adequate to combat the major threat to competition when the act was passed, independent parallel action may today result in the same undesirable restraint of trade. In addition, the fact that parallel action does not always properly give rise to the inference of collusion in today's market may make it difficult to prove an agreement which in fact exists. It should be recognized that whatever relaxations of requirements have been made are attributable to factors peculiar to the Sherman Act and are valid, if at all, only in that area. They should not be carried over into the general law of conspiracy.

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CIVIL-LAW ANALOGUES TO CONSIDERATION: AN EXERCISE IN COMPARATIVE ANALYSIS

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The author examines the various techniques utilized in French and German law to solve the problems that the common law handles through the doctrine of consideration. The comparative analysis suggests that the direct and nuanced approaches found in the civil law resolve these problems more effectively than does consideration.

CONSIDERATION stands, doctrinally speaking, at the very center of the common law's approach to contract law. It represents an ambitious and sustained effort to construct a general doctrine. The doctrine is complex and subtle. It performs a variety of functions that are quite unrelated except as they can be joined by a verbal formula.[1] This article discusses the analogues to consideration [2] found in two civil-law systems, the French and the German.[3]

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[1] Professor Patterson makes the same point in a recent article: "Consideration . . . has given a spurious unity to legal problems that are substantially dissimilar." Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 938 (1958).

[2] This general subject has been treated in several papers. Of particular interest are: Schiller, *The Counterpart of Consideration in Foreign Legal Systems*, N.Y. LAW REVISION COMM'N SECOND ANN. REP. 103 (1936); Lorenzen, *Causa and Consideration in the Law of Contracts*, 28 YALE L.J. 621 (1919); Mason, *The Utility of Consideration — A Comparative View*, 41 COLUM. L. REV. 825 (1941); Sharp, *Pacta Sunt Servanda*, 41 COLUM. L. REV. 783 (1941).

[3] All translations are the author's. Many of the cases cited may be found in VON MEHREN, THE CIVIL LAW SYSTEM: CASES AND MATERIALS FOR THE COMPARATIVE STUDY OF LAW (1957).

The legal systems of the western world are, for purposes of comparison, frequently divided into two groups: the civil-law system of continental Europe and the common-law system developed in England. This classification, though useful, is not fully satisfactory. In particular, it overlooks Scandinavian developments. Two

A comparative analysis that takes as its starting point not a practical problem but a doctrine such as consideration faces certain initial complications. Direct comparison at the level of doctrine is out of the question, as the doctrines diverge very widely. A focus or basis for comparison can be found in the functional problems that the doctrine to be studied handles and resolves, in whole or in part, for its own legal system. Comparative analysis focuses on these problems, locating them in the systems under investigation and explaining the rules and principles through which they are handled and the practical results achieved. The discussion that follows considers three problem areas that the common law approaches, to a greater or a lesser degree, through the doctrine of consideration: the problem of abstractness; the problem of unenforceability, relative and absolute; and the screening of individual transactions for unfairness.

One further preliminary remark is in order by way of a caveat: The common-law lawyer will not find in this article the detailed and exhaustive discussion, to which he is accustomed, of the facts and results of individual cases. Such analysis is not necessary nor particularly appropriate in a comparative study of doctrine. The problem is to understand the general frames of reference and techniques of analysis through which the several systems discussed approach various problems. The central concern is not to examine critically the handling of particular fact situations, drawing out all possible implications. Moreover, continental courts of last resort, in particular the French Cour de Cassation, do not state the facts of cases in their full complexity and ambiguity. Dissenting opinions are not permitted. The court's opinion usually presents only a highly summarized version of the facts, designed to set out the essence of the situation and to provide, much as a hypothetical stated case would, the basis for legal analysis and conclusions of law.[4] The facts as set out fall

points of difference are usually emphasized in comparing the civil and the common laws. Firstly, in the civil law, large areas of private law are codified. Secondly, the civil law was strongly influenced by Roman law in a variety of ways. The Roman influence on the common law was far less profound and in no way pervasive. These points of difference should not be allowed to obscure the extent to which the civil and the common laws share a common tradition. Both systems were developments within Western European culture; they hold many values in common.

[4] See VON MEHREN, THE CIVIL LAW SYSTEM 832–33 (1957); Kaplan, von Mehren, & Schaefer, *Phases of German Civil Procedure*, 71 HARV. L. REV. (pts. 1–2) 1193, 1251–52, 1443, 1459–60 (1958).

into standard patterns, the particularity of the individual case thus being submerged. Consequently, it would probably be impossible to carry through a comparative study on the basis of the kind of detailed, factual analysis to which the common-law lawyer is accustomed.

I. THE PROBLEM OF ABSTRACTNESS

One or more of the interested parties often think that a contractual obligation will be more readily enforced if it is formally divorced from the environment and the motives that produced it. Civil-law theorists, especially the German writers, have discussed such a divorcement in terms of whether the legal system permits an "abstract" obligation.[5] A fully abstract obligation would be enforceable regardless of the enforceability of the underlying transaction or the existence of collateral agreements. For example, an abstract obligation could be enforced even if obtained by fraud. Similarly, a party's failure to perform his part of the bargain would not affect the enforceability of such an obligation. Nor could collateral agreements be argued by way of defense. In sum, the abstract obligation would lead a legal existence completely independent from that of the transaction out of which it arose.

It has been possible at various stages in the development of some legal systems to achieve certain of the advantages of an abstract obligation by casting the obligation in special forms. The "stipulation" of Roman law had, depending upon the period in question, various of the effects of an abstract obligation.[6] In the old common law, a promise under seal was presumably enforceable even though the promisee failed to render the agreed exchange that in fact furnished the economic basis for the promise.[7] The German Pandekten Recht recognized only one abstract obligation, the bill of exchange.[8] A written document that did not indicate the transaction out of which it arose (the

[5] See generally DE PAGE, L'OBLIGATION ABSTRAITE EN DROIT INTERNE ET EN DROIT COMPARÉ (1957).

[6] See LEE, THE ELEMENTS OF ROMAN LAW 280 (3d ed. 1952).

[7] See 1 WILLISTON & THOMPSON, A TREATISE ON THE LAW OF CONTRACTS § 205 (rev. ed. 1936).

[8] See 1 VON TUHR & SIEGWART, ALLGEMEINER TEIL DES SCHWEIZERISCHEN OBLIGATIONENRECHTS § 32 (2d ed. 1942).

so-called *cautio indiscreta*) neither gave rise to an obligation nor sufficed alone to establish that an obligation existed. Otto von Bähr's book in 1885, *Anerkennung als Verpflichtungsgrund*, marked the beginning of a return to favor in German law of the abstract obligation, preparing the way for sections 780 and 781 of the Civil Code of 1900.

For present purposes, a full discussion of the abstract obligation would take us too far afield. However, a few remarks are needed because the requirement of the common law that consideration be shown before a contract is enforced reveals, in some degree at least, the transaction's motivational and economic background; the obligation is thus rendered to a certain degree nonabstract or causal. In some jurisdictions, a promise under seal still has certain characteristics of an abstract obligation; in particular, a prima facie case for relief can be made out by proving that the instrument is genuine.[9] In other jurisdictions, similar results flow from statutory provisions making a written instrument presumptive evidence of consideration.[10] And in all jurisdictions, a transaction can also be rendered partially abstract by embodying it in an integrating agreement. Such an agreement operates under the parol-evidence rule to exclude all contemporaneous oral agreements and all prior oral or written agreements relating to the same subject matter.[11]

Article 1132 of the French Code Civil provides that "the agreement is no less valid, although the *cause* has not been expressed."[12] An obligation so formulated without reference to the underlying transaction achieves a limited abstractness — in an action to enforce the plaintiff makes out a case by proving the agreement, and the burden of arguing the nonenforceability of the transaction

[9] Nonnegotiable bills and notes, which must be in writing, certain as to the parties, time of maturity, and amount, and which must contain an unqualified order or promise to pay in money, also carry a presumption of consideration. See Goodrich, *Nonnegotiable Bills and Notes*, 5 IOWA L. BULL. 65, 70–72 (1920). These instruments are thus partially abstract. Negotiable instruments have this same partially abstract quality before negotiation which, of course, by cutting off defenses, renders the original obligation fully abstract in the hands of a bona fide purchaser.

[10] See DAWSON & HARVEY, CONTRACTS AND CONTRACT REMEDIES 533 (1959).

[11] See RESTATEMENT, CONTRACTS §§ 237–44 (1932).

[12] CODE CIVIL art. 1132 (57th ed. Dalloz 1958) [hereinafter cited and referred to in text as Code Civil]. Typical examples of the type of obligation contemplated by article 1132 are the following: "I promise to pay *B* 1,000 francs. *A*." "I hereby acknowledge that I owe *B* 1,000 francs. *A*." *Cf.* 2 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 308 (4th ed. Ripert & Boulanger 1952). Of course, article 1132 also applies to performances other than the payment of money.

underlying the obligation falls on the defendant.[13] Thus, although the use of article 1132 does not deprive the defendant of any legal arguments available to him in an ordinary contracts case, it does place on him a burden of proof which ordinarily rests with the plaintiff.[14]

In this connection a French rule, applicable to noncommercial transactions[15] and analogous to the parol-evidence rule, must also be mentioned. Article 1341 of the Code Civil provides that "[N]o proof by witnesses against or beyond the contents of an instrument, nor as to what is alleged to have been said previously, at the time of or since it was made shall be allowed . . . ." Some measure of integrating intent on the part of the parties is required, otherwise the writing will not be considered an instrument.[16] By preparing an instrument the parties render the obligation partially abstract. Of course, defenses such as fraud, payment, and revocation remain open, but a wide, though disputed, range of collateral and modifying agreements, if *unwritten*, are excluded from the court's consideration.[17] Integrated written agreements are thus partially abstract in the sense that they are cut free from all aspects of the underlying transaction not memorialized in some writing.

German law does not recognize any principle analogous to the parol-evidence rule or its French counterpart.[18] However, the

[13] See CAPITANT, DE LA CAUSE DES OBLIGATIONS §§ 170–72 (3d ed. 1927); *cf.* Code Civil art. 1315.

[14] Société X. v. Y., Cour de Cassation (Ch. civ.), May 22, 1944, [1944] Recueil Dalloz [hereinafter cited as D.] Recueil Analytique [hereinafter cited as A.] Juris. 106; see 2 PLANIOL, *op. cit. supra* note 12, No. 309.

[15] See generally pp. 1029–31 *infra*. Some historical evidence exists that CODE DE COMMERCE art. 109 (54th ed. Dalloz 1958) [hereinafter cited and referred to in text as Code of Commerce] was not intended to remove commercial transactions from this, the so-called second rule of article 1341. See BONNIER, TRAITÉ THÉORIQUE ET PRATIQUE DES PREUVES § 145 (5th ed. 1888); 1 LOCRÉ, ESPRIT DU CODE DE COMMERCE 320–21 (2d ed. 1829). Today, the rule is clearly limited to noncommercial transactions. See 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS No. 1529 (2d ed. Esmein, Radouvant & Gabolde 1954); note 36 *infra*.

[16] See note to Pinard v. Caron, Cour de Cassation (Ch. req.), Feb. 6, 1928, [1928] D. I. 148 (note Gabolde), [1928] Sirey Recueil Général [hereinafter cited as S.] I. 265.

[17] *Compare* 2 COLIN & CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS § 772 (10th ed. Julliot de la Morandière 1948) (subsequent oral agreements providing for modification or novation can be shown), *with* 2 PLANIOL, *op. cit. supra* note 12, No. 2215 (cannot show subsequent oral agreements providing for modification or novation).

[18] See generally VON MEHREN, THE CIVIL LAW SYSTEM 562–64 (1957).

German Civil Code [19] contains the closest approach in the legal systems under discussion to a fully abstract obligation, except perhaps for some common-law jurisdictions still recognizing the seal. Sections 780 [20] and 781 [21] provide for written promises to pay (*Schuldversprechen*) [22] and written acknowledgments of debt (*Schuldanerkenntnis*).[23] And section 350 of the Commercial Code validates such promises and acknowledgments given orally if the transaction is a commercial one on the part of the person assuming the obligation.[24]

What then are the practical consequences of using sections 780 or 781? [25] These sections cannot be utilized, as each specifically indicates, to avoid more stringent formal requirements imposed by other sections of the Code. For example, a promise to give made in the form of a written promise to pay or a written acknowledgment is void because section 518 requires that promises to give be made in the form of a notarial or judicial contract. In general, however, defects in the underlying transaction do not directly affect the enforceability of a *Schuldversprechung* or *Schuldanerkenntnis*.[26]

[19] BÜRGERLICHES GESETZBUCH (17th ed. Palandt *et al.* 1958) [hereinafter cited as BGB and referred to in text as Civil Code].

[20] "For the validity of a contract whereby an act of performance is promised in such manner that the promise itself is to create the obligation (*Schuldversprechen*), a written statement of the promise is necessary unless some other form is prescribed."

[21] "For the validity of a contract whereby the existence of an obligation is acknowledged (*Schuldanerkenntnis*), a written statement of the declaration of acknowledgment is necessary. If some other form is prescribed for the creation of the obligation whose existence is acknowledged, the contract of acknowledgment requires this form."

[22] The following is an example of a *Schuldversprechen*: "I promise to pay *A* 1,000 marks on June 1. *B*." *Cf.* HECK, GRUNDRISS DES SCHULDRECHTS § 129 (1929). The promise can be of a performance other than money.

[23] The following is an example of a *Schuldanerkenntnis*: "I acknowledge that I owe *A* 1,000 marks, which I shall pay on demand. *B*." *Cf. ibid.* The performance acknowledged to be due can be other than the payment of money.

[24] Section 782 of the Civil Code further dispenses with the written form if the promise to pay or recognition is made in consequence of an agreed account or by way of a compromise.

[25] For an elaborate discussion of the problem of §§ 780–81, see Rümelin, *Zur Lehre von den Schuldversprechen und Schuldanerkenntnissen des BGB.*, 97 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 211 (1905); 98 *id.* at 169 (1906).

[26] Two other specific exceptions to this rule are made by express code provision. The promise to pay or acknowledgment of debt can always be attacked on the ground that the underlying transaction was an agreement to pay a marriage broker for his services or to pay a gambling debt, both types of agreements being unenforceable in German law. BGB §§ 656, 762.

Dispute exists as to whether the argument can be made that the underlying transaction is *contra bonos mores* and hence void under BGB § 138. See pp. 1070–71 *infra*. The majority view seems to be that arguments based on § 138 are not available. See VON MEHREN, THE CIVIL LAW SYSTEM 561 (1957).

[27] For discussions in English of the German law of unjust enrichment, see DAWSON, UNJUST ENRICHMENT *passim* (1951); 1 MANUAL OF GERMAN LAW 97–100 (British Foreign Office 1950).

[28] See ENNECCERUS, RECHT DER SCHULDVERHÄLTNISSE § 202 (13th ed. Lehmann 1950); *cf.* Verwalt.- u. Verwert.-Gesellschaft für Immob. und Br. v. Fr. und Gen., Reichsgericht (V. Zivilsenat), March 6, 1915, 86 Entscheidungen des Reichsgerichts in Zivilsachen [hereinafter cited as R.G.Z.] 301.

[29] German writers, although they recognize the grounds for attacking written promises to pay and written acknowledgments discussed in the text, call these obligations "abstract." See ENNECCERUS, *op. cit. supra* note 28, § 202, at 781. The usage of the term "abstract obligation" adopted in the text thus differs from the German usage.

[30] See Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 571–74 (1933).

The practical importance of thus insulating promises to pay and acknowledgments of debt from defects in the underlying transaction is greatly reduced by the operation of the rules relative to unjust enrichment contained in sections 812 through 821 of the Civil Code.[27] These rules are applicable to performances made, or to be made, pursuant to a *Schuldversprechen* or a *Schuldanerkenntnis*.[28] In sum, therefore, a *Schuldversprechen* or a *Schuldanerkenntnis* made pursuant to section 780 or 781 is "abstract" only to a limited degree. However, the use of these forms is effective to shift to the defendant the burden both of going forward and of persuasion with respect to vitiating defects in the underlying transaction.

French and German law thus basically reject, as the modern common law does with its requirement that consideration must be shown, the abstract obligation.[29]

II. THE PROBLEM OF UNENFORCEABILITY, RELATIVE AND ABSOLUTE

Consideration's most pervasive role is in handling the problem of unenforceability. Consideration operates to mark off various classes of transactions either as always unenforceable or as unenforceable unless there is present an element not necessarily or naturally associated with the transaction, for example, reliance or a formality. No legal system attempts to enforce all types of promises or agreements.[30] Some are not enforced because they are inherently too dangerous for one party or for the society; others are too unimportant or marginal to justify the effort; still

others are denied enforcement because they do not make sen
in terms of the level of social and economic development achieve
in the particular society.[31]

A promise to a friend to come to his house for dinner can b
taken as representative of a class of transactions, the social obl
gation, which would probably be held absolutely unenforceabl
in all the legal systems under discussion. A common-law cour
might attach this result to the doctrine of consideration by findin
that no consideration was, in the words of the *Restatement*
of Contracts, "bargained for and given in exchange for the
promise."[32] French and German courts have several lines of
analysis open, lines which are also available to common-law
courts: The promisor did not intend, and would not have been
understood by a reasonable man to have intended, to assume a
legal obligation; the agreement relates to an area of activity that,
in the absence of special circumstances, should be free from the
law's coercion.

In French, German, and common-law thinking four general, interrelated concerns lead the systems to treat a given transaction type as unenforceable. There is a concern for evidentiary security, a desire to protect both the individual citizen and the courts against manufactured evidence and difficulties resulting from insufficiencies in the available proof. The individual must be safeguarded against his own rashness and the importuning of others. The enforceable obligation needs to be marked off or signalized so as to ensure an awareness on the individual's part that his action may have legal significance and to simplify the administration of justice.[33] Finally, there is unwillingness to

[31] When the legal order recognizes the principle of freedom of contract or private autonomy there is little or no room for this last limitation on the enforceability of promises or agreements. In earlier periods of our legal history, the limitation was of fundamental importance. See generally VON MEHREN, THE CIVIL LAW SYSTEM 577–84 (1957); von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687, 698–708 (1955), in THE CODE NAPOLEON AND THE COMMON-LAW WORLD 110 (Schwartz ed. 1956). Thus, the formless, fully executory agreement was not enforceable in the common-law courts until the sixteenth century.

[32] RESTATEMENT, CONTRACTS § 75 (1932).

[33] These three concerns are usually discussed in connection with the problem of form. For a most lucid and helpful discussion of the common-law approach, see Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Professor Fuller distinguishes and analyses the evidentiary, cautionary, and channeling functions served by formal requirements. See especially *id.* at 800–01.

The drafters of the German Civil Code made comparable points in their analysis

enforce transaction types considered suspect or of marginal value.[34] To facilitate exposition, these four concerns will be referred to as evidentiary, cautionary, channeling, and deterrent policies.

Transaction types are considered unenforceable which present, in their natural or ordinary configuration (taking into account community habits and conceptions), one or more of these difficulties in a sufficiently acute degree. Speaking very generally, the unenforceability is absolute or incurable if the introduction of an element, say reliance or a formality, extrinsic to the transaction in its natural state cannot remove or sufficiently meet the concern. If the introduction of extrinsic elements can satisfy the objection, the unenforceability is curable and the transaction will be enforced if appropriate extrinsic elements are present.

of form:

> [T]he necessity of observing a form induces a business-like mood on the part of the participants, awakens a judicial awareness, incites prudent reflection, and guarantees the earnestness of the decision taken. A form which is observed further clearly indicates the legal character of the transaction, serves, as does the coining of money, as a stamp of the matured juridical will and makes the conclusion of the legal transaction clear beyond any doubt. An observed form finally ensures for all time the proof of the existence and contents of a legal transaction. It also leads to a reduction in, or to a shortening and simplification of, litigation.

1 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES 179 (1888). See also 2 *id.* at 291–94.

A statement by Chancellor d'Agueseau justifying the formal requirements made applicable to gifts by article 1 of the Ordinance of 1731, the forerunner of article 931 of the French Code Civil, suggests, though with less detail and thoroughness, similar considerations. "As to article 1, its provisions seemed essential because, as the inter vivos donation is irrevocable, it is the more important to prevent here frauds and inconsiderate actions (*surprises*) by the external solemnity of the act, following the spirit of Law 25, *Cod. de donat.*" Official Letter From Chancellor d'Aguesseau, June 25, 1731, in 12 D'AGUESSEAU, OEUVRES COMPLÈTES 310, 312 (Pardessus ed. 1819).

[34] The clearest example of this point of view, outside the field of illegal or immoral contracts, found in the three legal systems under discussion is the French attitude toward gifts and gift promises.

> From an economic point of view onerous contracts tend to promote an increase in the public wealth. A gift, on the other hand, is a sterile transmission, as are nononerous contracts in general. Gifts are furthermore transactions in which there may be reason to fear that the donor is activated by motives that are not always honorable; so that from this point of view the protection of the family should be drawn into consideration, especially since gifts expose the giver to improper influences and intrigues against which he should be defended.

BUFNOIR, PROPRIÉTÉ ET CONTRAT 487–88 (2d ed. 1924). A more elaborate discussion, emphasizing the legislator's suspicion of gratuitous acts, is 3 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 3211 (2d ed. Ripert & Boulanger 1946). These attitudes, though rarely clearly articulated, doubtless also operate on occasion in the common and the German law.

The problem of unenforceability has three aspects. Consideration is involved in all of these, though the degree of involvement varies. These are: delineating transaction types unenforceable in their natural or normal state; classifying individual transactions to determine whether they fall within an unenforceable transaction type; and determining and devising extrinsic elements capable of rendering enforceable otherwise unenforceable transactions.

A. Delineating Transaction Types Unenforceable in Their Natural or Normal State

The common law uses two quite different techniques in classifying transaction types with respect to their enforceability.[35] The first, seen in the Statute of Frauds and similar legislation, proceeds by stating the unenforceable transaction types in functional or economic terms. Statute of Frauds legislation speaks of contracts to sell goods the value of which exceeds a certain amount, contracts to sell any interest in land, agreements not to be performed within a year of their making, agreements upon consideration of marriage, suretyship agreements, and undertakings by an executor or administrator to be surety on a debt of the deceased for which the estate is liable. The other technique, seen in the doctrine of consideration, is less direct. A generalized, abstracted characteristic — the absence of a bargained-for exchange — defines those transaction types which are unenforceable.

French and German law today employ only the first and more direct of these techniques. Some sense of the approach, and of the general range of situations covered, emerges from a summary of the most important unenforceable transaction types known to French and German law.

[35] Discussion of immoral and illegal contracts is omitted as outside this paper's general scope even though, at some points, consideration becomes involved with this problem. *Compare* Harris v. Watson, Peake 72, 170 Eng. Rep. 94 (K.B. 1791) (promise to pay sailor additional wages held unenforceable on policy grounds), *with* Stilk v. Myrick, 2 Camp. 317, 170 Eng. Rep. 1168 (C.P. 1809) (promise to pay sailor additional wages held void; performance of a pre-existing duty does not constitute consideration). See Alaska Packers' Ass'n v. Domenico, 117 Fed. 99 (9th Cir. 1902) (successful demand by crew for new contract with higher pay held unenforceable). See also McDevitt v. Stokes, 174 Ky. 515, 192 S.W. 681 (1917) (promise to pay a jockey $1,000 if he won a race, made by a person not his employer, held void for lack of consideration); Board of Comm'rs v. Johnson, 126 Kan. 36, 266 Pac. 749 (1928) (law officers held entitled to recover reward for arrest; no legal duty to apprehend a fugitive from another state).

Article 1341 of the French Code Civil makes relatively unenforceable any noncommercial [36] contractual obligation involving a sum or value of more than 5,000 francs (approximately ten dollars).[37] Mortgages created by contract, noncommercial compromise agreements,[38] marriage contracts, and agreements to make a gift are all rendered relatively unenforceable by specific code provisions.[39] In every case, the unenforceability can be cured by the use of an appropriate extrinsic element.

The German law has no general unenforceability provision

[36] Under article 109 of the Code of Commerce, as now interpreted by the courts, the judge can admit any form of evidence considered potentially useful to prove a commercial transaction, unless the law expressly requires a writing. See Jaladon v. Rocher, Cour de Cassation (Ch. req.), March 24, 1825, [1825] S. I. 432; 4 FUZIER-HERMANN, CODE CIVIL ANNOTÉ art. 1341, comm. 216 (Demogue ed. 1938); RIPERT, TRAITÉ ÉLÉMENTAIRE DE DROIT COMMERCIAL No. 321 (3d ed. 1954). Some evidence exists that article 109 was only intended to permit the introduction of testimony by witnesses relative to the commercial transactions of purchase and sale. See 1 LOCRÉ, ESPRIT DU CODE DE COMMERCE 320–21 (2d ed. 1829).

For the distinction in French law between ordinary contractual transactions and commercial transactions, see pp. 1029–31 *infra*.

[37] The effect of continued inflation has been to make the requirement of article 1341 far stricter today than it was originally. The amount set in the article's original text was 150 francs. CODE CIVIL art. 1341 (1st ed. Didot 1804). This sum was raised to 500 francs in 1928, Law of April 1–3, 1928, [1928] Recueil des Lois pt. 2, at 131, and to 5,000 francs in 1948, Law of Feb. 21, 1948, [1948] Recueil des Lois pt. 2, at 69.

[38] Article 2044 of the Code Civil provides that agreements of compromise must "be made in writing." The drafters apparently intended to exclude, in principle, oral testimony relative to compromise agreements. See 15 LOCRÉ, LA LÉGISLATION DE LA FRANCE 431–32 (1828). Courts and writers originally so interpreted article 2044. Legregeois v. Nicolle, Cour d'Appel de Caen, April 12, 1845, [1845] D. II. 108, [1846] S. II. 168; see note to De Gryniéwitch v. De Boigne, Cour de Cassation (Ch. civ.), Jan. 8, 1879, [1879] D. I. 128 (note); note to Rothan v. Acker, Cour de Cassation (Ch. civ.), Nov. 28, 1864, [1865] D. I. 105, [1865] S. I. 5 (note 2). However, well before the end of the 19th century, it was established that oral proof of a compromise agreement was proper if there was a beginning of written proof, thus in effect making article 2044 subject to the same exceptions as article 1341. See Rothan v. Acker, *supra*.

Agreements of compromise in commercial matters were first treated by French courts on the same basis as noncommercial compromise agreements and were required to be in writing. See, *e.g.*, Blandeau v. Duranthon, Cour d'Appel de Bordeaux (2d Ch.), Feb. 5, 1857, [1857] S. II. 575. In commercial law a relaxation in the interpretation of article 2044 paralleling that in the civil law occurred and culminated in decisions holding that oral testimony could, at the discretion of the court, always be introduced to prove a commercial enterprise. See, *e.g.*, Dargenson, Domingo et Cie v. Savignon et Cie, Cour d'Appel de Paris (5th Ch.), June 13, 1894, [1894] D. II. 498, [1895] S. II. 19.

[39] Code Civil arts. 2127 (mortgages); 2044 (compromises); 1394, 1396–97 (marriage contracts); 931–32 (gift agreements).

Article 2015 of the Code Civil provides that "a suretyship shall not be presumed,

comparable to article 1341 of the Code Civil. The desirability of such a provision was considered and expressly rejected by the drafters of the German Civil Code.[40] Unless cured by the addition of an appropriate extrinsic element, German law considers unenforceable various more specialized transaction types: agreements binding a party to transfer ownership of land, agreements obligating one party to transfer all, or a fractional part of, his property, leases to run for more than a year, mortgages (*Hypotheken, Grundschulden*) before their entry in the land registry (*Grundbuch*), all assumptions of the obligation to stand as surety, unless the contract is a commercial transaction on the surety's part, promises of an annuity, marriage contracts, and promises to make a gift.[41]

The transaction types considered unenforceable in each of these legal systems are, in a very general perspective, roughly comparable. Divergences probably reflect historical accident rather than basically dissimilar policies. One important exception to this generalization is the provision of article 1341 of the French Code Civil classifying as relatively unenforceable noncommercial contractual obligations involving more than very modest values. A final, overall assessment must, however, await completion of the discussion on classifying individual transactions to determine whether they fall within an unenforceable transaction type and on determining and devising extrinsic elements capable of rendering enforceable otherwise unenforceable transactions.[42]

Two significant differences are already clear between the common law, on the one hand, and French and German law, on the other, in their handling of the problem of unenforceability. Both are connected with the doctrine of consideration. The first difference is that the common law denies enforcement to certain transaction types in their natural state which would be enforced under French and German law. A clear example is the option, given in a business context but without any price being paid. More doubtful examples, because it is often hard to tell whether the common-law courts are policing individual transactions or striking down agreements without regard to their actual fairness,[43] are business arrangements (such as requirements and output contracts) in which only one side bears a substantial burden, and compromise agreements or contractual adjustments in which the duties incumbent on one party remain substantially unaltered while those falling on the other are reduced in amount but not altered in kind.[44] German law does not consider any of these transaction types suspect, enforcing them without requiring the presence of any element extrinsic to the transaction's natural configuration. In regard to commercial transactions, French law reaches the same result. For noncommercial transactions, French law comes closer to the common-law position, considering suspect all compromises and any of the other transactions involving a value or amount of more than 5,000 francs. Both civil-law systems, of course, police the individual transaction for unfairness.[45]

A second significant difference lies in the common law's use of an indirect approach, through consideration, to the problem of unenforceable transaction types. The problem with a technique of delineation which relies on a general, abstract characteristic is the difficulty of limiting its scope. The system consequently tends to treat transaction types as suspect when there is little or no policy justification for doing so. For example, it is not clearly demonstrable, from the point of view of evidentiary, cautionary, channeling, and deterrent policies, that an option agreement made by two businessmen should be handled differently from many other kinds of commercial dealings. A strong argument exists that the common law's handling of commercial options, business compromises, and other business transactions lacking an element of exchange, is more a logical deduction from the general doctrine of consideration than an expression of justifiable policy concerns.[46]

it must be express . . . ." The French courts have not used article 2015 as a basis for imposing formal requirements on suretyship agreements. Of course, all noncommercial suretyship agreements fall under article 1341. Rigoudaud v. Fayaud et Jouhannaud, Cour de Cassation (Ch. civ.), May 10, 1909, [1911] D. I. 439, [1912] S. I. 169 (note).

[40] See 1 MOTIVE ZU DEM ENTWURFE EINES BÜRGERLICHEN GESETZBUCHES 178–81 (1888). Recently, suggestions have been made that would, in effect, result in a general requirement of a writing. See SCHIFFER, DIE DEUTSCHE JUSTIZ 147 (2d ed. 1949).

[41] BGB §§ 313, 311, 566, 873, 766, 761, 518; HANDELSGESETZBUCH (12th ed. Baumbach & Duden 1958) [hereinafter cited as Commercial Code] §§ 350, 351. For the distinction in German law between ordinary and commercial transactions, see pp. 1029–30 *infra*.

[42] See pp. 1027–51, 1051–62 *infra*.

[43] See pp. 1063–65, 1074–75 *infra*.

[44] *Cf.* Foakes v. Beer, 9 App. Cas. 605 (1884); RESTATEMENT, CONTRACTS § 76 (1932).

[45] See pp. 1062–73 *infra*.

[46] These observations apply, of course, only to the situation in which the party