CAUSA AND CONSIDERATION – A COMPARATIVE OVERVIEW

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Abstract

The article examines the Roman origin and historical development of "causa" as an essential requirement of the contracts, as well as its adoption in the majority of the national legislations belonging to the French legal family. Moreover, the article analyzes what has become to be known as the functional equivalent of causa in the English law – the doctrine of consideration and examines the correlation between them. In the end, the latest tendencies in codifying the European civil law with respect to causa and consideration are being critically discussed.

Keywords: *causa, consideration, mixed legal systems, comparative law, European private law*.

1. Introduction

There is hardly any major national legislation that does not contain any rules on contracts and their formation. Being looked upon as the most important consequence of the autonomy of the will, contracts serve as the founding stone of modern socio-economic life. Yet, the unrestricted application of this philosophical doctrine, as profound as it might be, could lead to results which cannot be considered appropriate, since virtually every promise would be treated as legally binding. Throughout the development of transactions, scholars and legislators have sought to establish numerous legal criteria to determine whether an expression of will is itself capable of producing the designated legal effect. These efforts were intended not only to protect the legal interests of the contracting parties by providing an obstacle to their desire or promise, but also to protect the interests of the whole society by promoting legal security in transactions.

The most notable examples of such criteria can be found in the necessity to observe a specific form or to hand over the goods ('traditio') in order to consider oneself bound by a contract. Thus, by providing additional requirements to the process of expressing one's will a clear distinction between enforceable promises and simple arrangements could easily be established. However, this model of extreme formalism that dominated the rules of almost every ancient society (the most notable example being the law in Ancient Rome) suffered gradual weakening after the collapse of the Roman Empire. The canonist lawyers were seeking to strike a balance between the classical Roman texts and the new socio-economical situation in Europe, putting consensual contracts in a rather favourable position compared to the formal ones. Their interpretation of Roman texts influenced the future development of private law. Several centuries later, with the new era of Enlightenment, the autonomy of the will was established as the founding stone of modern contract law. Still, continental lawyers from that period had to answer the question how to

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distinguish between enforceable promises and accidental agreements when additional requirements were considered to be an exception rather than a rule. The need to establish new abstract criteria to be used as an essential element of the validity of contracts and as indicia of seriousness brought the modern theory of causa to life.

However, Roman law did not play a significant part in moulding modern private law everywhere in Europe. This is the reason why English common law did not adopt the concept of causa, but rather developed its own methods to determine which promises could be enforceable and the ultimate result of this process, lasting for centuries, became known as the doctrine of consideration.

The similarity of the two concepts is beyond doubt. They share some common features, yet there is a considerable difference in terms of notion, scope of application and legal consequences between them, which prevents the statement that the former is a complete functional equivalent of the latter.

Moreover, there is a third group of national legislations where neither causa nor consideration is acknowledged as a vital element of the contracts. It is sufficient for an agreement to be both valid and enforceable when there is mutual consent of the parties upon its primary points.

The main aim of this article is to analyse these three types of legal approach to the question how to distinguish between a simple agreement and a valid contract by presenting the theory of causa and the doctrine of consideration in a comparative perspective, trace its origin, present and future tendencies.

2. Origin of the causa

As far as the origin of causa is concerned, many authors state is that it is a totally un-Roman concept[1], that no general theory of causa could be deduced from the Roman texts[2] and even that having such an abstract principle was impossible for the Romans because of the primitivism of their legal system that excluded any possibility of dealing with abstractions[3]. Although the presence of causa as a concept in Roman private law is admitted by a few scholars, they point out that it was used in various senses, differing immensely from the modern notion of causa[4]. The vast majority of the authors agree upon the fact that the earliest ideas of causa emerged as the result of the canonists' interpretations; a sophisticated medieval attempt to generalise various figures belonging to Roman private law[5]. St. Thomas Aquinas developed the idea that every effect is dependent upon its reason (causa) and causa is something without which a thing cannot exist. If everything is based on a causa, he said, this should apply to contracts as well. Influenced by St. Thomas Acquinas, the glossator Baldus, while interpreting the Roman contract of stipulation, stated that all contracts have a causa – the "nominate" carry it within themselves, while the abstract (such as the stipulation) receive it from outside[6]. Other scholars assume that the origin of causa can be found several centuries later, when the

[1] Zimmermann, R., *The Law of Obligations. Roman Foundations of the Civilian Tradition*, (Cape Town, Wetton, Johannesburg: Juta & Co, Ltd, 1992), 549.

[2] Lorenzen, E., "Causa and Consideration in the Law of Contracts", *Yale Law Journal* 7 (1919): 630.

[3] Peterson, S., "The Evolution of "Causa" in the Contractual Obligations of the Civil Law" *Bulletin of the University of Texas*, 46 (1905): 39.

[4] Daruwala, P., *The Doctrine of Consideration Treated Historically and Comparatively*, (Calcutta: Butterworth & Co., 1914), 367.

[5] Buckland, W., *Roman Law and Common Law. A Comparison in Outline*, (Cambridge University Press, 1965), 227.

[6] See Zimmermann, R., The Law of Obligations, op.cit., p. 551.

famous French scholar Jean Domat[7] put together a blend of Roman law and natural reason, the result of which was the theory of causa. Domat stated that in unilateral contracts, such as loan of money, causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract and provided the money. Following that logical pattern, he continued with bilateral onerous contracts[8] where he assumed that the engagement of one of parties is the reason (causa) of the engagement of the other party. As far as gratuitous contracts were concerned, Domat identified the causa with the motive, the intention to make a gift. This theory was incorporated by another prominent French scholar – Robert Pothier (1699-1772) in his famous work „*Traite des obligations selon les regles tant du for de la conscience, que du for extérieur*, Tome 1, Debure l'aîné, 1761, in the chapter "*Defaut de cause dans le contrat*" and ultimately found its place among the other essential elements of the validity of contracts in the process of drafting the French Civil Code from 1804[9].

The merits of this theory are beyond doubt, but to my view one aspect of the origin of causa remains overlooked. Scholars' primary efforts are pointed at analyzing the interpretations of Roman law found in the works of glossators and natural lawyers, whereas traditionally little attention is being paid to the original Roman texts. In my opinion, Roman private law did contain all the vital elements that shaped the concept of causa.

Roman law of contracts has always been dominated by a strong formalism and pre-defined, "closed" types of contract. This meant that no agreement could be enforced unless it belonged to some of these types. An abundantly clear rule was that a nude pact does not constitute an action – *ex nudo pacto non oritur actio*[10]. By the time of Justinian's Corpus Iuris Civilis, contracts could be separated into three large groups – real, formal (verbal and litteral) and consensual[11]. Whenever the requirements for each those types were fulfilled, an action could be brought to enforce the obligation.

In addition to this closed system, another difficulty of tracing the roots of causa in Roman contract law should be considered as well. Causa as a notion was known to Romans, but it had various meanings[12], one of which was 'causa civilis'. Despite being used

[7] Jean Domat (1625-1696), lawyer and philosopher, representative of the Natural law school, author of "Les Loix civiles dans l'eur ordre naturel". It is interesting to point out that Prof. Zimmermann, being a staunch supporter of the canonist origin of the rule himself, does not refer to Domat in any way related to the causa. This peculiarity might be explained with the fact that in his works Domat claimed that his main aim is "to undertake the digesting of the Roman laws into their true and natural order, hoping thereby to render the study of them easier, more useful and more agreeable". What he in fact did was to develop a modern legal system, based on natural reason, upon the Corpus Iuris Civilis. See Peterson, S., The Evolution of "causa" in the Contractual Obligations of the Civil Law, op. Cit., p. 43.

[8] Rather than using the "closed" formalistic system of contracts in the Roman private law, Domat referred to them simply as "do ut des", "do ut facias" and "facio ut facias", thus acknowledging their application in every commercial relationship, both nominate and innominate.

[9] Keyes, W. N., "Causa and Consideration in California – A Re-Appraisal" *California Law Review* 47 (1959): 77.

[10] About the difference between contracts and pacts see for example Birks, P., *The Roman Law of Obligations*, Oxford University Press, 2014, 22 et seq.

[11] See D. 3.89.: *Et prius videamus de his quae ex contractu nascitur. Harum autem quattor genera sunt: aut enim re contrahitur obligatio aut verbis aut litteris aut consensu. „Let us now inquire into those (obligations), that arise from a contract. There are four kinds: contractual obligations, that arise either through re (handing over the good), by words (verbal), by writing (litteral) or through (reaching a) consensus.*"

[12] Some of them have nothing to do with the modern theory of causa and did not influence its origin, for example, pictatis causa in Roman family law or falsa causa in Roman law of testaments.

only once in the Digest (D. 15.1.49.2) its importance was pointed out by scholars since 'causa civilis' meant the reason for the enforcement of contracts[13]. In the case of formal contracts, 'causa civilis' consisted in the observance of the prescribed legal formalities. As far as consensual contracts were concerned it was the consent of the contracting parties, meaning the exchange of mutual promises[14]. The causa civilis of real contracts could be found in the exchange of a thing. Along with them, however, by the time of compiling the Digest Roman private law was no stranger to a special kind of contracts, called innominate[15]. They were stated under the general formulae do ut des, do ut facias, facio ut des and facio ut facias. There is a specific text in the Digest dedicated to them - D. 2.14.7.1-2: "*Those agreements, who do not create an action do not retain their common name; instead they are consumed by the names of the other contracts: sale, hire, society, loan, deposit and other similar ones. But when they cannot be attached to those contracts, if there is a ground (causa), as Aristo decisively responded to Cels's question, an obligation arises, when I give you a thing, so that you would give me one, or so that you would do something: that is a contract and a civil obligation arises from it*"[16].

It is clear that innominate contracts were treated as real, that there had to be a performance by one of the parties. Its significance could be found in two aspects. First, giving the thing was the causa civilis that gave rise to the enforceability of the contract with an action[17]. The second aspect, however, can be derived from the interpretation of the text. If one of the parties gave the thing this was actually a pre-performance, conducted in order to receive a counter-performance – be it a thing or an operation provided by the other party. Since the Digest explicitly acknowledge the emergence of a contract ("synallagma"), the fulfilment of the first performance serves as the basis of the new contract, as a reason ("causa") for its existence and justifies the counter-performance, thus ultimately bringing a new contract into existence. Probably this interpretation has influenced Domat, since his concept of causa in bilateral onerous contracts resembles the provisions of D. 2.14.7.1-2 to a great extent.

[13] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op. cit., p. 625. Yet, there are some scholars who believe that causa civilis and modern causa are one and the same phenomenon, but it is an isolated point of view, such as Daruwala, P., The Doctrine of Consideration, op. cit., p. 364-365. Concerning the text (15.1.49.2) of the Digest, it would seem more precise to speak about obligations than contracts, since the text excluded the possibility of enforcing a stipulation when there is no reason (causa) for it - on the mere statement of debt without actually having borrowed the money.

[14] This type of contracts would ultimately become the founding stone of modern contract theory, but in Roman private law there were only four consensual contracts – sale, hire, society and mandate. See Birks, P., The Roman Law of Obligations, op. cit., p. 53 et seq.

[15] See Zimmermann, R., The Law of Obligations, op. cit., p. 549. Innominate contracts were never called "innominate" in the times of classical Roman law. This notion is believed to have emerged in the works of scholars of the Eastern Roman empire. What is important to stress out, however, is that this legal figure can be found in the Digest, meaning it was already known in the middle of the 6th century AD thus allowing us to use it and make conclusions about causa.

[16] *Quae conventions pariunt actions, in sou nomine non stant, sed transeunt in proprium nomen contractus: ut emptio venditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus. Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem, ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias: hoc synallagma esse et hinc nasci civilem obligationem.*

[17] This is explicitly indicated several lines below – D. 2. 14.7.2 - ... igitur nuda pactio obligationem non parit, sed parit exceptionem – *A nude agreement does not constitute an obligation, it only produces an exception (defense).*

The modern theory of causa can be traced back to Roman law in another aspect as well. Scholars point out that it had special significance as far as formal contracts were concerned[18]. The stipulation in the early stages of its development was an abstract formal contract independent from the various economical circumstances that would lead people to concluding it – a duty to pay was created despite the fact that the underlying reason for it failed. This considerable independence between the declared will and the actual circumstances suffered gradual weakening and two examples are able to attest to this process. First, the parties could impart special importance to the underlying purpose for entering into a stipulation. Thus, the external economic relationship could play the role of a condition of the validity of the stipulation[19]. The second case can be found in the Digest – D. 44.4.2.3 – *If anyone stipulates with another without any causa, and then institutes proceedings by virtue of this agreement, an exception on the ground of fraud can properly be pleaded against him*[20].The party who stipulated could paralyze the effect of the formal stipulation by using an exceptio doli, an exception which enabled him to escape liability by proving that the duty assumed either had no causa or was based upon an illicit causa[21].

As far as the first case is concerned, there are some differences between it and the result of the canonists' interpretation. First of all, the Romans limited this rule only to the case of a stipulation, whereas Baldus applied it to all contracts. Second, the external economic relationship could become the causa of a stipulation only by consent of both contracting parties. The canonists included causa to the essential elements of the contract *ipso iure*. Yet the legal consequences do not differ dramatically. Whenever there was no external relationship to support the stipulation the debtor could simply deny payment, just like in modern times, when causa is absent. To my view, the possibility of making the validity of the stipulation depend upon the existence of an external economic relationship is what probably has lead the glossator Baldus to conclude that abstract contracts receive their causa from the outside while the others carry it within themselves.

Elements of causa may be found in the exceptio doli as well. The exceptio doli was an "abstract" exception, since its application was allowed in every case, regardless of its individual circumstances. Yet, the burden of proof that the duty was assumed without any reason or it was based on an illicit reason was set upon the debtor, according to the common principle in Roman evidence law "*reus in excipiendo fit actor*" – as far as exceptions are concerned, the defendant is in the position of the plaintiff[22]. Only one step is needed to draw the conclusion that a reason is present in every obligation until proved otherwise. This reputable presumption is today one of typical elements of causa and can be found in a number of national legislations.

The last element of the modern theory of causa can be found in the rules about unjustified enrichment in Roman law (D. 12.4-7). Whenever a promise or money has been given to the other party, but there was no reason for this, a *condictio sine causa* could be used to recover what has been promised. In the same text we can find the *condictio ex*

[18] See Buckland, W., *Elementary Principles of the Roman Private Law*, (Cambridge University Press, 1912), 232.
[19] See Girard, P., *Geschichte und System des römischen Rechts*, II Teil, (Berlin, 1908), 495.
[20] *Si quis sine causa ab aliquot fuerit stipulates, deinde ex ea stipulation experiatur, exceptio utique doli mali ei nocebit*.
[21] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 628; Girard, P, Geschichte und System des römischen Rechts, op.cit., p. 496.
[22] See Lieberwirth, R., *Latein im Recht*, (Berlin: Staatsverlag der DDR, 1988), 263.

turpem causam for recovery of what is promised for an illicit purpose or motive where the promisor was in fact innocent[23]. In modern times, the lack of causa or the presence of an illicit causa leads to the nullity of the contract.

This historical overview proves that the Romans did not develop a comprehensive theory of causa just because the predefined contract system excluded the necessity of introducing another abstract criterion to determine whether an agreement was deemed to be legally enforceable or not. At the same time one can find all the essential elements of causa in Roman contract law – the need for an economic reason to support the legal obligation that can even become an element of its validity (derived from the stipulation); the necessity for every transaction to be supported by some existing and permissible reason and finally a predecessor of the presumption that every obligation has a causa, until proven otherwise. This could lead to the only possible conclusion that as far as the causa is concerned, Romans had a notion of causa and despite the fact that they did not consider it an essential element of the validity of all their contracts, in practise they often applied its principles[24].

3. National legislations that acknowledge the legal function of causa as an essential element of the validity of contracts

The question who is the genuine creator of the concept of causa is naturally very important, but it should be considered that both the canonists and Domat have laid down only some of its most important features. The first time a modern theory of causa in its whole came to existence was in the year 1804. The earliest civil law codification to adopt the principle of causa was the French Civil Code from 1804. Causa is regulated as one of the four essential requisites for the validity of agreements, as shown in art. 1108[25] with some quite familiar ideas that are known to us since Roman time – the prohibition of an obligation that has no causa or has a false or unlawful causa (art. 1131 and 1133) and a reputable presumption of causa (art. 1132).

At the same time Domat's work has influenced the legal doctrine in its attempts to explain the concept of causa. Modern French scholars traditionally define causa as the typical legal purpose, a ground for existence of the undertaking signed by both parties to the contract[26]. There is a distinction between the objective causa and the subjective causa. Objective causa (*cause objective, cause abstraite*) is the logical result of Domat's theory but further developed. In this sense, in bilateral contracts causa consists of the aim of the buyer to acquire title to the thing and of the aim of the seller – to receive the money in exchange for transferring the property. Thus, in synallagmatic contracts the benefit offered by each of the contracting parties serves as the cause for the obligation of the other party. The motives that have guided the parties into concluding the contract are irrelevant. Scholars admit the existence of a second approach to causa – in its subjective form (*cause subjective, cause concrete*).

[23] Buckland, W., McNair, A., Roman Law and Common Law, op. cit., p. 223.

[24] See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 630.

[25] "Four requisites are essential for the validity of an agreement: The consent of the party who binds himself; His capacity to contract, a definite object which forms the subject-matter of the undertaking; a lawful cause in the obligation."

[26] See *Principles, Definitions and Model Rules of European Private Law, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law*, ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 292.

Traditionally, it is being defined as the typical, deciding motive for the parties for entering into this type of contracts, their subjective intentions and the specific reasons for concluding the contract[27].

The significance of causa can be found in a number of cases. First, it establishes that the reciprocal obligations of the contracting parties arising from bilateral contracts are strictly interdependent. Where one of these obligations is not executed, whatever reason might have lead to this, the other obligation has no causa and therefore the party can resist payment. If there was no concept of causa and the obligations of the parties were independent, payment would still be due and the only opportunity to recover it would have been the claim for unjustified enrichment. But the concept of causa ensures that whenever one of the parties fails to perform the other party could simply demand annulment of the contract, thus making contract law more secure and the arisen disputes easier and quicker to resolve[28].

The second feature of causa is that it restricts the courts' unlimited control upon the agreement between the parties[29]. Enacted in 1804, the French Civil Code is a legal embodiment of the major philosophical ideas of that period and was influenced in particular by the idea of individualism. Since autonomy of the will was established as the leading concept in the law of contracts, 19th century French scholars were convinced that the judge should be allowed to intervene in the contractual relationships as little as possible. As a result the control that could be imposed was limited to the objective verification whether a contractual counter-performance actually exists, whether it is one normally expected in the particular type of contract and whether it is not unlawful or false. Inquiries into the motives or other psychological factors that urged the parties into a contract were generally not admitted by the courts.

Although the modern theory of causa was laid down at the beginning of the 19th century, this does not mean it reached a standstill. On the contrary, the concept of causa has developed further, particularly by following some decisions of the French Cassation court and the efforts of legal scholars. Modern French legal doctrine has acknowledged two primary tendencies in the development of the doctrine of causa – its 'concretisation' and 'subjecitivisation'[30].

Throughout the last decades, the concept of causa has become more concrete, in the sense that it does not simply refer to a contractual counter-performance of any nature, but to a "real" contractual counter-performance, which includes taking into consideration the real, genuine interest it represents. A number of judgements of the French Court of cassation reveal a new approach in the assessment of causa – not from a formal point of view (since it might be not apparent at first glance), but from the point of view of the concrete, genuine interest, represented by the performance to the other contracting party, even when the terms of the exchange are apparent[31]. The

[27] Tikniute, A., Damrauskaite, A., "Understanding Contract Under the Law of Lithuania and other European Countries", *Jurisprudence*, 18, (2011): 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 293.

[28] See Julliot de la Morandiere, *Precis de Droit Civil, Tome II*, (Paris: Dalloz), 1957, Russian translation by Fleischitz, E., Moscow, 1960, 270.

[29] Ibidem, p. 271.

[30] *Reforming the French Law of Obligations. Comparative Reflections of the Avant-Projet de reform du droit des obligations et de la prescription*, ed. by John Cartwright, Stefan Vogenauer, Simon Whitaker, (Oxford and Portland, Oregon: Hart Publishing, 2009), 77.

[31] *Cass. Civ. (3) 13. October 2004*, D 2004 AJ 3140.

process of "concretisation" of the causa has lead to a major change in French case law. In the past, where a counter-performance does not exist or is not immediately apparent from the contractual structure both unilateral and bilateral contracts were declared void for lack of causa. Today courts tend to undertake a search for the real interest pursued by the party who appears to impoverish itself. They go beyond the contractual structure and analyse the benefit or some other thing that has been previously received and is capable of sustaining an obligation[32]. If the benefit is still unclear, courts continue their attempt in establishing whether the contracting party nevertheless has an interest in the contract, since it may be provided through another contract or by a third party.

The second current development may be described as a "subjectivisation" of causa. It means that courts analyze the obligation and aim at establishing the causa of each of the contracting parties' obligations, without limiting themselves to the pre-established type of the contractual counter-performance[33]. Traditionally, causa is defined as the typical aim, associated with the certain type of contract and pursued by the parties. In the process of applying the principles of causa, courts proclaim the annulment of a contract that does not contain the interest which is normally expected to be present at this particular type of contracts. Thus courts determine the essential elements of a contract - the minimum inviolable prerequisites for its existence. Since this could lead to a number of contracts being proclaimed void on the ground that an apparent causa is lacking, the notion of causa was enriched by a new aspect. Courts are prepared to refine the control and to hold valid an agreement, provided that a real economic context is present. The search for the 'atypical' cause can be found in a rather recent decision of the French Cassation Court[34]. As a clause in a purchase contract of a hotel room by a family couple, the hotel set up a joint venture whose object was to share the fruits and costs of the hotel restaurant and would be managed by another company. The Court pronounced the purchase contract void, since the hotel assured the couple that they will never have to bear the losses of the hotel, yet on the ground of this clause the family couple would stand surety to the hotel. The absence of causa was proclaimed because of the impossibility of realising a profit, 'a specific goal of viability, expressly coupled with the purchase'[35]. This decision has been subject to eloquent critics. They raised the question about legal certainty in contract law, since every party dissatisfied by the absence of profit could purport to obtain nullity of the contract. Several scholars, however, justified this approach, since the contract should demonstrate by plain terms that the two parties knew of a particular goal pursued and have admitted it from the outset into their relations. Even if the is not the traditional one, associated with this particular type of contracts, the contract will still be held valid. On the contrary, where one cannot derive the goal from the contractual structure, or where it has been included without the express volition of both parties, the contract has no cause and this leads to its nullity[36].

On the face of it, the depth of the French courts' inquiry may seem quite intensive and unprecedented especially when one considers the reason why causa was actually brought to life – to ensure that courts will intervene as

[32] Reforming the French law of obligation, op.cit., p. 79.
[33] Ibid., p. 81.
[34] *Cass civ (3) 29. March 2006*, Bull civ I № 88, JCP G 2006 in: Reforming the French Law of Obligation, op. cit.,p. 88.
[35] Ibid. p. 89.
[36] Ibid. p. 89

little as possible in the contractual relations. French legal doctrine even referred to these undergoing processes as an "exteriorisation" of the causa[37]. To my view, this process is actually a function of the autonomy of the will. Allowing courts to try and determine whether one of the parties has interest despite the lack of a visible counter-performance ultimately leads to decreasing the number of contracts declared void for the lack of causa, which can actually be perceived as a true manifestation of the main principle in the contract law – the autonomy of the will.

The provisions about causa in the French Civil Code have served as a role model for several other national legislations belonging to the Romanistic legal family. Causa is considered an essential element of the validity of contracts according to the provision of art. 1274 of the Spanish Civil Code. What is interesting to point out is that the Spanish legislator has adopted Domat's theory of causa and not its modern notion[38]. The "Spanish approach" of defining causa as a requisite of the validity of contracts is its original meaning, has influenced the Civil Code of the Philippines[39]. The modern French notion of causa can be found in the national legislations of Belgium, Luxembourg[40], Italy[41], Romania[42], Bulgaria[43] and Slovenia[44]. In the same meaning the requirement of causa can be found in some legislations not belonging to the EU: in Quebec[45], the States of Louisiana[46], California[47] and Montana[48] and in the United Arab Emirates[49]. The subjective meaning of causa (as the deciding motive that has lead a party to commit itself) is adopted by the national legislations of Chile[50] and Colombia[51]. This comparative overview clearly shows that the concept of

[37] Ibid., p. 80.

[38] See art. 1274 of the Spanish Civil Code: "In onerous contracts the causa is understood to be, for each contracting party, the prestation or promise of a thing or service by the other; in remuneratory ones, the service or benefit which is remunerated; and in contracts of pure beneficence, the mere liberality of the benefactor".

[39] See art.1350 of the Civil Code of the Philippines that follows closely the provision of the art. 1274 of the Spanish Civil Code.

[40] See art. 1108 and art.1131-1133 of the Belgian Civil Code and the Luxembourg Civil Code. As a whole, both Civil Codes follow very closely the provisions of the French Civil Code.

[41] See art.1325 and art.1343-1345 of the Italian Civil Code. The provisions about causa are the same as in the French Civil Code.

[42] See art. 1235-1239 of the Romanian Civil Code. It is interesting to point out that the definition of causa in the new Romanian Civil Code of 2014 seems to have been influenced by the respective provision of art. 1410 of the Quebec Civil Code.

[43] See art. 26, (2) of the Bulgarian Law of Obligations and Contracts: "Contracts that … have no causa are void. The existence of a causa is presumed until otherwise proven."

[44] See art. 39 of the Slovenian Law of Obligations: "Every contractual obligation must have a permissible causa (ground). The causa shall be deemed impermissible if it contravenes the constitution, compulsory regulations or moral principles. (3) It shall be presumed that an obligation has a causa, even if such is not expressed.(4) If there is no causa or the causa is impermissible the contract shall be void."

[45] See s.1410 of the Civil Code of Quebec: "The cause of a contract is the reason that determines each of the parties to enter into the contract. The cause need not be expressed."

[46] See S. 1967 of the Civil Code of Louisiana: "Cause is the reason why a party obligates himself."

[47] See art. 1550 of the California Civil Code, where the requirement for a "sufficient cause" is explicitly provided.

[48] See S. 28-2-102 of the Montana Code, that resembles the provision of art. 1108 of the French civil Code.

[49] See S. 129 (c) of the UAE Civil Code: "The necessary elements for making of a contract are: agreement, subject matter and a lawful purpose for the obligations". To my view, there is no reason to consider that "a lawful purpose" has any other meaning than a lawful causa.

[50] See art. 1467 of the Civil Code of Chile, where the following definition is present: "By causa it is meant the motive that induces the act or contract".

[51] See art. 1524 of the Civil Code of Colombia, whose provision is the same as in art. 1467 of the Chilean Civil Code.

causa is ever-evolving and it is constantly modified to suit the exercise of control over contractual obligations in the best way possible.

4. National legislations that have adopted the doctrine of consideration

In contrast to the causa as a requisite of contracts that can be discovered in the national legislations of countries belonging to both civil and common law, the doctrine of consideration is a typical feature of common law legislations only. The doctrine of consideration can be found in the legislation of the United Kingdom, the United States of America, Australia and Cyprus as well as in some mixed jurisdictions, such as the Republic of South Africa. The main focus of this article will be placed upon clarifying this doctrine in English law, where consideration emerged and developed.

Differing from the legal systems on the Continent, English law was not based on the blend of Roman law and Canonist law, but rather developed its own institutes[52]. Yet, it faced the same problem about enforceability of promises.

In the early stages of its development (around the middle of the 13th century AD), English law had not developed the doctrine of consideration as a universal requisite, applicable to all contracts. Promises to do or to give something had to be set out in a written form, called deed. Whenever there was a breach of a promise, a special action, called covenant was granted to the plaintiff. A requirement that the covenant must be written and issued under the seal of the covenantor was introduced in the 14th century. In the course of time, the action of covenant gradually limited its legal consequences to the recovery of damages for breach of a sealed promise and was finally supplanted by another action (assumpsit)[53]. In the course of the 16th century, the action of assumpsit became the common legal means for the protection of a party against default by the other party, including the enforceability of promises. The legal effects of the action of assumpsit led the jurisprudence to the conclusion that since creditors enjoy such a convenient way of protecting themselves against a misconduct, carried out by the other party, not every given promise, whatever its nature deserves legal protection[54]. In particular, it was assumed that the action of assumpsit shall not be used to enforce a gratuitous promise and only promises with a bargain, i.e. with a counter-performance will be worthy of protection[55].

The assumed policy of the jurisprudence to limit the cases where one can claim enforceability of a promise was just one of the premises of the doctrine of consideration. The second one could be found in a stunningly familiar issue that tormented the minds of civil law scholars as well – the need to reduce the role of formalism without sacrificing security of transactions. Both premises make it probable that in the 17th

[52] There is a statement that the theories of consideration derived from canon law, since the chancellors who adopted them were former ecclesiastics. This would mean that causa and consideration share the same historical roots. See Willis, H.E., What is Consideration in Anglo-American Law, *University of Pennsylvania Law Review*, 72 (1924): 249. The majority of scholars believe, however, that the doctrine of consideration was developed independent of outer influence, See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, 29th ed., (Oxford University Press, 2010), 91 et seq.

[53] Willis, H. E., What is Consideration in Anglo-American Law, op.cit., p. 251 et seq.

[54] Simpson, A., A History of the Common Law of Contract: The Rise of the Action of Assumpsit, (Oxford University Press, 1975), 199 et seq.

[55] Cheshire, Fifoot and Furmston's Law of Contract, 12th edition, (London, Dublin, Edinburgh: Butterworths 1991), 71.

century judges inquired into the contractual bond, searching for a reason for the promise being binding[56].

The process of forming the doctrine of consideration did not remain unchallenged. In the 18th century an attempt to redefine the notion of consideration had been carried out by Lord Mansfield, Chief Justice of the King's Bench. He refused to recognize it as a vital criterion of a contract and treated it merely as evidence of the parties' intention to be bound[57]. If this intention could be ascertained in any other way (writing or witnesses) consideration was unnecessary[58]. His second conclusion was considered even more disturbing. Lord Mansfield eventually accepted consideration as essential to English contracts, but defined it as a moral obligation[59]. It took almost another sixty years for English case law to overcome Lord Mansfield's approach. In *Eastwood v Kenyon*, the concept of consideration as a moral obligation was condemned. The judges pointed out that the acceptance of a moral duty as the sole test of an actionable promise collides with English law that requires some factor additional to the defendant's promise so that it would become legally binding and this was the doctrine of consideration[60]. The logical consequence of the *Eastwood v Kenyon* case was that consideration was no longer looked upon as a rule of evidence or a moral obligation. Throughout the 19th century, various attempts to define consideration have been undertaken in case law. It has been established that a plaintiff can prove the presence of consideration in one of two ways. He might either prove that he had given the defendant a benefit in return for his promise or that he himself had incurred a detriment for which the promise was to compensate[61].

This approach had been accepted and further developed in the beginning of the 20th century. English case law attempted to define consideration using the contract of purchase and sale – "An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"[62]. Despite the fact that defining consideration seems straightforward and simple, scholars do not think of it as a single principle, but rather as a doctrine that has evolved throughout the centuries. That is why

[56] Some scholars regard this perception of consideration as being as close to the theory of causa as possible, since the meaning of "consideration" altered much in the next century, See Cheshire, Fifoot and Furmston's Law of Contract, op.cit., p. 71.

[57] Pillans v Van Mierop (1765) KB 3 Bur. 1663. Lord Mansfield added that "the ancient notion of consideration was for the sake of evidence only; for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration". See Lorenzen, Causa and Consideration in the Law of Contracts, op.cit., p. 637.

[58] Rann v Hughes (1778), 7 Term Rep. 350. See McCauliff, C., A Historical Approach to the Contractual Ties that Bind Parties Together, 71 Fordham Law Review (2002): 850 et seq.

[59] "Where a man is under a moral obligation, which no Court of law or equity can enforce, and promises, the honesty of the thing is a consideration ... The ties of conscience upon an upright mind are a sufficient consideration" Hawkes v Sanders (1782), 1 Cowp 289.

[60] Eastwood v Kenyon (1840) 11 AD & EL 438.

[61] "A valuable consideration in the sense of the law may consist in either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" – *Currie v Misa* (1875) LR 10 Exch 153; "Consideration means something which is of value in the eye of the law, moving from the plaintiff: it may be some detriment to the plaintiff or some benefit to the defendant" – *Thomas v Thomas* (1842) 2 QB 851.

[62] This definition emerged originally in the English case law – see *Dunlop v Selfridge* (1915). This particular case is sometimes being referred to as the most significant case for the consideration doctrine. See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contract*, op.cit., p. 92.

three further sub-principles have been introduced to facilitate its application[63].

According to the first sub-principle, consideration should either be executory or executed, but not past. 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[64]. Whenever 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[65].

However, 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 favours or a gift, and no contract can arise[66], since there is a "past consideration". Since it confers no benefit on the promisor and involves no detriment to the promise in return for the promise, the general rule is that past consideration is equal to no consideration[67].

The second sub-principle that has been accepted in the case law and among scholars is that consideration must move from the promisee[68]. 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[69]. However, the application this principle should lead to the conclusion that a promisee cannot enforce a promise made to him where the consideration for the promise has been provided by someone else[70].

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[63] Richards, P., *Law of Contract*, 9th ed., (London: Pearson Longman, 2009), 58 et seq.

[64] Cheshire, Fifoot and Furmston's Law of Contract, op.cit., p. 74; Beatson, J., Burrows, A., Cartwright, J., Anson's Law of Contract, op.cit., p. 95.

[65] *Wigan v English and Scottish Law Life Assurance Association* (1909) 1 Ch 291.

[66] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 74.

[67] There are, however, some exceptions to this rule. A past consideration would be able to support a promise if the consideration was given at a previous request of the promisor. The Judicial Committee of the Privy Council has summarized the conditions under which this exception applies in *Pau On v Lau Yiu Long* (1980) AC 614 – "An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. The act must have been done at the promisor's request, the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit, and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance." Further exceptions to the rule "past consideration is no consideration" can be found in the existence of an antecedent debt (*Wigan v English and Scottish Law Life Assurance Association* 1909 1 Ch 291) and in the case of negotiable instruments (s. 27 (1) of the Bills of Exchange Act 1882). See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 97. Some scholars assume that a moral obligation is equal to no consideration. The notion of "moral obligation" is used in a different, narrower sense in comparison to Lord Mansfield's definition of the consideration as a moral obligation. Scholars believe that an obligation should be considered moral whenever there is an impossibility to enforce it due to some specific legal defect. English case law has refused to consider binding the promise given by a discharged banker to pay his debts in full incurred before his discharge if this promise is not supported by "fresh consideration" – *Jakeman v Cook* (1878) 4 Ex.D. 26. See Treitel, G., *The Law of Contract*, 11th ed., (London: Sweet & Maxwell 2003), 80.

[68] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 77; Richards, P., *Law of Contract*, op.cit., p. 61.; Treitel, G., *The Law of Contract*, op.cit., p. 81.

[69] See Beatson, J., Burrows, A., Cartwright, J., *Anson's Law of Contracts*, op.cit., p. 98.

[70] It should be noted that English courts hesitate about this logical consequence. Australian courts, however, apply this requirement without doubt. See Coulls v Bagot's Executor and Trustee Co Ltd (1967) ALR 385, where

The third sub-principle lies in the requirement that consideration must be real, must be "something which is of some value in the eye of the law"[71]. That's why case law consistently declined to accept as consideration the case where a party refrains "from a course of action which he has never intended to pursue"[72]. Furthermore, whenever there is impossibility, physical or legal, at the time of formation of the contract, consideration is held unreal[73]. Case law requires the impossibility to be obvious, meaning that "according to the state of knowledge of the day, so absurd that the parties could not be supposed to have so contracted"[74]. There is no consideration in the case when a promise is too vague or insubstantial to be enforced as well. Whenever a promise leaves the performance exclusively in the discretion of the promisor the consideration is deemed to be illusory[75].

It has been established that courts will inquire into consideration to prove that it is real, but the question about its adequacy should remain outside their scope[76]. Courts will not seek to measure the comparative value of both promises, since the adequacy of consideration is to be considered by the contracting parties at the time of making the agreement. The parties are presumed to be capable of pursuing their own interests and reaching a desired equilibrium in commercial transactions[77]. That's why courts cannot denounce an agreement just because it seems to be unfair. On the contrary, they have been prepared to find a binding contract in cases where consideration is virtually non-existent. Four centuries ago it has been assumed that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action[78] and this rejection of performing a quantitative check is meticulously applied by courts[79]. However, some exceptions where consideration is held to be 'insufficient' have been introduced[80].

5. The correlation between causa and consideration

As it has appeared, both the theory of causa and the doctrine of consideration are brought to life to serve as an "indicia of seriousness"[81] in an attempt to distinguish between a simple arrangement and a contract. This circumstance naturally leads to the

the judges have accepted that "a person not a party to a contract may not himself sue upon it so as directly to enforce its obligations ".

[71] Treitel, G., *The Law of Contract*, op.cit., p. 83; Richards, P., *Law of Contract*, op.cit., p. 62.

[72] *Arrale v Costain Civil Engineering Ltd* (1976)

[73] Beatson, J., Burrows, A., Cartwright, J., Anson's *Law of Contracts*, op.cit., p. 102.

[74] *Lord Clifford v Watts* (1870) LR 5 CP 577.

[75] *Ward v Byham* (1956) 1 WLR 496.

[76] Cheshire, Fifoot and Furmston's *Law of Contract*, op.cit., p. 81.

[77] *McEcoy v Belfast Banking Co Ltd (1935)* AC 24.

[78] Sturlyn v Albany (1587) Cro Eliz 67.

[79] In modern times this principle became known as the "peppercorn theory". In Chappel & Co Ltd v Nestle Co Ltd it was assumed that it is irrelevant whether the consideration is of some value to the other party: "A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn".

[80] Scholars agree that whenever there is a public duty imposed upon the plaintiff by law, any promise to carry it out is a promise without consideration. A further exception lies in the case where the plaintiff is bound by an existing contractual duty to the defendant. See Cheshire, Fifoot and Furmston's Law of Contract, p. 89 et seq.

[81] Zweigert, K., Kötz, H., Introduction to Comparative Law, 2nd Revised Edition, translated from German by Tony Weir, (Oxford: Clarendon Press, 1992), 417 et seq. See also Kötz, H., Europäisches Vertragrecht, Bd.1 Abschluss, Gültigkeit und Inhalt des Vertrages, die Beteiligung Dritter am Vertrag, (Tübingen: Mohr Siebeck, 1996) 77 et seq.

question about the correlation between causa and consideration. At first glance there is a distinctive similarity not only in the function of both figures as "indicia of seriousness". Another common feature between them may be found in the reason why they were developed. Both causa and consideration have emerged as a result of the necessity to facilitate the exclusion of formalism that dominated the contractual relationships in both Roman private law and early English law. In modern times, formalism is considered an exception rather than a rule, since the need to observe a specific form is now usually substituted by the requirement of a causa or consideration in order to consider a contract valid and binding.

These similarities of both concepts did not remain unnoticed by judges and scholars. Case law shows that there was a considerable period of time in English law where consideration and causa were used interchangeably. In the *Calthorpe's case* consideration is defined as a "cause or meritorious occasion, requiring a mutual recompense, in fact or in law"[82]. Despite the fact that in its further development English case law abandoned the approach of defining the doctrine of consideration using causa, this proved to be a very robust idea. The question about the correlation between causa and consideration influenced the development of the enforceability of promises in the mixed legal systems.

The first Civil code of Louisiana, enacted in 1825, as well the next one, enacted in 1890, contained a definition of causa. It was assumed that "Cause is consideration or motive. By the cause of the contract in this section is meant the consideration or motive for making it"[83]. Scholars admit that until the end of the 19th century due to the strong civil law influence the common law doctrine of consideration, although specifically indicated in the provisions of the Civil Code was not applied, because cause meant consideration[84].

To my view, this is only partially true. Scholars' primary aims are pointed at clarifying that under this definition consideration is not equal to motive[85] and omit an important aspect. A historical interpretation of this definition leads us to the conclusion that in 1825, when the first Civil Code of Louisiana was enacted, the notion of causa could have had no other meaning than the one manifested by J. Domat and R. Pothier – in unilateral contracts causa lies in the fact that the creditor performed his obligation at the time of the conclusion of the contract, in bilateral onerous contracts the engagement of one party is the reason for the engagement of the other party and in gratuitous contracts motive serves as causa. If a parallel can be drawn, causa in unilateral contracts and executory consideration seem to be quite alike, since both require something to be done or given. Causa in bilateral contracts and executed consideration are, on the other hand, quite different, but share the same function of establishing the difference between enforceable and unenforceable promises. As far as gratuitous contracts are concerned, they must be made by 'deed' in English law to become enforceable. The Louisianian legislator has included the motive in the definition of causa, since the existence of a motive justifies the existence of a gratuitous promise and substitutes the need for a causa. Following that logical pattern, we might conclude that the scope of causa is

[82] This decision dates back to the year 1574. See Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 636. Other scholars also admit that in the 16th and 17th century consideration probably meant the reason for the promise being binding, fulfilling something like the role of causa in continental systems, See Cheshire, Fifoot, Furmston's Law of Contract, op.cit., p. 71.

[83] See art. 1890 of the Louisiana Civil Code 1825 and art. 1896 of the Louisiana Civil Code of the year 1890.

[84] Drake, J., Consideration v. Causa in Roman-American Law, *Michigan Law Review* 4, (Nov. 1905): 39.

[85] Ibid., p. 22.

broader than the doctrine of consideration and that's why causa encompasses both consideration and the liberative motive, as set out in the definition of art. 1890 of 1825 Louisianian Civil Code. As we have seen, it is the causa, not the doctrine of consideration that is used as a universal requisite of the validity of contracts in present-day Louisiana.

In the Republic of South Africa, the question about the correlation between causa and consideration emerged in the beginning of the 20th century. The provision of art. 1371 of the repealed Netherlands Civil Code provided the requirement for a causa in every contract and consequently it was introduced into the legal system of Transvaal by the Dutch settlers as well. Yet, in 1904 a member of the Supreme Court stated that "the causa of Roman-Dutch law has become for all practical purposes equivalent to the valuable consideration of the Common Law"[86]. Despite the fact that this idea was not acknowledged by later South African case law, it was accepted by the majority of the scholars of that time[87].

The idea that causa and consideration are similar, but not the same worked its way into the case law of other mixed legal systems. In the Philippines causa and consideration were originally used as synonyms[88]. Later on, it was established that although somewhat different, both concepts work out equivalent effects in jurisprudence. The common law consideration was held narrower than the civil law causa, since consideration consists of some benefit to the promisor or a detriment to the promisee, whereas causa is the essential reason for the contract[89].

Modern scholars are inclined to accept that causa and executory consideration are similar[90], but others point out that it can be accepted only if causa is being used in its objective sense[91]. To my view, this statement is true, but several other circumstances should not be overlooked.

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[92]. Thus a contract, supported by consideration, could be declared

[86] See Zimmermann, R., The Law of Obligations, op.cit., p. 556.

[87] Drake, J., Consideration v. Causa in Roman-American Law, op.cit., p. 19; Lorenzen, E., Causa and Consideration in the Law of Contracts, op.cit., p. 639; Buckland, W., McNair, A., Roman Law and Common Law, op.cit., p. 233.

[88] See the decision of the Supreme Court Marlene Dauden Hernaez vs Wolfrido delos Angeles, G.R. No. L – 27010; April 30, 1969.

[89] See *Mixed Jurisdictions Worldwide. The Third Legal Family*, 2nd ed., by Palmer, V., (Cambridge University Press, 2012), 471.

[90] See Markesinis, B., Cause and Consideration: A Study in Parallel, *The Cambridge Law Journal* 37 (Apr. 1978): 58.

[91] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op.cit., p. 1397; Principles, Definitions and Model Rules of European Private Law, op.cit., p. 292.

[92] Markesinis, B., Cause and Consideration: A Study in Parallel, op.cit., p. 74.

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 is considerably wider than the doctrine of consideration.

At the same time in English law nominal consideration is sufficient to sustain a contract, whereas in civil law causa will not be applicable in this case. Civil law legislations usually have adopted the Roman concept of *laesio enormis*, allowing the party to bring up an action and invalidate a contract where the price of the counter-performance is considerably lower than the price of his own performance. English law does not require consideration to be adequate. Although it has developed exceptions to ensure that the lack of adequacy is not due to fraud, mistake or irrational generosity[93], courts will not pronounce the invalidity of contract solely on this behalf. In this sense, as strange as it may seem on face of it, consideration is wider than the notion of causa.

If a conclusion may be drawn, it seems that the 'objective causa' can be considered the functional equivalent of executory consideration, since they stand as close as possible to each other. Apart from that, causa and consideration differ greatly in terms of elements, scope and legal consequences. What they share in common is a similar historical path and the function to establish which promises should be considered binding.

6. The need for coherence. The abandonment of causa in France.

Surprisingly, the concept of causa and the doctrine of consideration share another common feature. Both have been subject to criticism that has doubted their utility and even called for their abandonment[94]. Moreover, many national legislations, such as Germany[95], the Netherlands, Scotland[96] Greece, Portugal[97], Slovakia, the Czech Republic[98], Lithuania[99], Estonia[100] and Hungary do not acknowledge causa or consideration as necessary elements of the formation and validity of a contract. Thus the existence of two parties who have agreed upon concluding a contract is deemed enough. This has been accepted in the civil Codes of various national legislations outside the EU, such as Switzerland[101], Israel[102], Ethiopia, Armenia, Brazil, South Korea[103] and Russia.

Following the rapid development of international civil and commercial

[93] See Treitel, The Law of Contract, op. cit., p. 74.

[94] The most famous French anti-causalist is Marcel Planiol. See Planiol, M., Traite elementaire de droit civil, 7th ed., translated into Bulgarian by T.Naslednikov, (Sofia, 1930) 424 et seq. On the criticism of consideration see Chen-Wishart, M., In Defense of Consideration, Oxford University Commonwealth Law Journal 13 (2013): 209 et seq.

[95] Zweigert, K., Kötz, H., Introduction to Comparative Law, op.cit., p. 426-427;

[96] Mixed Jurisdictions Worldwide. The Third Legal Family, op.cit., p. 256.

[97] See Principles, Definitions and Model Rules of European Private Law, op.cit., p. 294.

[98] Ibid, p. 294.

[99] Tikniute, A., Dambrauskaite, A., Understanding Contract under the Law of Lithuania and Other European Countries, op. cit., p. 1400.

[100] Kull, I., European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?, Juridica International 9 (2004) 33 et seq.

[101] Guhl, T., Das Schweizerische Obligationenrecht, Achte Auflage, (Zürich: Schulthess Verlag, 1991) 94 et seq.

[102] Kellerman, A., Siehr, K., Einhorn, T., Israel Among the Nations, (The Hague/Boston/London: Kluwer Law International, 1998), 299.

[103] Jin, Oh Seung, Overview of Legal Systems in the Asia-Pacific Region: South Korea, paper presented at the Conference Overview of Legal Systems in the Asia-Pacific Region (2004); 04.10.2004; available at http://scholarship.law.cornell.edu/lps_lsapr/6 (last accessed on 04.04.2016).

relationships both inside and outside the EU, the existence of three differing types of legal approach to the question whether an agreement is actually a valid contract could cause a number of complications and undermines the certainty of circulation. That is why several attempts to overcome this challenge have been undertaken on a supranational level. Of course, they differ considerably, but they all share one common feature – the need for a causa or consideration is abandoned and a contact is concluded, modified and terminated by the mere agreement of the parties, without any further requirement.

One of the oldest attempts to unify the requisites of the contract was set out in 1927, by a Draft of a French-Italian Code of Obligations. It never entered into force, due to the outbreak of World War II, but its provisions served as an eloquent proof that causa and consideration may not be included into the issue of formation and validity of contracts[104]. This principle was adopted several decades later with the UN Convention on Contracts for the International Sale of Goods (CISG) coming into force in 1980. Its article 11 provides that "A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".The provision of art. 1.2 of the UNIDROIT Principles (latest revision of 2010) is virtually the same[105].

The approach of simplifying the requirements to consider a contract valid and binding has inevitably influenced EU law as well. The ongoing attempts to create a unified European private law have resulted in introducing several "soft law" codifications, such as the Principles of European Private LAW (PECL) and the Draft Common Frame of Reference (DCFR)[106]. The provision of art. 2:101, (1) PECL sets out a quite liberal and simplified approach. It excludes the formal requirements for the conclusion of a contract in such a way that a contract is concluded if the parties intend to be legally bound and reach a sufficient agreement *without any further requirement.*This implies that the contract can be concluded without the presence of causa or consideration[107].

The Study Group on a European Civil Code closely follows the approach of providing minimal substantive restrictions in the provision of art. 4:101, Book II of the DCFR[108]. The absence of a causa or consideration is considered to promote efficiency by making it easier for parties to achieve the desired legal results in a faster and more convenient way. At the same time the level of legal protection has not lowered since

[104] Smith, J.D., A Refresher Course in Cause, Louisiana Law Review 12 (1951): 2.

[105] See Dennis, Michael J. The Guiding Role of the CISG and the UNIDROIT Principles in Harmonising International Contract Law, Uniform Law Review 19 (2014): 114–151.

[106] About the notion of "soft law" see Terpan, F., Soft Law in the European Union. The Changing Nature of EU Law. European Law Journal 21 (January 2015): p. 68-96.

[107] Storme, M., The binding character of contracts – causa and consideration, Towards a European Civil Code (red. A.S. Hartkamp, M. Hesselink, E. Hondius), 2nd revised and expanded ed., (Kluwer, 1998), 239-254; Maria del Pilar Perales Viscasillas, The Formation of Contracts & the Principles of European Contract Law, 13 Pace International Law Review (2001): 374; Zimmermann, R., Jansen, N., Contract Formation and Mistake in European Contract Law: A Genetic Comparison of Transnational Model Rules, Oxford Journal of Legal Studies 1 (2011): 9.

[108] II. – 4:101 Requirements for the conclusion of a contract.
A contract is concluded, without any further requirement, if the parties:
(a) intend to enter into a binding legal relationship or bring about some other legal effect; and
(b) reach a sufficient agreement.

the contract could be proclaimed invalid of some defect of consent or illegality[109].

It is obvious that the undergoing abandonment of causa and consideration as a requirement of the formation of a contract is not merely a whim, but a consistent supranational policy that has emerged nearly a century ago. That is the reason why one cannot be surprised to see that the French legislator has undertaken a major reform of the law of obligations to harmonize it according to the latest tendencies in European private law. According to the "***Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations"*** **which will enter into force on 01.10.2016, the French Civil Code abandons the concept of causa, so that a contract will be valid if the parties have capacity to contract, have given their consent and there is an object (see the new version of art. 1128, which will enter into force on 01.10.2016).**

The abandonment of the concept of causa, happening in the very national legislation, where it was enacted for the first time, may seem really confusing at first glimpse. However, one should bear in mind that this is merely a reflection of the common European policy of adapting the law of contracts to the new circumstances. It seems that the theory of causa in civil law and the doctrine of consideration have finally performed their main task – to accelerate the fall of formalism and help establishing a new contract law, based on the autonomy of the will and consensualism. This is actually the main aim of every supranational attempt to harmonize contract law. The new concept is that the contract will have its foundations in the objectively expressed will of the parties to be legally bound without the need for a causa, since the presence of the autonomy of the will is itself considered enough to guarantee the validity of a contractual relationship. On the other hand, the regulatory functions of causa upon the post-formation phase of the contract have been overtaken by a set of profound rules that invalidate any contractual relationship whenever there is a defect of consent or illegality[110] and other special rules. In this sense, causa is not useless, it has been made useless by providing an abundant number of provisions that have substituted it and are set to perform quite similar functions.

7. Conclusion

It seems that the theory of causa in civil law and the doctrine of consideration have a last thing in common – that neither of them will probably find its place in a future European codification of private law. Nevertheless, one should consider that causa and consideration have succeeded in establishing the autonomy of the will as the founding principle of contract law. Throughout the centuries they have influenced its development up to the point where they are no longer needed. To my view the concept of causa will suffer a gradual abandonment, just like it happened to formalism, since this is the present tendency in European contract law.

[109] Principles, Definitons and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition. Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), ed. by Christian von Bar, Eric Clive and Hans Schulte-Nölke, (Munich: Sellier European Law Publishers, 2009), 95.

[110] See Book II, Chapter 7 DCFR, called "Grounds of invalidity", corresponding to art. 14:101 PECL.

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