIF. LAW COMM'N 2017); 1 WILLIAM H LAWRENCE, COMMERCIAL PAPER AND PAYMENT SYSTEMS 6-5 (1990).

which expressly does not apply to Article 3 — states that value is, among other things, "any consideration sufficient to support a simple contract."[3] With this, it can be said that, unless we are dealing with Article 3 of the U.C.C., anything that represents consideration also represents value.[4]

Conversely, Article 3-303 of the U.C.C., which is used in the context of commercial transactions involving the issuance or transfer of negotiable instruments, modifies the general doctrine of consideration of the common law. Article 3-303 of the U.C.C. defines value and consideration as follows:

> (a) It shall be understood that an instrument is issued or transferred for value if:
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> (1) It is issued or transferred for a promise of performance, to the extent, the promise has been performed;
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> (2) the transferee acquires a security interest or another lien in the instrument other than a lien obtained by judicial proceeding;
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> (3) the instrument is issued or transferred as evidence, payment, or as security for an existing obligation of any person, whether the obligation is due;
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> (4) the instrument is issued or transferred in exchange for another negotiable instrument, or
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> (5) the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third person by the person taking the instrument.
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> (b) *Consideration.* — Means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration.[5]

Article 3-303(a) of the U.C.C. makes a distinction between value and consideration when parties are making transactions involving negotiable instruments. For transactions involving negotiable instruments, "'value' is a broader concept than 'consideration', for one can also give value by giving something that would not, because of the pre-existing duty rule, be consideration."[6] That is, under Article 3, one can give value by giving something that would not be consideration under general contract law and it is deemed given for consideration.

Article 3-303(b) — which is a defense that the maker of an instrument has when a negotiable instrument has been given without consideration — states that

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[3] U.C.C. § 1-204.
[4] U.C.C. § 3-303, cmt.1.
[5] U.C.C. § 3-303.
[6] E. ALLAN FARNSWORTH, NEGOTIABLE INSTRUMENTS CASES AND MATERIALS 65 (4th ed. 1993).

"[i]f an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration."[7] This means that, for Article 3 purposes, whenever there is value there is consideration, but whenever there is consideration there is not necessarily value. As William H. Lawrence states:

> The concepts of consideration and value are both relevant to the law of commercial paper, but they serve different purposes. Consideration is required for enforcement of the contract liability of a party to an instrument, and want or failure of consideration can be asserted as a defense against any person who does not have the right of a holder in due course. '"Consideration" refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him.' Value, on the other hand, is important to determine whether the holder of an instrument can qualify as a holder in due course. To qualify as a holder in due course, a holder must take an instrument for value, and value is not the equivalent of consideration.[8]

First, Article 3-303 states that an instrument is issued or transferred for value if it "is issued or transferred for a promise of performance, to the extent the promise has been performed."[9] This clause "requires that the consideration already have been given before it constitutes value."[10] Under contract law, "consideration should either be executory or executed, but not past."[11] This article of the U.C.C. eliminated the possibility of an executory consideration. This means that, contrary to the common law contracts doctrine of consideration where a promise to perform a service in the future is supported by consideration and value, under Article 3-303 a promise to perform in the future is supported by consideration but lacks value until the promise has been performed.

I will illustrate this with an example. Suppose that an Owner makes a contract with a Painter to paint his house for $1,000. Owner had in his possession a note of a $1,000 payable to bearer that he found on the front porch of his neighbor, Issuer. Owner had seen the note fall off Contractor's pocket when he was leaving Issuer's house after finishing a construction job. Owner, without telling Painter he found the instrument, gave Painter the negotiable instrument for his services. Painter accepted the note as payment. The contract between Owner and Painter stated that the work would be done in a month. Under the common law contracts doctrine of consideration, Painter has given consideration and value, and is thus the H.D.C. of the note. Nonetheless, under Article 3-303 of the U.C.C., there is consideration in the agreement made between Owner and Painter, but there is no value because the promise has not been performed yet.

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[7] U.C.C. § 3-303(b).
[8] 1 WILLIAM H LAWRENCE, COMMERCIAL PAPER AND PAYMENT SYSTEMS 6-5 (1990) (*citing* U.C.C. §3-303, cmt. 1).
[9] U.C.C. § 3-303(a)(1).
[10] LAWRENCE, *supra* note 8.
[11] Dimitar Stoyanov, *Causa and Consideration – A Comparative Overview*, 6 CHA KW SOC'Y J. 254, 261 (2016).

What is the effect of this distinction between value and consideration in Article 3 of the U.C.C.? Can Painter, in the previous example, enforce the note? The effect of this distinction is that Painter has not become an H.D.C. and whoever lost that instrument could claim ownership at any time before Painter performs his promise. Painter would also be open to the possibility of receiving claims and defenses from third parties over the instrument. This is because one of the requirements to become an H.D.C. is that the instrument has to be taken for value.[12] "In order to show that he is a good faith purchaser, not merely a donee, the person in possession of personal property must show that he gave value."[13] Painter may enforce the note because it was taken for consideration, but whoever lost the instrument has a defense in his favor until it has been taken for value.

Second, Article 3-303 states that an instrument is taken for value if "the transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding."[14] Following the example above, assume that Painter, before performing his promise to Owner, negotiated the note to Buyer who paid $800 in cash that same day. Buyer then went to Issuer to claim payment and Issuer refused to pay claiming that it lacked consideration under Article 3 of the U.C.C.[15] In this case, Issuer is wrong. Buyer is an H.D.C. because he acquired the note with value and consideration, and secured the note by paying $800. Therefore, the Issuer is obligated to pay the full $1,000 to the H.D.C., in this case Buyer.

Third, Article 3-303 states, "the instrument is issued or transferred as evidence, payment, or as security for an existing obligation of any person, whether or not the obligation is due."[16] Assume that Painter never sold the note to Buyer. Painter owes Creditor $1,000 for a work he did to his house months ago. Painter gave the note to Creditor before performing the job with Owner. In this case, Creditor is an H.D.C. because he received the note as payment for an existing obligation.

Article 3-303 contains another big difference from the doctrine of consideration under general contract law. As we discussed before, "consideration should either be executory or executed, but not past."[17] Past consideration is equal to no consideration outside Article 3 of the U.C.C.[18] Under Article 3-303 and following the example, the note was given for value because it was given in payment for an existing obligation. Even though under contract law there would be no consideration, here there is because Article 3-303 states that "[i]f an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration."[19]

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[12] U.C.C. § 3-302(a)(2)(i).
[13] FARNSWORTH, *supra* note 6.
[14] U.C.C. § 3-303(a)(2).
[15] U.C.C. § 3-303(b).
[16] U.C.C. § 3-303(a)(3).
[17] Dimitar Stoyanov, *supra* note 11.
[18] U.C.C. § 3-303, cmt. 1.
[19] U.C.C. § 3-303(b).

Finally, Article 3-303 contains two exceptions to the exclusion of executory promises from the definition of value under Article 3 of the U.C.C.[20] The article states that an instrument is issued or transferred for value if "[t]he instrument is issued or transferred in exchange for another negotiable instrument, . . . [o]r the instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third person by the person taking the instrument."[21] On this topic, William H. Lawrence states that:

> The code does not state when a commitment is irrevocable, but the policy involved makes it clear that the only commitment that qualifies is one the holder cannot rescind upon discovering a claim or defense to the transaction … The other circumstance in which a holder can take for value by giving an executory promise is when the holder issues his or her own negotiable instrument for it. The negotiable instrument would be comparable to an irrevocable commitment if it were negotiated to a holder in due course, because the drawer would be bound and unable to rescind the promise to pay. The Code recognizes value immediately upon issuance and does not require actual negotiation to a holder in due course.[22]

II. HOLDER IN DUE COURSE UNDER THE UNIFORM COMMERCIAL CODE

The importance of understanding the definition of value found in Article 3 of the U.C.C. is due to the application of value to the H.D.C. doctrine.[23] Value gives a holder of negotiable instruments the protections of an H.D.C., while consideration "is required for enforcement of the contract liability of a party to an instrument, and want or failure of consideration can be asserted as a defense against any person who does not have the rights of a holder in due course."[24] Now that we have explained what value and consideration are under Article 3-303 of the U.C.C., we will apply those definitions to Article 3-302 of the U.C.C., which establishes the H.D.C. doctrine.

It is public policy of the United States and Puerto Rico to promote free commerce.[25] This is achieved with the creation of legislation that promotes confidence and security in commercial transactions.[26] The H.D.C. doctrine is one of those provisions that provides this security and confidence. It provides the holder of a negotiable instrument a pass from any claim or defense against him.[27] Without this doctrine, the person in possession of a negotiable instrument would

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[20] LAWRENCE, *supra* note 8, at 6-9.
[21] U.C.C. § 3-303(a)(4)(5).
[22] LAWRENCE, *supra* note 8, at 6-9, 6-10.
[23] *Id.* at 6-6.
[24] *Id.* at 6-5.
[25] *See* 1 WILLIAM D. WARREN & STEVEN D. WALT, COMMERCIAL LAW 690-91 (9th ed. 2013).
[26] *Id.*
[27] U.C.C. § 3-302, cmt. 1.

be a mere holder.[28] A holder is a person entitled to enforce a negotiable instrument.[29] Article 3-301 defines a person entitled to enforce an instrument as:

> (i) [T]he holder of the instrument,
> (ii) a non-holder in possession of the instrument who has the rights of a holder, or
> (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.[30]

What is the difference between a mere holder and an H.D.C? The main difference is that, even though both can enforce an instrument, a mere holder must defend his possession against claims and defenses of someone claiming to have better rights over the instrument, while an H.D.C. does not. As William H. Lawrence explains:

> A purchaser's success against valid claims and defenses depends on whether the purchaser can assert the rights of a holder in due course. A purchaser who attains this status will take the instrument free from all claims to it and also free from most defenses. A holder in due course is also entitled to significant procedural advantages. Therefore, an understanding of the requirements to qualify as a holder in due course and the consequences of qualifying or not qualifying is essential.[31]

Article 1 of the U.C.C. defines holder as:

> (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
> (B) the person in possession of a document of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
> (C) the person in control of a negotiable electronic document of title.[32]

In summary, a holder is a payee in possession of the instrument or the person who possesses an instrument endorsed by the payee, or the person in possession when the instrument is payable to bearer. For the holder to have all the rights that the instrument provides, it is necessary that he be not just a mere holder. He must become an H.D.C. Article 3-302 of the U.C.C. defines a "holder in due course" as follows:

> (a) Subject to subsection (c) and Section 3-106(d), 'holder in due course' means the holder of an instrument if:

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[28] *See* FIDELMA WHITE, COMMERCIAL AND ECONOMIC LAW IN IRELAND 127 (2008); RICHARD B. HAGEDORN, THE LAW OF PROMISSORY NOTES 6-7 (1992).
[29] U.C.C. § 3-301; WHITE, *supra* note 28.
[30] U.C.C. § 3-301.
[31] LAWRENCE, *supra* note 8, at 6-3.
[32] U.C.C. § 1-201(21).

(1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
(2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in Section 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a).

(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

(c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

(d) If, under Section 3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

(e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

(f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

> (g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.[33]

Continuing with the example of the transaction between Owner and Painter in part II of this paper, remember that Owner — without telling Painter that he had found the note — gave Painter the negotiable instrument for his services. Painter accepted the note as payment. Suppose that Painter completed the work. In this case, Painter becomes an H.D.C. because he took the instrument for value and consideration, in good faith and without notice of it being stolen. Painter is, thus, going to get paid even though Contractor appears with a claim or defense. Contractor has other mechanisms in law to recuperate his loss. Now, if Painter had known that the note was stolen, he would have not become an H.D.C. In that case, it would have been unjust to give Painter the rights of the instrument over Contractor.[34]

Now, what if Painter had not originally known about the note being found, but came into notice of this before completing his job? Article 3-302 states that:

> If, under Section 3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.[35]

III. THE SYSTEMS COME TOGETHER

As mentioned in the introduction of this paper, Puerto Rico adopted parts of the U.C.C. by translating it from English to Spanish.[36] Some translations have created some confusion, including the translations of the terms value and consideration and their relationship with the civil law doctrine of *causa*.

The doctrine of *causa* in civil law and the doctrine of consideration in the common law have often been treated as equal terms because they have the same function.[37] Yet, although similar, they are not the same. Both concepts are similar in that they give legal validity to contracts that are made voluntarily and that meet all other legal requirements.[38] Although they share similar characteristics, they have considerable differences regarding their notions, the scope of their applications, the defenses available and their legal consequences.[39] These differences prevent the assertion that the first is an equivalent of the second.

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[33] U.C.C. § 3-302.
[34] LAWRENCE, *supra* note 8, at 6-7.
[35] U.C.C. § 3-302(d).
[36] *Id.*
[37] Ernes G. Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621, 621-22 (1919) *in* SELECTED READINGS ON THE LAW OF CONTRACT 565 (1931).
[38] William N. Keyes, *Cause and Consideration in California -- A Re-appraisal*, 47 CAL. L. REV. 74 at 87, 88 (1959); Lorenzen, *supra* note 387
[39] Stoyanov, *supra* note 11, at 254.

A. *CAUSA*: CIVIL LAW; GENERAL CONTRACT DOCTRINE

Causa, together with the will of the parties and the object for which they entered into a binding contract, gives validity to agreements between natural or legal parties.[40] Article 1207 of the Civil Code of Puerto Rico states that "[c]ontracting parties may establish agreements, which they deem convenient, provided that these are not contrary to the law, moral, or public order."[41] Article 1226 of the Civil Code then explains that "[i]n contracts, involving a valuable [*causa*], the prestation or promise of a thing or services by the other party is understood as a [*causa*] for each contracting party; in remuneratory contracts, the service or benefits remunerated, and in those of pure beneficence, the mere liberality of the benefactor."[42] Further, Article 1227 of the Civil Code states that "[c]ontracts without [*causa*] or with an illicit one have no effect whatsoever."[43] It explains that "[*causa*] is illicit when it is contrary to law and good morals."[44] Article 1228 of the Civil Code also states that "the statement of a false [*causa*] in contracts shall render them void, unless it be proven that they were based on another real and licit one."[45] And, lastly, Article 1229 of the Civil Code states that "[e]ven though the [*causa*] should not be expressed in the contract, it is presumed that it exists and that it is licit, unless the debtor proves the contrary."[46]

In short, the concept of *causa* could be considered as the legal reason for parties to enter into a binding contract or the motive that induces the act or contract. A contract in Puerto Rico and in other civil law countries is always presumed to have *causa* unless proven otherwise. For a contract to be valid in a country governed by the civil law it must not be deemed without *causa*.[47] As Ernest G. Lorenzen, a law professor at Yale University, states:

> A contract is deemed *without* cause if the parties did not have a serious intent to enter into a binding legal relationship, for example, if they were merely playing or joking. The transaction would be without cause also if the parties meant to bind themselves legally, but the contemplated object of the contract failed. The obligation of the purchaser of a chattel which has perished prior to the making of the contract is regarded as without cause. An obligation is said to have a false cause if the parties believed that a certain legal foundation for the promise existed when it did not exist in fact. An agreement on the part of A to pay to B a certain sum of money which he erroneously believed that he owed B would be an agreement based upon a false cause. Not frequently the terms "without cause" and "false cause" are used interchangeably. A contract has an illegal

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[40] CÓD. CIV. PR, art. 1213, 31 LPRA § 3391 (2010).
[41] CÓD. CIV. PR, art. 1207, 31 LPRA § 3372 (2010).
[42] CÓD. CIV. PR, art. 1213, 31 LPRA § 3431 (2010).
[43] CÓD. CIV. PR, art. 1213, 31 LPRA § 3432 (2010).
[44] *Id.*
[45] CÓD. CIV. PR, art. 1213, 31 LPRA § 3433 (2010).
[46] CÓD. CIV. PR, art. 1213, 31 LPRA § 3434 (2010).
[47] CÓD. CIV. PR art. 1227, 31 L.P.R.A. § 3432 (2010); *see* Lorenzen, *supra* note 37; *see also* Stoyanov, *supra* note 11, at 254.

> cause if the object contemplated 'is condemned by law. Article 1133 of the French Civil Code expresses this rule in the following words: 'The 'cause' is unlawful when it is prohibited by law, when it is contrary to good morals, or is against the public interests.'[48]

B. CONSIDERATION: COMMON LAW; GENERAL CONTRACT LAW DOCTRINE

Contrary to the civil law doctrine of *causa*, the doctrine of consideration is typical of the common law.[49] Historically in the common law, for contracts to be valid and thus enforceable, the agreement made between the parties must have consideration; it must provide something of sufficient value.[50] Sufficient value or consideration is not necessarily a monetary exchange; the key is that something must be given. The tendency is to require that for a contract to have consideration it must be bargained.[51] The Restatement of the Law of Contracts states in its restatement 17 that:

> (1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
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> (2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.[52]

Restatement 71 further states:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
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> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
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> (3) The performance may consist of
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> > (a) an act other than a promise, or
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> > (b) a forbearance, or
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> > (c) the creation, modification, or destruction of a legal relation.

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[48] Lorenzen, *supra* note 37, at 565, 633.

[49] Stoyanov, *supra* note 11, at 260.

[50] *Elements of Consideration*, SAM HUSTON STATE UNIVERSITY, https://www.shsu.edu/klett/ELEMENTS%20OF%20CONSIDERATION%20ch%2012.htm (last visited May 28, 2018); Nolo, *What Makes A Contract Valid?*, FORBES (Nov. 20, 2006, 2:46 PM), https://www.forbes.com/2006/11/20/smallbusiness-statelaw-gifts-ent-law-cx_nl_1120contracts.html#2590a2e96aff.

[51] RESTATEMENT (SECOND) OF CONTRACTS, §17(1) (AM. LAW INST.2D 1981).

[52] *Id.*

> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.[53]

C. *CAUSA* & CONSIDERATION

Since under consideration, for a contract to be enforceable it must be bargained, we can start seeing here the difference between consideration and *causa*. Contrary to *causa*, gratuitous promises, past performances, moral obligations, pre-existing duties, and illusory promises may not be enforceable under the doctrine of consideration because they lack a bargain. Scholars, such as Dimitar Stoyanov, have divided the doctrine of Consideration into three sub-principles to facilitate its application.[54]

The first sub-principle is that consideration should either be executory or executed, but not past.[55] "Consideration may be *executory* when a promise is made in return of a counter-promise by the other party and *executed* when it is made in return for the performance of an act."[56] Furthermore, "[w]henever the plaintiff purports to enforce a transaction, he must be able to prove that his promise (or act) together with the defendant's promise, constitute one single transaction and there is interdependence between them."[57] However, as Stoyanov explains, "where the defendant has made a further promise, subsequent to and independent of the underlying transaction between the parties, it should be regarded as a sign of gratitude for past favors or a gift, and no contract can arise since there is a 'past consideration.'"[58] Past consideration is equal to no consideration because "it confers no benefit on the promisor and involves no detriment to the promise in return for the promise."[59]

The second sub-principle is that consideration must move from the promisee.[60] As Stoyanov explains:

> This means that a promise can be enforced whenever the promisee has paid for it and there is a bargain. In the cases where the promise was not made by deed and the promisee did not provide consideration, no enforcement is allowed. At the same time this element means that even when the promise is supported by consideration provided by the promisee, consideration must move from the claimant, i.e. the person seeking to enforce the contract must have provided the consideration himself. However, the application of this principle should lead to the conclusion that a

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[53] RESTATEMENT (SECOND) OF CONTRACTS, §71 (AM. LAW INST.2D 1981).
[54] Stoyanov, *supra* note 11, at 261.
[55] *Id.*
[56] *Id.* (*citing* MICHAEL P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 74 (1991)).
[57] *Id.*
[58] *Id.*
[59] Stoyanov, *supra* note 11, at 261.
[60] *Id.*

> promisee cannot enforce a promise made to him where the consideration for the promise has been provided by someone else.[61]

The third sub-principle requires that consideration be real; that is, that it be "something which is of some value in the eye of the law."[62] Thus, "case law has consistently declined to accept as consideration the case where a party refrains 'from a course of action which he has never intended to pursue.'"[63] Furthermore, consideration is also deemed unreal "whenever there is an impossibility, physical or legal, at the time of formation of the contract … [and] [w]henever a promise leaves the performance exclusively in the discretion of the promisor." [64]

In short, the concept of consideration could be deemed as a measure of the value an agreement has "in the eye of the law."[65] However, this does not mean that courts do not enforce a agreement made without consideration. Contrary to jurisdictions governed by civil law, where a pact without *causa* cannot be legally enforced, courts governed by common law principles have made some exceptions and have enforced gratuitous, past or moral obligations even though they lack consideration by using principles like the quasi-contract and the promissory estoppel doctrines.[66] Stoyanov perfectly summarizes the differences between *causa* and consideration as follows:

> First, causa is an element necessary for more than just the plain formation of all contracts in civil law. It is used to invalidate unlawful or immoral transactions and justifies the consequences that follow from an excusable failure to perform one of the obligations on a bilateral contract. It can be said that causa accompanies the contract from its formation until its discharge. On the contrary, the doctrine of consideration imposes a standard solely for the formation of an onerous contract, since a gratuitous promise must be performed in the form of a 'deed' to be enforceable. Afterwards, there are several other legal figures, known to English law that are used to perform control over unlawful or immoral transactions or the excusable failure to perform, such as illegality, mistake and frustration. This means that consideration itself cannot carry out the functions of causa. Thus, a contract, supported by consideration, could be declared void from the outset for lack of causa or unlawful causa. That is why it can be assumed that the notion of causa and its scope of application are considerably wider than the doctrine of consideration.[67]

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[61] *Id.*

[62] *Id. (citing* Guenter Treitel, The Law of Contract *83 (2003);* Paul Richards, Law of Contract *62 (2009))*.

[63] *Id.* at 162 (*citing* Arrale v. Costain Civil Engineering Ltd. [1976] 1 Lloyd's Rep. 98 (AC) (Eng.)).

[64] *Id.*

[65] *Id.* at 261 (*citing* Guenter Treitel, The Law of Contract 83 (2003)).

[66] 3 Samuel Williston & Richard A. Lord, A Treatise on The Law of Contracts (4 ed. 2008).

[67] Stoyanov, *supra* note 11, at 263.

D. TRANSLATION OF CONSIDERATION AS *CAUSA*

Now that we have explained the difference between the concepts of *causa* and consideration in both the civil and common law, we will explain the controversy presented by the translation from the U.C.C. to the LTC of the articles governing the concepts of value and consideration. Section 2-303 of the LTC defines *causa* as:

> [A]ny [onerous *causa*] sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration. If an instrument is issued for a promise of performance, the issuer has a defense to the extent performance of the promise is due and the promise has not been performed. If an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for consideration.[68]

As shown in section 2-303 of the LTC, legislators have not only translated consideration as *causa*; they have stated that *causa* means any onerous cause sufficient to support a simple contract. This means that there must not only be *causa*, but that the *causa* must be onerous. In the civil law, 'onerous' is something that implicates some sacrifice accompanied by some benefit.[69] It does not necessarily mean that there has to be a sacrifice of monetary value; it can be a performance or a promise to make some performance in the future. Like the doctrine of consideration, in onerous *causa* something must be given. The Supreme Court of Puerto Rico defined what an onerous *causa* is in *Banco de Santander v. Rosario Cirino*, 126 DPR 591 (1990). The opinion states that an onerous *causa* "requires that the acquisition be made through a bilateral agreement with reciprocal obligations. The definition excludes donees; and the determination of whether the business or agreement was onerous or gratuitous should be done in accordance with pure civil law."[70] It is logical and inescapable that gratuitous acquisitions are excluded from its definition. However, under Puerto Rico general contract law doctrine, there is *causa* when donations or gratuitous promises are made.[71] It is evident how much more similar the concept of onerous *causa* is to the concept of consideration under the common law where a gratuitous promise of performance is deemed without consideration.[72] However, it would not be right to say that consideration is equal to onerous *causa* because they still have some differences. For example, consideration should either be executory or executed, but not past. There is no reason why an onerous *causa* cannot be past.

The Supreme Court of Puerto Rico has said that onerous *causa* requires that the acquisition be made through a bilateral legal business.[73] This means that a unilateral contract cannot be onerous. If there were only to be onerous *causa* when

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[68] Ley de Transacciones Comerciales, 19 LPRA § 603(b) (1995).
[69] Banco de Santander de P.R. v. Rosario Cirino, 126 DPR 591, 607 (1990).
[70] *Id.* (unofficial translation).
[71] CÓD. CIV. PR art. 1226, 31 LPRA § 3431 (2010).
[72] Joseph H. Drake, *Consideration v. Causa in Roman-American Law*, 4 MICH. L. REV.19, 19-20 (1906).
[73] *Banco de Santander*, 126 DPR, at 607.

involved in a bilateral business, some negotiable instruments could be deemed out of the protection of the H.D.C. given by the LTC, for example, a promissory note involving a loan, which is a unilateral business.[74] Even though the Supreme Court definition of onerous *causa* excludes unilateral contracts, some scholars have said that the definition does not exclude all unilateral contracts. Spanish scholar José Puig Brutau states:

> The onerousness does not necessarily require the simultaneous connection of two obligations, it may result from obligations born successively or of benefits made that way, so that the counterpart of an obligation does not arise until the other party has actually delivered a thing. The classic example is the mutual one with interest, from which the only obligations arise from the borrower, so it is not synallagmatic but unilateral, and it is onerous. Therefore, onerosity refers to patrimonial attributions, while synallagma refers to obligations as a causal link between two performance obligations.[75]

We can take from this statement that an onerous business does not necessarily entail a bilateral relationship. An onerous business can be a loan although it is a unilateral contract. Thus, a promissory note involving a loan should be considered to have onerous *causa* for LTC purposes.

Another important aspect of the definition given by the Supreme Court of Puerto Rico about onerous *causa* is that "the determination of whether the business was onerous or gratuitous should be done in accordance with pure civil law."[76] This is a problem especially since the LTC is a direct translation of the U.C.C., a code created to be used in common law jurisdictions. The problems associated with the adoption of concepts that come from the common law into civil law jurisdictions are clear and have great consequences. Legislators in Puerto Rico must take the necessary measures to ensure that when incorporating concepts from the common law into our civil law doctrines, the concepts used are the equivalent in both systems of law. It is not enough that they are similar. It is important that, in a country with two basis of law, their legislators know the doctrines used in both systems of laws and their equivalent. If there is no equivalent, a new doctrine should be born or at least it should be clear which concept they want to incorporate; the one that comes from the civil law or the one that comes from the common law. This way, a judge can rest his decisions on the correct doctrine.

CONCLUSION

Under general contract law in common law jurisdictions, when there is consideration there is value and vice versa. However, this is not the case under Article 3 of the U.C.C. with regards to negotiable instruments. Furthermore, *causa*

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[74] *See* 2 LUIS DÍEZ-PICAZO & ANTONIO GULLÓN, SISTEMA DE DERECHO CIVIL (9 ed. 2001).
[75] 1-II JOSÉ P. BRUTAU, FUNDAMENTOS DE DERECHO CIVIL 113 (4 ed. 1988) (unofficial translation).
[76] *Banco de Santander*, 126 DPR, at 607 (unofficial translation).

is a broader civil law concept, which entails that whenever there is *causa* there is also consideration, yet when there is consideration there is not necessarily *causa* since consideration does not include, among other things, gratuitous promises and past performances.

That being said, both the U.C.C. and the LTC state that it shall be understood that an instrument is issued or transferred for value if, among other things, it is issued or transferred for a promise of performance, to the extent, the promise has been performed.[77] Part (b) of section 2-303 of the LTC states that "if an instrument is issued for value as stated in subsection (a) of this section, the instrument is also issued for [causa]."[78] This could mean that whenever there is value there is *causa* but when there is *causa* there is not necessarily value. However, since that same section states that *causa* is any onerous *causa* sufficient to support a simple contract, what this really means is that whenever there is value there is onerous *causa* but when there is onerous *causa* there is not necessarily value. Both the U.C.C. and the LTC separate or distinguish value from consideration and *causa*.

By requiring an onerous *causa* and not just *causa* in Article 2-303 of the LTC, does this make the concept of consideration equivalent to *causa*? We conclude that it does not. As shown in this paper, even though very similar, onerous *causa* and consideration still have some differences. There will be some instances where *causa* and consideration will be the same, but it would not be correct to say that consideration is equal to onerous *causa*. For example, consideration should either be executory or executed, but not past. There is no reason why an onerous *causa* cannot be past.

Treating two different concepts as equal can cause problems and affect the rights of the people involved in commercial transactions since the scope of *causa* is much broader than the scope of consideration. Because *causa*, onerous *causa* and consideration are proven not to be the same, what happens when a judge in Puerto Rico tries to enforce an article of the LTC? As we stated before, the Supreme Court of Puerto Rico has said that the determinations of whether a contract was onerous or gratuitous should be done in accordance with pure civil law.[79] So, what is the correct term to use when introducing the consideration doctrine to the civil law? There is no correct term. The consideration doctrine found in Article 3 of the U.C.C. is not the consideration doctrine used under the common law general contract law, which can be executory or executed. Under the U.C.C., it can only be executed with two specific scenarios where consideration can be executory. Another difference from the doctrine of consideration under general contract law and the doctrine of consideration under Article 3 of the U.C.C. is that past consideration is permitted under the U.C.C., whereas under the general contract laws it is not.

In civil law there is no equivalent concept of the consideration found on the common law. We know that *causa* is a wider concept and includes consideration thus value, but there is no equivalent term in both systems of law. If this problem emerges in a jurisdiction governed by the civil law only, a new modality of the

[77] Ley de Transacciones Comerciales, 19 LPRA § 603(a)(1) (1995); U.C.C. § 3-303(a)(1).
[78] 19 LPRA § 603(b) (1995).
[79] *Banco de Santander*, 126 DPR, at 607 (unofficial translation).

doctrine of *causa* should arise. But in Puerto Rico, where there is a mixture of both the common and civil law, the LTC should just provide the correct definition for purposes of the article. *Causa* and consideration cannot be treated as equals. It is irresponsible for legislators in Puerto Rico to translate and implement a concept without going into detail about its meaning. These adoptions can create confusion when judges are interpreting the law and affect the rights of the people involved in a transaction under the LTC.