

# FORMATION OF A VALID CONTRACT

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LAW FOR  
ENGINEERS  
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# FORMATION OF A VALID CONTRACT



# **FORMATION OF A VALID CONTRACT**

- WHAT IS A CONTRACT?**
- IMPORTANCE OF CONTRACTS?**
- DISTINGUISH FROM SOCIAL ARRANGEMENTS?**
- GIVE EXAMPLES OF A CONTRACT**
- GIVE EXAMPLES OF SOCIAL ARRANGEMENTS**

# **PART C – GENERAL PRINCIPLES OF CONTRACT**

## **1. THE FORMATION OF A VALID CONTRACT**

In order for a contract to be valid and binding in law, certain requirements have to be met. **All the requirements must be met**, if one is missing then there will normally not be a valid contract and the courts will refuse to enforce it.

1. The parties must have contractual capacity
  2. The parties must have a serious intention to contract
  3. The parties must communicate their intention to each other
  4. The parties must be of the same mind, i.e. no misunderstandings or mistakes
  5. The agreement must be lawful
  6. Performance of the contractual obligations must be possible
  7. The agreement must comply with any formalities
  8. The agreement must be certain in its terms
- } offer &  
acceptance

## 1.1 Contractual Capacity

General rule?

**Exceptions:** limited contractual capacity

## 1.1 Contractual Capacity

People with limited contractual capacity are:

Married persons

Minors

*\*Insolvents*

Mentally ill and

*\*intoxicated persons.*

## **(a) MARRIED PERSONS**

- 1- Marriages In Community Of Property (ICOP)
- 2- Marriage out of community (OCOP)
- 3- Marriage out of community with accrual (accrual)

Mechanics...briefly



**(a) MARRIED  
PERSONS**

**Marriages In Community Of Property (ICOP)**

Assets – before marriage

Liabilities – before marriage

Assets – after marriage

Liabilities – after marriage

**Focus is on contractual capacity!**



**(a) MARRIED  
PERSONS**

**Marriages In Community Of Property  
(ICOP): terminology**

Matrimonial Property Act (MPA) 1984

Alienate:           sell, mortgage, lease out (as lessor/landlord),  
                          give away

Cede:               manner of alienating usually used for intangible  
                          assets

Mortgage:          you borrow money to purchase immovable  
                          property and as security for that loan, you  
                          mortgage the property. **EG**

Pledge:             give something as security. **EG**

**(a) MARRIED  
PERSONS**

**Marriages In Community Of Property (ICOP)**

**General rule:**

Exceptions: i.e

Why is this section important to you?

- **Formal consent**

Formal consent is a written and signed consent witnessed by two witnesses.

- i. Alienate or mortgage immovable property
- ii. Enter into as a credit receiver, a credit agreement in terms of the National Credit Act 2005
- iii. Bind him/herself as surety

In case of (ii) consent can be given by ratification. But must still be in writing (signed) before two witnesses.

Consent is not required for (ii) + (iii) if the act is done in the **ordinary course of that spouse's trade or business or occupation? AI**

- **Written consent?**

- i. Alienate, cede or pledge any shares, insurance policies, fixed deposits, or any investments in a financial institution. **(financial investment assets.):**
- But don't need consent to sell shares listed on JSE or to deal with a deposit in one's own name at a bank (**fact check?**)
- Don't need consent if the act is done in connection with the spouse's trade, business or occupation
- ii. Alienate or pledge jewellery, coins, paintings etc. **(capital assets)**
- iii. Withdraw money held in the name of the other spouse at bank, building society or post office

- **Written consent?**

**Ratification?**

**Exception? Trader.**

- **Informal consent**

This is a verbal consent?

- i. Alienating or pledging household furniture and effects
- ii. Receiving money due to the other spouse from:
  - their trade, business or occupation e.g. salary or pension
  - inheritance, donation , bursary or prize (fact check?)
- iii. **Large** donations from joint estate. **EG**

**REMEMBER**

If the act has not been listed in any of the categories above,  
then no consent is needed.

- **Informal consent**

This is a verbal consent.

Ratification?

Overlap?

- **Transactions made without consent**

General rule:

However, there is an exception:

If the third party (other party to contract) does not know or could not reasonably have known that the required consent had not been given, then the contract is valid.

If the contracting spouse knew that he or she would not get consent and the estate has suffered a loss, then an adjustment will be made in favour of the other spouse upon dissolution of the marriage



- **Transactions made without consent**

Example.

Jill and John are married ICOP. John sold some jewellery (buyer - jewellery collector) which Jill inherited from her grandmother. They keep it as a capital asset. John did not have Jill's consent to sell the jewellery and he knew that she would never consent.

ADD (1): John gave written consent with Jill's forged signature

ADD (2): value of the jewellery is R10 000 – sold for R6 000.

- **Transactions made without consent**

## **Guidance**

Dealing with the contractual capacity of spouses married in ICOP.

1. **Step 1:** Identify the area you are dealing with.

This transaction is regulated by.... (The contractual capacity of spouses is regulated by the matrimonial property act)

2. **Step 2:** Identify the applicable law.

The issue is John is committing fraud. The agreement was not consensual. The contract is invalid (main issue).

3. **Step 3:** Identify the issue.

Asking whether the contract is valid, so the rules should deal with the issue you brought up.

4. **Step 4:** set out the applicable legal rules

Forged consent is not valid consent. So there isn't consent (fraud). But the third party couldn't have known so the contract is valid (E1)

5. **Step 5:** apply the law. Since the estate made a loss, it means that if they were to get divorced, they would have to split the 10. So John has to make good with Jill's loss.

6. **Step 6:** conclude.

4. ICOP. Spouses have Full contractual capacity. Some exception where consent is needed. This is part of the exceptions. This is a capital asset. So John will need the consent to sell the property. Where there is not consent, the contract is void. But there are exceptions (two exceptions).

# **Marriages Out of Community of Property (OCOP) & Marriages Out of Community of Property with the Accrual (Accrual)**

Have full cont. capacity

Jointly resposbsnle of household expensive

## **(b) MINORS**

**Who is a Minor?**

## **(b) MINORS**

### **Contractual Capacity of Minors**

#### **Assistance by guardian?**

#### **What is the meaning of assistance?**

Express or implied? Examples.

## Effect of An Assisted Contract

The effect of a duly assisted contract is that the **minor is bound and liable in terms of the contract** not the guardian.

So it is a fully valid and enforceable contract against the minor.

The only time the minor will not be bound by a duly assisted contract is if the contract was inherently prejudicial. The prejudice however must be substantial and not trivial.

Note such a contract is valid (not void) but the contract can be cancelled.

## Effect Of An Unassisted Contract under the Common Law

The contract is a “limping contract”.

What the limping contract means is that the minor can choose (with the assistance of the guardian) whether to enforce the contract (ratification) or not to enforce the contract (repudiation).

The choice lies solely with the minor (guardian) . Other party (the adult) is bound by that decision.

Repudiation: minor not bound under law of contract and neither is other party (adult)

Ratification: both minor and the other party (adult) are bound by the contract

## Effect of an Unassisted Contract - Consumer Protection Act 2008

CPA only applies to certain types of agreements- mainly sale and lease and where the **seller / lessor** is someone who sells those goods and services **in the ordinary course of business**.

The CPA says that the effect of a minor's unassisted contract where the Act applies is that it is voidable.

This is different from a limping contract and a void contract –will look at these voidable contracts in more detail in another section.



## **Liability of an Unassisted Minor in terms of Fraudulent Misrepresentation**

Where a minor has lied about his or her age or has lied about having the guardian's consent that is fraudulent misrepresentation.

Because the minor lied about their age/ consent, the minor could incur obligations under the law of delict.

## **Statutory Exceptions**

## (c) INSOLVENTS

Sequestrated  
Insolvency Act

1. Insolvent may not enter into a contract in terms of which he disposes of assets in the insolvent estate.
2. Insolvent may not, without the written consent of the trustee, enter into contract which adversely affects the estate.
3. Insolvent may not, without the trustee's consent be involved in a business which is a general dealer or manufacturer.

Contracts in contravention of the above are **voidable at instance of trustee (*not void*)**. This means the contract is valid until the trustee chooses to cancel it and he may or may not choose to do so depending on what is in the best interests of the creditors.

(d) **MENTAL INCAPACITY ARISING FROM MENTAL ILLNESS  
OR INTOXICATION**

**Mental Illness**

lucidum intervallum = sane interval

**Intoxication**