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Indralaya, Januari 2007

Redaksi
The Comparison of the Consideration Concept in Common Law and Civil Law and Its Implication to Business Practice

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Abstract: The concept of contract in common law countries is more restricted than in civil law countries. In common law such as Australia, the essential elements are offer, acceptance, intention and consideration. In civil law countries, such as French law, the essential elements for valid contract are consent of the person who places himself under an obligation, capacity to contract, an objet which is certain and which forms the subject matter of the agreement and one cause which is legal. In Germany law, essential elements for valid contract are consent of the parties expressed by means of their statement of will which communicate with each other, capacity of each person and possibility that determine as objectively possible of performance when a contract occur. However, besides others three essential elements in Australian common law system, one element which does not like in civil law system is consideration. Consideration may be a promise to do something, not to do something, doing something, abstaining from doing something, an advantage flowing to the promisor, an advantage flowing to a third person at the promisor’s direction or a disadvantage to the promise. In this context, if an agreement occurs without something value as an exchange no matter how small it is, it is not a contract. In civil law, the nearest concept parallel to consideration concept in common law is cause in French law. While, in German, not only consideration concept but also cause are not familiar. Both consideration and cause concept have an effect to contract if consideration element or cause element is not present in a contract. Legal effect to this contract may be a contract will not be enforce by a court or unenforceable contract; maybe will not arise rights and obligations among parties or void contract; maybe capable of being set aside or voidable contract; or maybe a contract is illegal which is prohibited by the law et al.

Kata Kunci: Contract, Consideration, Cause

A. Introduction

Today, which relationship among humans more intensively, role of laws are more and more important to make guidelines and law and order in communities. As Beazer has indicated society creates laws as rule of playing for them to examine conduct or behaviour to be right or wrong, or acceptable or not. Law gives some hints for people to interact and to communicate one to each other and enforce them when a breach happened. Generally accepted, in contract, society provides freedom for parties to create their contract, they can create

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their own rights and obligations among them. However, this freedom must be regulated by law. Law in this term gives legal effect for parties.

Although many laws are similar in different societies, for an instance murder is crime in criminal law, laws can differ from one society to each other. Culture, history, customs and religion have contributed to this differentiation. These factors have a big impact to form legal system in modern state, especially historical factor since interaction among countries and correlation between colonial country and their colony in the past.

Broadly speaking, there are some legal systems all around the world. These legal systems are common law countries such as the United Kingdom and their colony including the United States of America and Australia, civil law countries such as France, Germany, Switzerland and Indonesia, bureaucratic law such as North Korea and China and the last, legal system which is based on religion such as most countries in East Asia, Saudi Arabia and Iran.

However, this essay only examines comparison of common law and civil law systems related to consideration concept in contract law. Common law system refers to Australian law and civil law system refers to some countries such as French and German law. The reason why French and German law are examined, because countries under civil law system are divided into two groups, Romano-Germanic and French systems, so, this essay only examines one country in Romano-Germanic, German and one country in French system, French law. At the end this essay assessed the implication of this concept in relation to business practice.

B. Contract Law and Elements of Valid Contract

The concept of contract has not the same meaning in the different legal system. In common law countries, the concept of contract is more restricted than in civil law countries. Sweeney and O’Reilly have suggested that a contract in common law is basically an agreement involving two or more parties which will be enforced by a court of law.

In civil law countries, definition of contract differs from one to each other. For example in France, contract is defined as an agreement by which one or more people force themselves to give, to do or not to do anything. In addition, Under German doctrine and the Bürgerliches Gesetzbuch (BGB), for example, do not define what a contract is. Definition of contract in Germany can be found

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2 Ibid.
6 Ibid.
in Larenz as cited by Silva as an agreement between the parties that want to create a right that cause effect among them.\(^7\)

Based on examples of two systems' definition above, the indications are therefore similarly that a contract requires two or more parties. Clearly, there is no contract exist if only one party be present. Also, it may not be said as a contract if a contract is forced by one party.

However, to examine whether or not a valid contract, there are some elements must be provided. In common law such as Australia, the essential elements are offer, acceptance, intention and consideration.\(^8\) In civil law countries, such as French law, the essential elements for valid contract are consent of the person who places himself under an obligation, capacity to contract, *un objet* which is certain and which forms the subject matter of the agreement and *une cause* which is legal.\(^9\) Whereas, essential elements for valid contract in German law are consent of the parties expressed by means of their statement of will which communicate with each other, capacity of each person and possibility that determine as objectively possible of performance when a contract occur.\(^10\)

As essential elements, all of these elements must be present in a contract. If one or some of these elements are no present in a contract, a contract may be an unenforceable; will not be enforce by a court, void; there is no rights and obligation arise, voidable; capable of being set aside, or illegal; a contract which is prohibited by the law.

Given essential elements for valid contract among three countries above, it can be seen that element offer and acceptance and intention in Australian contract law, element consent and capacity in both countries French and German Law, have not too contrary one to each others. Broadly speaking, a contract requires agreement among the parties and must intend their agreement to have legal effect.

However, besides others three essential elements in Australian common law system, one element which does not like in civil law system is consideration. Consideration as well as other elements is essential too to establish a valid contract. For example, if X offers to give his motor cycle to Y, and Y accepts it, it is not a contract but an agreement.

Description below will discuss concept of consideration in Australia under common law system and comparison to countries under civil law system.

\(^7\) Ibid.

\(^8\) Brendan Sweeney and Jennifer O'Reilly, above n4, 94.


\(^10\) Ibid.
C. The Concept of Consideration and Cause

Under common law concept, such as Australia, definition of consideration is:

*The inducement, price or motive that causes a party to enter into an agreement or contract.*

In *Dunlop Pneumatic Tyre Co v Selfridge & Co* (1915) AC 847, Lord Dunedin defined consideration as:

*...an act of forbearance of the one party for the promise thereof is the price for which the promise is bought and the promise thus given for value is enforceable.*

Based on this understanding, price or motive is given in exchange for getting something from other’s promise and it must have a value. Consideration may be a promise to do something, not to do something, doing something, abstaining from doing something, an advantage flowing to the promisor, an advantage flowing to a third person at the promisor’s direction or a disadvantage to the promise. Once more, in this context, if an agreement occurs without something value as an exchange no matter how small it is, it is not a contract. This is what Fifoot called, as cited by Silva as a deed or an act under seal.

This situation is just like a unilateral contract in civil law system which a formal act that implies an obligation without consideration. In addition, a unilateral contract in common law is defined as one in which only one of the parties makes a promise to another in return for another party behaving specified manner without another party to do so. An example case for this is *Carlii v Carbolic Smoke Ball Co* [1983] 1 QB 256, which the person offering the reward promises to pay it to whoever acts in the particular manner. Moreover, a bilateral contract under common law system is one where both the parties to the contract have an obligation to perform. For example, if someone has a contract with another to sale his motorcycle, he has an obligation to transfer ownership of that motorcycle, while another party has obligation of paying purchase price to him.

However, Clarke, Gamble and Brebner, state that promises will be binding among the parties only if consideration is provided for the parties, but it is not for

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13 Brendan Sweeney and Jennifer O’Reilly, above 9.
14 Antonio Silva, above n 8.
15 Ibid.
16 Sam Cusumano, above n 12, 7
17 Ibid.
a promise is made under seal or deed and the doctrine of promissory estoppel.\textsuperscript{18} The latter is what they call as two exceptions.

In civil law, the nearest concept parallel to consideration concept in common law is cause in French law.\textsuperscript{19} Both consideration and cause require good deal for parties and not only for one party as being legally enforceable. In French law cause can be divided into two meaning in its application. First, absence of cause is a matter of objective determination and concerned with the cause of obligation.\textsuperscript{20} For example, cause in contract of sale a motorcycle is obligation for buyer to pay price and deliver and transfer a motorcycle by seller. In this term the objective determination will determine out of any of party involved such as motives of the parties. Second, illicite of cause is subjective examination of particular reasons which determined parties to enter into the contract and concerned with the cause of the contract.\textsuperscript{21} In the illicite cause, the subjective examination will determine a matter of immoral or illegal motive of the parties involved. While, in German contract law, not only consideration concept but also cause are not familiar.

However, different with consideration concept where consideration depend on the parties to consider what is consideration for their contract whatever small it is but have a value, in cause concept, as Marsh have pointed out, 'cause varies according to the class of contract and not according to the parties to the contract'.\textsuperscript{22} Furthermore, in common law, a moral obligation to perform a promise does not constitute good consideration. We can see this view in Thomas v Thomas (1842) 114 ER 330 as follows:

\textit{Motive is not the same thing with consideration. Consideration means something which is of value in the eyes of the law, moving from plaintiff \ldots respect for the wishes of the testator, does not in any way move from the plaintiff. It move from the testator.}\textsuperscript{23}

In the cause concept motive especially illicite or immoral may be a reason to entering into the contract. This statement was strengthen by Cour de cassation on 4 January 1956 in an \textit{arret de principe} that a contract \textit{a titre onereux} was only void if the illicite or immoral purpose was agreed by both parties.\textsuperscript{24} For example in this context, operation of brothel will be void both for contract itself and anything that have correlation to the employment there of domestic servant.\textsuperscript{25}

\textsuperscript{18} Philip Clarke, Roger Gamble and Julie Brebner, \textit{Contract Law} (2\textsuperscript{nd} ed, 2000), p. 55.
\textsuperscript{19} P. D. V. Marsh, above n 9, p. 95.
\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid, 96.
\textsuperscript{23} Ibid, 32.
\textsuperscript{24} P. D. V. Marsh, above n 22, 99.
\textsuperscript{25} Ibid.
In addition to explanation above, purpose is important thing in cause. But in consideration term, purpose has no correlation to legally enforceable if a promise has no valuable consideration that recognized by law.

D. The Implications of Consideration and Cause Concepts In Relation To Business Practices

Commercial necessity is principal rationale for the existence of contract law. The production, distribution and exchange of goods and service depend on promises as well as buyers, sellers and payments matters involved promises. That is why the law enforces certain promise. In the consideration and cause context, these concepts have some implication to business practices.

Firstly, in the cause concept a party may be informally enter a unilateral contractual obligation. He or she may, without consideration, validly remit debts, extent the time limit for performance or agree to any change of contractual conditions favoring the other party exclusively, but not for the illicit cause when the parties have immoral purpose. In consideration concept, the absence of consideration constitutes a ground for special formal requirements corresponding to those existing for deeds. However, in cause concept unilateral contractual would be valid, whether or not a titre onereux or a titre gratuity, this contract has une cause legitime.

Secondly, motive or purpose of parties to conduct a contract under cause in civil law system requires not breach moral of society or public policy. However, in consideration in common law has nothing to do with purpose or motive. It is only enforceable for business practice to conduct a contract if given in exchange a valuable consideration.

Finally, both consideration and cause concept have an effect to contract if consideration element or cause element is not present in a contract. Legal effect to this contract may be a contract will not be enforce by a court or unenforceable contract; maybe will not arise rights and obligations among parties or void contract; maybe capable of being set aside or voidable contract; or maybe a contract is illegal which is prohibited by the law et all.

These implications have a big influence in business, because broadly speaking if there is no element consideration or cause in contract, there is no guidelines for people to fulfill their interest.

E. Conclusion

Society provides freedom for parties to create their own rights and obligations among them in contract. However, contract law gives legal effect for

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26 Philip Clarke, Roger Gamble and Julie Brebner, aboven 18, 5.
27 Ibid.
28 P. D. V. Marsh, above n 25, 104.
parties. There are some legal systems all around the world. Two of them are common law and civil law systems. In this two system a contract requires two or more parties. However, in essential elements to examine whether or not a valid contract, consideration element is only known in common law system. In civil law system, such as French law, cause is the nearest concept parallel to consideration concept. Both consideration and cause require good deal for parties and not only for one party as being legally enforceable. Cause varies according to the class of contract and not according to the parties, but consideration depend on the parties to consider what is consideration for their contract. Furthermore, in common law, a moral obligation to perform a promise does not constitute good consideration. In the cause concept motive especially illict or immoral may be a reason to entering into the contract.

Commercial necessity is principal rationale for the existence of contract law. The implications of consideration and cause concept can be listed as; cause and consideration are important element that must be present for enforceable and valid; motive or purpose will be examined depend on which legal system is used. In civil law motive or purpose is important in cause element, but not for consideration element under common law system; and both consideration and cause concept have an effect to unenforceable, void, voidable or illegal.

Legal effect in contract law is important thing to give guidelines and hints for people in their business relation. However, some countries have their own legal system. Whatever system a country has, the output is to achieve law and order among them.
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