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Capacity of Parties Negotiation

Capacity to Contract

According to contract law, not all entities are eligible to enter into a contract. Laws that address the *capacity to contract* have been established to protect individuals from being exploited when agreeing to perform. Contracts are only legally enforceable if executed by a sane, sober adult. Contracts assented to that are not legally binding include those "signed" by:

1. Minors (under age 18).
2. Individuals under impairment or suffering disability from
    a. Alcohol or drugs.
    b. Mental incapacity.

Those that lack the capacity to contract can rescind the contract, rendering it unenforceable. This defense cannot take back a portion of the contract; the entire contract must be dismissed. There are cases where a party who lacked the capacity to contract can later *ratify* or approve the agreement upon achieving the recognized ability to enter into the agreement.

Minors

Minors must show the lack of capacity prior to reaching the age of majority. Though there have been differing court opinions, generally speaking, if a minor misrepresents their age in order to obtain the contract the other party may invalidate the agreement due to fraud. If a parent or guardian executes a contract on behalf of the child, the parent may be held liable for any negligence, and cannot charge that the contract is voidable on the minor's behalf due to a negligent act committed by the child. Children who are *emancipated* (given freedom) from adult guardians may be able to gain capacity to contract.

Impairment by mental incapacity

Impairment covers a variety of mental conditions that can lead to incapacity to contract. Organic brain disease or brain injuries, mental retardation, depression, psychoses, and insanity can all be grounds for terminating a contract. There are two tests typically used to determine a party's mental lack of capacity:

1. *Cognitive* capacity. Did the party have the ability to understand the consequences, responsibilities, and nature of the agreement?

2. *Volitional* capacity. Did the party have the ability to control their actions and act in a reasonable manner towards the completion of the contract? (Important in some cases is whether the other party was aware of the disability.)

If an impaired party gains a benefit despite having the impairment, he may have to make restitution to the offended party. Certain impaired parties (such as an alcoholic) are typically held to a higher standard of legal competency than minors, and may be deemed responsible for their actions; however, if an addiction can be linked to a diagnosis or the other party was aware of the impairment at the time of agreement, then the contract may be voidable.

Negotiation

When contracts are more complex or of high value, there is usually some *negotiation* between the parties. Both parties enter into an agreement with the intention to *bargain* for what each will promise and receive. On each side there will be the expectation to give and gain. Nearly every business contract has this premise at its core. Parties may negotiate for themselves or have a representative perform that duty. It is important to note that, if a third-party negotiates on your behalf, he must be deemed a legally intended representative who will likely be required to testify in dispute resolution.

If you negotiate on your own behalf, make sure you have the personality and conviction to handle opposing viewpoints. Good negotiation can require strength, patience, compassion, and capitulation. To reach a contract that best suits your objectives, there are steps you should take prior to formally discussing an agreement.

Writing the Contract

While laws don't prevent parties from constructing unique agreements (except government contracts), it is often recommended that hiring an attorney to draft a contract is a good idea. The *Statute of Frauds* requires that contracts for certain transactions must be written, and writing a valid and fully enforceable contract can require sound legal contract knowledge. Many times, the agreement to perform is minor

in contrast to ensuring that the contract complies with federal and state laws in the event a dispute takes place. Many boilerplate contracts exist that include clauses that generally meet legal guidelines, but each agreement is as unique as the parties involved and even the most fundamental issue may not be written to protect a wronged party.

Some laws state specifically what terms should be included in a contract, such as the rescission period in a real estate sales agreement. Other regulations require disclosures, like the early balance computation clause in credit agreements. A vendor wishing to sell goods must ensure his agreement meets the standards under the UCC. Individual agreements do not generally have the same requirements, but if a dispute arises, it is better to have more in the contract than less.

Written contracts can be as unique as necessary. However, contract language should be *specific*, *clear,* and *concise;* ambiguous, complex, or confusing terminology can make a contract less enforceable if disputed. Drafting an outline before creating the agreement can be helpful. Accuracy of all data (such as party names and addresses) is important, as is consistency of tone and usage of abbreviations and grammar. Defining important phrases or vague terms will help avoid confusion. As with any legal document, a lawyer should review the final document prior to obtaining signatures.

Clauses

If a promise is unfulfilled or a performance is unsatisfactory, the clauses included in a contract are the elements that most often get scrutinized (and challenged) when disputes arise. In written contracts, the clauses shape the agreement to conform to each party's wishes and statutory requirements. When writing a contract for a business transaction the clauses used in contracts of one industry may not be applicable in another, which has led to the creation of special disciplines in contract law. We'll discuss some specific clauses that are typical of special contracts (such as financing agreements) in Module XI. The important thing to remember is that clauses must clearly indicate the subject matter pertaining to that provision.

There are a few clauses that are generally standardized across contract types. They include:

Time is of the essence. States that each party will act as quickly as possible to perform. Any delay may cancel the contract. Subject matter that includes perishable goods, critical deadlines, or weather-related influences typically requires this clause.

Force majeure. States that parties can be relieved of obligations or may amend the contract in the event that an extraordinary event or catastrophe occurs that prevents one or more parties from fulfilling its obligations. Literally meaning *greater force*, it can protect a party that cannot perform because of an element beyond their control, from charges of wrongdoing.

Indemnification. States that party A must either 1) repay party B for damages that party A caused, or 2) ensure that party B will not be held responsible for claims, damages, injury, or other loss that party A creates because of his own negligence, an accident, or other adverse conditions.

Notices. States the method and process for conveying official statements, such as a default claim. Typically includes the offeror's mailing address.

Amendment. Typically states that the agreement may not be amended unless done so in writing and agreed to by all parties.

Governing Law. States the jurisdiction (typically by geography) under which dispute claims will be filed. Most U.S. contracts list the state court in the state where the agreement is executed.

Assignment. States that obligations committed to by a signatory party may or may not be assigned to other parties. If assignment is given without the third-party's consent, that assignment will likely by voidable.

Negotiating and writing a contract is the most effective way for a party to get exactly what they want from another party, and protect them from false or damaging claims. But while most efforts result in successful contracts and satisfied parties, there are cases where a contractor enters into an agreement that is less than proper.

MCQs

1. **What is Negotiation?**

    A. Negotiation can be defined as a basic means of getting what you want from others.
    B. It is back-and-forth communication designed to reach an agreement
    C. Negotiation is a method by which people settle differences. It is a process by which compromise or agreement is reached while avoiding argument and dispute.
    D. **All of the above**

2. **The various stages of the negotiation process are:**

    I. Preparation and Planning
    II. Definition of Ground Rules
    III. Clarification and Justification
    IV. Bargaining and Problem Solving
    V. Closure and Agreement

    A. **All of the above**
    B. (I) and (IV) only
    C. (I) (IV) and (V) only
    D. None

3. **Distributive bargaining and integrative bargaining are the two approaches typically adopted in the negotiation process.**

    A. **True**
    B. False

4. **The ability to negotiate requires a blend of interpersonal and communication skills used together to achieve the desired result. Which of the following are the traits of an effective negotiator?**

    A. Negotiators must have the skills to analyse a problem to determine the interests of each stakeholder in the negotiation.
    B. Effective negotiators are able to listen actively to other parties during the debate, reading their body language as well as listening to the verbal communication.
    C. Effective negotiators are able to maintain good working relationships with those involved in the negotiation process.
    D. **All of the above**

5. **Some of the measures that a skilled negotiator may adopt to avoid a deadlock in the final stages of negotiations include:**

    A. Offer a comprehensive and convincing explanation of the reasons why the concessions sought by the other party cannot be accepted.

B. Express willingness to review the matter or concessions or benefits sought by the other party, in the future.
C. **Both A&B**
D. None