

CHAPTER FOUR

CAPACITY

4.1 Introduction

A person's real agreement is required in order for a contract to be valid in free market jurisdictions, as explained in Chapter 2 ("Real Agreement (Offer and Acceptance)"). Of course, each party to the contract must also have the basic "ability" to actually make the real agreement that is required. A person's ability--or legal competence--to make a contract is called her capacity to make that contract.

***** DEFINITION:** **Capacity** is a person's legal power or qualification to do what adult persons generally have the legal power or qualification to do.

In general, a living adult person has contractual capacity--and thus the ability to make a valid contract--if she is able to understand the nature of making the contract, can control her actions in making the contract, and is permitted by law to make the contract. A person who lacks any of these qualities with regard to a particular agreement has some "incapacity." She generally cannot make a valid contract with regard to that agreement, and she generally can avoid any such agreement she does make.

The law also makes distinctions among persons who lack full capacity: some have total incapacity, and others have only partial incapacity. In many jurisdictions, if a person completely lacks capacity, contracts she makes are void. If a person only partially lacks capacity, then contracts she makes are generally voidable. The specific rules about the status of such contracts are discussed more fully in the Sections below.

***** ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.4c contains a more concise discussion of the formation requirement of capacity; and Chapter 2 ("Real Agreement (Offer and Acceptance)") contains further discussion of real agreement.

4.2 Living Adults Generally Have Full Capacity to Make Contracts

The general rule is that living adults have the capacity to make valid contracts, with certain limits that will be explained in this Chapter. So if adult parties come to the court with a contract dispute, the court will generally presume that the parties have the capacity to contract. If a party lacks full capacity because she is in one of the special groups listed in Section 4.3 below, then that party must show this to the court if she wishes to avoid the contract.

Both “natural persons” and “legal entities” generally have the legal capacity to make contracts. A “natural person” is a human being. A “legal entity” is an entity other than a human being that has its own legal existence, and that can therefore make contracts in its own right. For example, governments, corporations and partnerships are such legal entities. Normally they have the capacity to make valid contracts. Sometimes such entities are referred to as “legal persons.” So in law there are actually two types of “persons:” “legal persons” and “natural persons!” Both types of persons generally have the capacity to make valid contracts.

One general limit on who has the capacity to make contracts is that only natural persons who are alive at the time an agreement is made can form a contract. It may seem obvious that a dead offeree cannot accept an offer. But it is possible that an offeree could die after sending her acceptance but before her acceptance becomes effective. And of course, an offeror could die before her offer is accepted. In these situations, the offer is terminated at the time of death, and no contract can be formed. This was explained in Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.6c. Where a party dies after a contract is formed, the question is whether contract duties may be discharged, probably under doctrines of impossibility or impracticability. That problem is discussed in Chapter 9 (“Performance and Discharge of Duties”), Section 9.8a.

*** **ADDITIONAL REFERENCE:** Chapter 2 (“Real Agreement (Offer and Acceptance)”), Section 2.6c discusses how offers terminate when a party dies; and Chapter 9 (“Performance and Discharge of Duties”), Section 9.8a discusses how courts respond when a party dies after a contract is formed.

4.3 Persons Who May Not Have Full Capacity to Make Contracts

Capacity is basically the legal ability of a person to consent to a contract, as noted in Section 4.1. Most adults have the full capacity required to make a valid contract, as discussed in Section 4.2. But there are certain types of persons the contract laws of many free market jurisdictions generally say are unable to give the consent required to form such a valid contract. These persons have a total or partial incapacity to contract.

Specifically, the laws of many free market jurisdictions say that the following types of persons generally have incapacity to some degree:

- (1) minors (as explained in Section 4.4);
- (2) mentally incompetent persons (Section 4.5);
- (3) intoxicated persons (Section 4.6);
- (4) persons convicted of and imprisoned for serious crimes (Section 4.7); and
- (5) foreigners, but only in very limited situations (Section 4.8).

This Chapter will discuss each of these special groups of persons--and describe the extent of their incapacity to contract--in the Sections that follow.

4.4 Contracts Minors Make Are Generally Voidable

In many jurisdictions, natural persons generally gain full capacity to contract when they reach the age of eighteen (18) years. In such jurisdictions, anyone below the age of eighteen years is called a "minor." Minors generally lack full capacity to contract. Of course, this rule applies only to natural persons--legal entities need not be any special age in order to have capacity to contract!

Because minors lack full capacity, the law protects them from the consequences of making contracts. Specifically, the law says that contracts minors make are generally voidable, with certain limits which are described below. This means that a minor may generally avoid such contracts.

A minor may still make contracts freely, and unless the minor chooses to avoid them, these contracts can be enforced. The minor can go to court and force the adult to abide by the contract. However, the adult cannot force the minor to obey the contract if the minor properly indicates that she will avoid it--even if the contract has been partly or fully performed. But if a minor wishes to perform a contract made with an adult, the adult is bound by it. The adult cannot avoid it just because the minor might avoid it!

***** WHY IS THIS IMPORTANT?** Why does the law say that contracts minors make are generally voidable, and that the minor can avoid them if she wishes?

The reason for this rule is that most jurisdictions believe minors are likely to lack mature judgement. Because of this, such jurisdictions feel minors may be vulnerable to the actions of unscrupulous persons, who may take advantage of them in the marketplace. Even if no unscrupulous persons are involved, minors are believed to need protection from a tendency to buy without thinking carefully. And they may not be able to understand fully the consequences of making contracts. So the law says that contracts generally

cannot be enforced against minors if the minors do not wish to proceed with the contracts, with certain limited exceptions to be discussed below.

This general rule is also intended to discourage adults from dealing with minors in most circumstances. In some cases, the rule may actually seem unfair to adults, because a clever minor may be able to take advantage of an adult! But this possibility appears to further the general goal of the rule--to deter adults from making contracts with minors--by making such contracts risky for adults.

Although the basic purpose of these rules is to protect vulnerable minors from unscrupulous adults, the law in practice makes no distinction between contracts made with “scrupulous adults” and contracts made with “unscrupulous adults.” In either case, the minor alone decides whether the voidable contract will be enforced. In addition, the law does not distinguish between “sophisticated minors” and “unsophisticated minors”--either kind can generally avoid contracts. So it is usually irrelevant with whom the minor deals, what kind of person the minor is, or what the circumstances of the contract are. An exception might be where both parties to the contract are minors, or lack capacity for some other reason. In that case, it would appear that neither party should be able to enforce the contract against the other.

CASE STUDY 102

FACTS Chuon lived in a society where the age of majority was 18. When Chuon was 17 years old, he decided to buy a video cassette recorder that he saw on sale in Vantha’s Video Shop. It was a \$250 VCR, but for one day only Vantha was offering it for sale at the extra low price of only \$99.95.

However, after Chuon brought the VCR home, he decided that he no longer wanted the VCR, because the purchase had left him with no more money. So he tried to avoid the contract.

QUESTION OF LAW Can Chuon avoid the contract, even though there was nothing unscrupulous about Vantha's conduct in selling the VCR to him?

DECISION Yes. Because Chuon is under 18 years old, he can avoid the contract on the grounds of lack of capacity, return the VCR and get his money back.

In general, the law gives minors the right to avoid contracts even where the other party is not at fault, and regardless of the minor's reason for wanting to avoid the contract. In this case, Chuon can avoid the VCR contract because he was only 17 years old (a minor) when he made the contract. By contrast, if Vantha wished to avoid the contract but Chuon did not, Vantha could not do so. This is because the contract is binding on Vantha if Chuon wants it to be. So if Chuon wanted to keep the VCR, Vantha could not get the VCR back, even if she returned the money Chuon paid.

In general, minors may “disaffirm” or “ratify” contracts they make. To disaffirm is to properly indicate that a person will avoid the contract. To ratify is to properly confirm that a person intends to be bound by the contract. These ideas will be discussed in the next two Sections.

4.4a Minors May Disaffirm Voidable Contracts They Make

As noted above, minors can avoid any voidable contract they make. When minors seek to avoid contracts, they “disaffirm” their contracts.

***** DEFINITION: Disaffirmance** is one party’s repudiation of or refusal to abide by a contract--that is, the party’s proper indication that she will avoid the contract.

A minor can disaffirm a voidable contract at any time during her minority, or within a reasonable time after she reaches the age of majority. What is a “reasonable time” depends on all the circumstances of a particular case. For example, a minor might receive a lot more time to disaffirm a contract for the sale of an expensive item like a car than she would for a relatively minor item like a pen. It appears that many common law jurisdictions generally give minors a substantial amount of time--even years in some cases--to disaffirm voidable contracts. However, some authorities say this time may be shorter if the minor has received benefits under the contract both before and after she reached the age of majority.

It is also important to note that a minor cannot disaffirm only part of a contract and seek to go through with the rest. In other words, a minor cannot choose to disaffirm only what she does not like! A contract can only be disaffirmed totally, or not disaffirmed at all.

There are also some important differences related to disaffirmance based on whether a contract is executory or executed. First, if a contract made by a minor is completely executory (the contract has not yet been performed at all), a disaffirmance by the minor basically cancels the contract. This is basically a unilateral rescission of the contract. That means that no one--neither the minor nor the adult--is required to comply with the contract.

Second, if the contract is partly or fully executed (performed), then a disaffirmance means that the contract has no legal effect from the time of the disaffirmance. Again, this is basically a rescission. After a minor disaffirms a contract, she is no longer bound by the terms of the contract. She can also demand restitution (under quasi-contract) of whatever she has given to the other party under the contract. In addition, the minor may be required to return some or all of what she has received from the other party under the contract. This potential obligation is also based on quasi-contract.

Third, silence by the minor for a reasonable time after the minor reaches the age of majority has different effects on executory and executed

contracts. If a minor makes a contract that is still executory at the time the minor reaches the age of majority, and the minor is silent up to and for a reasonable time after reaching the age of majority, the law says that such silence automatically disaffirms the contract. But if the contract is already executed at the time the minor reaches the age of majority, and the minor is silent up to and for a reasonable time after reaching that age, then such silence automatically ratifies the contract--confirming that the minor will perform the contract. And in either case--disaffirmance or ratification--these are the effects of such silence whether the minor actually intends them or not.

In order to disaffirm, a minor need only indicate to the other party expressly or impliedly that she is disaffirming the contract--that she does not intend to be bound by it. From that time on, the contract is disaffirmed. The minor need not go to court to disaffirm. If the adult party asks a court to force the minor to comply with her obligations under the contract, the minor need merely prove to the court that she was a minor at the time the contract was made. That would be a valid defense to the adult's claim, because the law generally presumes that minors lack full capacity to contract.

As noted above, when a contract is disaffirmed in this way, the law generally tries to provide restitution to the parties, under the doctrine of quasi-contract--except that the adult may not be able to recover for benefits that the minor no longer has or cannot return. When a minor disaffirms a contract, she can recover whatever she has given to the other party under the contract. But the minor must return to the other party what the minor has received under the contract only if such items are still in her possession. That is, most jurisdictions say that the minor need not compensate the other party for items the minor no longer possesses or cannot return. If the minor no longer has some or all of the property, or has received services that cannot be returned, the minor may still disaffirm the contract. In that situation the other party still has to return all of what she has received from the minor, even though that party may not be able to recover all of what she has given to the minor.

So a minor can generally disaffirm a contract--and get back what she has given under the contract--even though the adult party may be damaged by the disaffirmance! This may seem unfair. But as discussed in Section 4.4 above, the "minor incapacity" rule was designed to discourage adults from dealing with minors. If an adult knew that she could always get back anything that she transferred to a minor, the adult might be encouraged to make contracts with minors. Also, adults can protect themselves by assuring that parties with whom they contract are 18 years old, or by requiring co-signers to the contract. This will be further explained in Section 4.4d, below.

CASE STUDY 103

FACTS Much, a minor, bought a watch for \$20 from the S'aht Jewelry Company. About a month later Much lost the watch. While Much was still a minor, he disaffirmed the contract and demanded the return of his \$20.

QUESTION OF LAW Can Much get his \$20 back even though he cannot return the lost watch?

DECISION Yes. Much can disaffirm and get his \$20 back because he was a minor when he made the contract.

Minors can generally disaffirm contracts and get restitution, even if the adult cannot recover everything she provided to the minor under the contract. In this case, the minor Much can disaffirm his watch sale contract and get his money back, even though he cannot return the watch to the Jewelry Company. It does not matter that he is unable to return the watch. Most courts require only that the minor return the goods she still has in her possession--even though the adult must return everything she has received.

One potential problem related to this rule about restitution after disaffirmance is what happens to the property an adult has received from a minor in this situation if that adult no longer has that property. In general, if an adult buys property from a minor, the adult has only voidable title to the property. That is, the minor may recover title--ownership--from the adult if she chooses to disaffirm. In addition, if the adult gives the property away to a third party, or sells it to a third party who knows it came from a minor, it appears that the minor can also get back title to the property.

However, sometimes the adult sells the property to an innocent third party--one who does not know that the property came from a minor--before the minor disaffirms the contract. Such innocent third parties are sometimes called “good faith purchasers for value.” The rules for this kind of resale to a good faith purchaser are different for goods and real property.

If this kind of resale occurs with goods, it appears that the innocent third party gets unvoidable title to the property. This means that the minor cannot take back title to the property--although she may still get compensation from the adult with whom she made the contract for the reasonable value of the property.

If this kind of resale occurs with real property, it appears that in some jurisdictions the minor may still be able to reclaim title to the property--even though the adult has sold it to an innocent third party! If the minor reclaimed title in that way, and the third party wanted to recover the value of what she had given under her contract, the third party would have to bring a lawsuit against the adult who made the original contract with the minor. The rights of minors to reclaim title to real property will be further discussed in Section 4.4c, below.

CASE STUDY 104

FACTS Vicseth, a minor, owned a 1989 car. But he traded it to an adult named Pochin in exchange for a 1991 car. Vicseth drove the 1991 car

for two weeks, and found that it was not as good as the 1989 car. So Vicseth asked Pochin to return his 1989 car. But Pochin said that he had already sold the 1989 car to Kumnith, who knew nothing about the fact that Vicseth was a minor. Vicseth then sued Kumnith for the return of his car.

QUESTION OF LAW Can Vicseth recover his 1989 car from Kumnith?

DECISION No. Kumnith can keep the car because he is an innocent third party who bought the car in good faith and for value.

In many jurisdictions, if an adult resells goods she got through a voidable contract with a minor to a good faith purchaser for value, the innocent third party gets unavoidable title to the property. This means that the minor cannot take back title to the property--although she may still get compensation from the adult with whom she made the contract for the reasonable value of the property.

In this case, Pochin got a 1989 car through a contract with the minor Vicseth. This means Pochin had voidable title to the car--goods--because the sale of goods contract between Vicseth and Pochin was voidable, and Vicseth had not yet disaffirmed it. So until Vicseth actually disaffirmed the contract it was binding, and it vested title in Pochin.

Then Pochin sold the car to Kumnith. Kumnith was a good faith purchaser for value, since he knew nothing about who owned the car before. Because the car is goods, sale to an innocent third party in this situation gives that third party unavoidable title. So in this case, the sale to Kumnith gave unavoidable title to Kumnith. Vicseth cannot get the car back from Kumnith. However, Vicseth can bring a claim against Pochin for restitution, because the original contract was voidable against Pochin.

*** **ADDITIONAL REFERENCE:** Chapter 1 ("Basic Aspects of Contract Law"), Section 1.3c contains further discussion of executory and executed contracts, and Section 1.5 contains further discussion of situations in which courts may apply the doctrine of quasi-contract; and Chapter 10 ("Remedies"), Section 10.4 contains further discussion of restitution, and Section 10.7b contains further discussion of rescission.

4.4b Minors May Ratify Voidable Contracts They Make

Just as a minor may disaffirm a voidable contract, she may also ratify such a contract--but only when she reaches the age of majority. When a minor ratifies a contract, the minor basically says that she does want to perform the contract and gives up the right to avoid it. After that occurs, the minor is legally bound by the terms of the contract, just like the adult.

*** **DEFINITION: Ratification** is a proper confirmation that a party intends to be bound by a voidable contract, despite that party's right to avoid it--basically the opposite of disaffirming a contract.

The big difference between disaffirmance and ratification is that a minor can ratify a voidable contract only after she reaches the age of majority. So if the age of majority is 18 years of age, a minor cannot ratify a contract until she reaches 18 years. In the case of a minor, ratification means some words or conduct showing the minor's willingness to be bound by the promises she made while she was a minor. Of course, although for convenience we will continue to refer to persons in this situation as “minors,” in reality they are “ex-minors,” since they have just reached the age of majority. It appears that this rule about when minors can ratify is designed to make sure minors are as mature as possible when they make such an important decision.

As with disaffirmance, a minor cannot ratify only one part of a contract. In other words, a minor cannot choose to ratify what she likes and disaffirm what she does not like about a contract.

In addition, as discussed in Section 4.4a, silence by the minor for a reasonable time after she reaches majority has different effects on executory and executed contracts. Where a minor is silent about an executory contract for a reasonable time after reaching the age of majority, this disaffirms the contract. But where that occurs with an executed contract, the law says that such silence by the minor ratifies the executed contract.

CASE STUDY 105

FACTS Keary, a wealthy minor, wanted more than anything else to be a landlord. So she rented a house she owned to an adult named Tepirith for one year at the rent of \$500 per month.

Three weeks after Keary and Tepirith signed the contract, Keary reached the age of majority. One week after that time, the first month's rent was due, and Tepirith paid it. Keary received and spent the money. Soon afterwards, Tepirith began to complain about the awful condition of the house. Keary did not wish to deal with this problem, so she attempted to disaffirm the contract.

QUESTION OF LAW Can Keary now disaffirm the contract?

DECISION No. Keary can no longer disaffirm because she has already ratified the contract through her conduct.

Minors can ratify their voidable contracts through conduct. In this case, Keary received and spent the first month's rent money after reaching the age of majority--the time when she could legally ratify a voidable contract she made as a minor. Keeping and spending this money at this time is actually a ratification, because it clearly indicates Keary's intention to be bound by the contract. And after a minor ratifies a contract, it cannot later be disaffirmed. So in this case Keary ratified the contract prior to her attempt to disaffirm it, and she can no longer disaffirm it. She must obey it.

4.4c Limits on the General Rule about Minors' Capacity to Make Contracts

There are some limits on the general rule that minors can disaffirm contracts. In some special situations, minors still have the right to disaffirm, but certain limits are placed on that right. In other cases, it appears that the contracts minors make are actually considered to be valid (not voidable), and so minors do not have the right to disaffirm.

We will discuss a total of four special situations which differ from the general rule. However, these special limits may not apply in all jurisdictions. And there may be other limits in some jurisdictions. For example, although this situation will not be discussed in detail, many jurisdictions say that minors cannot avoid agreements they make to support their children born outside of marriage. So it is very important to check the local law in this area.

In any case, the four special situations this text will discuss where some jurisdictions limit the ability of minors to disaffirm contracts are:

- (1) contracts for "necessaries;"
- (2) business and professional contracts;
- (3) contracts based on misrepresentation of a minor's age;
- AND (4) real estate contracts.

(1) Contracts of Minors to Buy "Necessaries"

Sometimes a minor makes a contract to buy "necessaries," which are basically things the minor needs to live. Most jurisdictions appear to say that the minor may disaffirm such contracts. In such jurisdictions, minors may disaffirm fully executory contracts to buy necessities with no liability at all. However, if the contract for necessities has been performed to some extent, the minor must provide restitution of the reasonable value of necessities she has actually received under the contract, under the doctrine of quasi-contract. That means the minor must pay for what she has received, though not at the contract price, only the reasonable value. This rule applies whether the minor still has the necessities or not.

As noted above, "necessaries" are basically what a person needs to live, according to her particular circumstances and standard of living. Exactly what this is can be difficult to determine. Generally necessities include food, clothes and shelter which have not already been provided for the minor by parents or other guardians. That is why this rule is particularly important for "emancipated" minors who do not receive most of their support from their parents or guardians. Some jurisdictions say that necessities can also include health care, work tools, education through high school or even university, and other items. Some of these might be considered luxuries, but for some people they may be considered "necessaries," because of the particular circumstances.

CASE STUDY 106

FACTS Sok, a minor, needed a new set of clothes. So he purchased one for \$20 from an adult named Sitha. But after Sok had received the clothes, Sok refused to pay or give the clothes back, saying that he could disaffirm the contract any time he wanted.

QUESTION OF LAW Is Sok required to pay for the clothes even though he is a minor?

DECISION Yes. Sok can disaffirm, but he must pay for the clothes he received, because clothes are generally "necessaries."

Minors can disaffirm contracts for necessities, but they must provide restitution of the reasonable value of what they have received. In this case, the minor Sok can disaffirm his contract to buy the clothes from Sitha. However, Sok will be required to pay for the reasonable value of the clothes he received. He may not be liable for the full contract price of \$20, unless the court determines that \$20 was in fact the reasonable value of the suit.

WHY IS THIS IMPORTANT? What is the reason for this exception to the general rule that says minors are liable for the reasonable value of what they receive under contracts they make to purchase "necessaries?"

In this situation, contract law attempts to balance a minor's need for protection from bad deals with her need to make contracts in certain circumstances. Specifically, minors usually need things such as food, clothing, and shelter, and perhaps certain others, depending on their situation. The law recognizes (and intends) that a minor's incapacity will generally deter adults from contracting with her. But the law also recognizes that this same general rule, by discouraging such contracts, might prevent minors from obtaining what they need to live! This would be especially difficult for emancipated minors who do not receive most of their support from adults.

To solve this potential problem, the law applies this exception to contracts for necessities. The exception is designed to ensure that adults can contract safely with minors for those things that a minor needs to live. An adult may be reluctant to sell a minor non-necessaries--since there is a risk that the minor may later disaffirm the contract and be required to provide little or no compensation to the adult. But the adult faces no such risk with a contract for necessities. So the adult need not hesitate to make such contracts.

In fact, as noted in Section 4.4a above, this protection for the adult is actually a kind of quasi-contract. Although there really is no valid contract remaining in these special situations, the law seeks to prevent unjust enrichment of the minor more than under the general rule, in order to motivate adults to deal with minors in these situations, and provide them with

the basic necessities of life. So although it may seem that the law gives minors less power in this situation--less power to disaffirm their contracts with limited liability--the real effect should be to give minors the more important ability to make agreements for these necessities.

(2) Business and Professional Contracts of Minors

In some jurisdictions, contracts that a minor makes as part of that minor's business or profession are binding on both the adult and the minor. So if a minor engages in a business or profession in the same way as a person having full capacity, the minor cannot generally disaffirm contracts that arise from that business or profession. In fact, it appears that such contracts can be fully enforced by the minor or against the minor! Therefore, at least in some jurisdictions, these contracts would seem to be valid.

CASE STUDY 107

FACTS Charavuth, a minor, owned a market stall that sold clothes. She bought the clothes on credit from a supplier named Thida. Thida later sued Charavuth for failing to pay her debts for some of the clothes. Charavuth claimed that she was not liable for the debts under these contracts because she was a minor.

QUESTION OF LAW Can Charavuth disaffirm these contracts on the grounds that she is a minor?

DECISION No. Charavuth cannot disaffirm these contracts because they arose out of her dealings as a business person.

In many jurisdictions, minors cannot avoid contracts they make as part of their business or profession, and so such contracts appear to be valid. This is an exception to the rule about capacity which normally applies to minors. In this case, Charavuth cannot disaffirm the contracts she made as part of her business selling clothes at the market. In fact, she is bound as if she were an adult. So she is liable for the actual debts she incurred--not just the reasonable value of what she received under the contracts.

(3) Contracts Based on Misrepresentation of a Minor's Age

Sometimes a minor may lie about her age in order to induce an adult to make a contract with her. When this occurs, most courts still allow the minor to disaffirm the contract. This is true even though the adult may have a more reasonable expectation that the contract will be honored, since the adult may have thought she was dealing with another adult.

However, although most courts allow the minor to disaffirm, they may impose on the "lying minor" a greater burden of restitution to the other party. This means that the minor may have to compensate the other party for

the reasonable value of what the minor received--even if the minor no longer has it. This is similar to the special rule about necessities. This rule about misrepresentation is more fair to adults who had reason to believe they were making valid contracts with other adults. In addition, it appears that most courts will allow the adult to avoid the contract in this special situation. That would give the adult even more power than under the exception for necessities! Some jurisdictions also say that the adult may bring an action against the minor for the tort of deceit because of the misrepresentation.

CASE STUDY 108

FACTS Narom is 17 years old and lives in a jurisdiction where 18 is the age of majority. Narom sells one damlung of gold to Poly, a local gold dealer, telling Poly that he is actually 18 years old. After selling the gold, Narom throws several huge parties for all his friends with the money he has received.

The next week, Narom returns to see Poly and demands the gold back, saying that he can disaffirm the contract because he is a minor. But when Poly asks for the money he paid Narom for the gold, Narom laughs and says most of it is gone. Narom says that under the law, he is not required to return money he no longer has. Poly asks the court for help.

QUESTION OF LAW Is Narom required to pay Poly the full amount of money he received for the gold?

DECISION Yes, in some jurisdictions. In these jurisdictions, Narom must provide full restitution because his contract was based on misrepresentation about his age.

Most courts allow minors to disaffirm contracts they make by lying about their ages. But some jurisdictions say that minors who lie about their age in this way must compensate the other party for the reasonable value of what they received under the contract. That is, they must provide full restitution. So in this case, courts in some jurisdictions would order Narom to pay Poly the amount of money he received from Poly under their gold sale contract. This is true even though Narom no longer has some of the money.

(4) Real Estate Contracts of Minors

Another important limit some courts make on the right of minors to disaffirm contracts is that a minor cannot fully disaffirm a contract for the sale of real estate until she reaches the age of majority. Before that time, a minor may partially avoid the sale by retaking possession of the property, and using it or renting it to others. But the minor cannot recover the title to the property (actual legal ownership) until reaching the age of majority.

The reason for this limit appears to be that the law views real estate contracts as very important. The law wants to make sure minors are

as mature as possible before they decide whether to fully disaffirm such contracts, just as it does in the situation where minors are considering ratifying contracts.

***** CASE STUDY 109**

FACTS Sisawada, a minor, made a contract to sell a small tract of land to Visal. While Sisawada was still a minor, he decided he liked the land after all, since it was a good place to play. So he sought to avoid the sale and recover title to the land.

QUESTION OF LAW Can Sisawada recover title to the land?

DECISION Yes. Sisawada can recover the title to the land he sold, but not until he reaches the age of majority.

Many jurisdictions say minors can disaffirm contracts they make to sell land, and retake possession, but that they cannot get title to such land back until they actually reach the age of majority. In this case, Sisawada can disaffirm the contract immediately on the grounds that he lacked capacity to contract when he made it. This allows Sisawada to take back possession of the land right away, and to use the land. However, he cannot actually recover title to the land until he reaches the age of majority.

4.4d How Parties Can Reduce the Risks of Making Contracts with Minors

As described above, adults generally make contracts with minors at some risk to the adult. So every business person should know how to protect herself from this risk, at least when making important contracts.

One way to guard against this risk is to have an adult (usually a parent or guardian) join in the contract as a co-signer with the minor. This does not bind the minor. But it does give the other party the right to enforce the contract against the adult who became a party to the contract.

***** CASE STUDY 110**

FACTS Yarath, a 16-year-old, made a contract to buy a car from Bora for \$1200. Yarath agreed to pay the money to Bora in monthly installments of \$100 over 12 months. Yarath's father (who had capacity) co-signed the agreement. After the third month, Yarath stopped making payments. The age of majority was 18 years old.

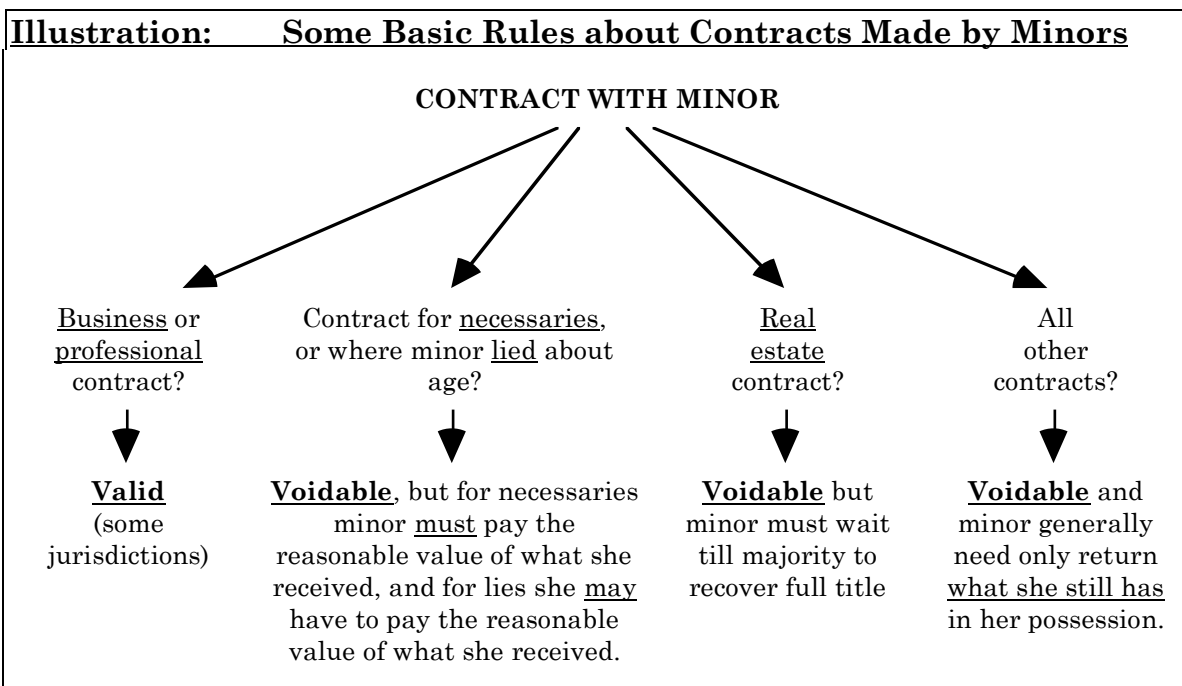
QUESTION OF LAW Can Bora recover the unpaid installments under the contract from Yarath, since Yarath's father co-signed the contract?

DECISION No. Bora cannot recover from Yarath, since Yarath was a minor when he made the contract, but he can recover against the adult who signed the contract: Yarath's father.

Parties can reduce the risks of making contracts with minors by requiring that an adult with capacity join as a co-signer. In this case, Bora cannot enforce the car sale contract against Yarath, since Yarath can use his lack of full capacity as a defense and avoid the contract. But Bora can enforce the contract against Yarath's father, since his father co-signed the contract. Because the father has capacity, the father's promise to become responsible for the contract obligations of his son Yarath is enforceable.

Of course, the safest way to reduce the risks of making contracts with minors would be to avoid making contracts with minors. But often this is not practical, especially for merchants. And in everyday commercial life, it is often not practical for contracts with minors to include a co-signer. If everyone who contracted with a minor demanded that this occur, it would reduce enormously the number of sales to minors. So in practice a merchant must take some risks when dealing with minors, since minors generally have the right to avoid contracts even years later. However, few minors actually exercise this right. So it is often more profitable for a business person to assume this risk, rather than to seek absolute protection against loss each time she deals with a minor. In practice, the profits from sales to minors greatly exceed the amount of refunds demanded by minors on the grounds of lack of capacity!

4.4e Summary of Some Basic Rules about Contracts Made by Minors



4.5 Contracts Mentally Incompetent Persons Make Are Generally Either Void or Voidable

In general, a “mentally incompetent” person is someone who has a substantial mental disability. Such persons are sometimes called “insane” persons. But that word may not be appropriate or adequate to describe all the ways persons might be mentally incompetent to make a contract. Mentally incompetent persons, like minors, are considered not to have the ability to make reasonable choices about contracts. Therefore, the law tries to protect them. This Section will discuss persons whose incompetence is not caused by intoxication. Intoxication will be discussed in Section 4.6 below.

Contracts mentally incompetent persons make are generally either void or voidable. In many jurisdictions, agreements of persons who have been adjudicated incompetent are void, while those of incompetent persons who have not yet been adjudicated incompetent are generally voidable. The rules about these agreements will be explained in the following Sections.

In many jurisdictions, courts will generally consider a person to be mentally incompetent to make a particular contract if she:

- (1) lacks the mental capacity to understand the nature and consequences of the contract;
- OR (2) understands the contract but cannot control her behavior with respect to it and the other party has some reason to know that.

The first part of this rule is the traditional test for whether a person is mentally incompetent to make a particular contract. But some modern courts say a person also lacks the mental competence to make a contract if she understands the transaction, but cannot control her behavior with respect to the transaction--that is, she cannot keep herself from acting irrationally in making the contract--and the other party has a reason to know about this lack of control. For example, this might be the case with someone who suffers from a “manic-depressive” disorder, an illness where the sufferer has episodes where she may do many things in a frantic way and cannot control her behavior. So this is the second part of the modern rule above.

In practice, it is often difficult to determine whether a person actually lacked mental capacity to a sufficient extent at the time she made a particular contract to have the right to avoid it. In fact, there are really two important things courts must consider in making this determination: the nature of the contract, and the nature of the incompetence. Obviously, some contracts are easier to understand than others. A certain person may be able to agree to some contracts, but not other contracts. In addition, mental incompetence may be mild or severe, and it may take very different forms in different people. But a mere weakness of intellect or mind is not grounds for avoiding a contract.

On the other hand, mental incompetence does not have to last long or be permanent in order for an incompetent person to avoid a contract. In fact, the mental incompetence can be temporary, or even momentary. For example, sometimes a particular event can cause a temporary loss of capacity. Someone who has just received a blow to the head in a car accident may not be competent, while she is still groggy or confused from the accident, to make a contract with a cyclo driver to take her to the hospital. This may not fit the common understanding of "incompetent." But it might fit the legal definition we are discussing here: such a person might lack the mental capacity to understand the contract, or control her behavior as to the contract.

4.5a Agreements of Persons Who Have Been Adjudicated Incompetent Are Void

In many jurisdictions, an agreement made by an incompetent person is void if, at the time the contract was made, that person had already been formally adjudicated incompetent by a court. This is true regardless of whether the agreement is reasonable, or what kind of agreement it is. A person who has already been declared incompetent by a court is considered incapable of making a real agreement, no matter how fair or important the contract may appear. Where parties ask courts for assistance with regard to such agreements, it appears that courts generally award restitution.

CASE STUDY 111

FACTS Sitek was declared incompetent by a court, which appointed Youran as a guardian to take care of Sitek's affairs. Later Sitek sold his car to Dara for \$500, which was a fair price. But Youran still sued Dara for the return of the car.

QUESTION OF LAW Could Youran have the court declare the contract to be void, despite the fact that Dara paid the reasonable value of the car?

DECISION Yes. After Sitek was declared incompetent by the court, any contract he made was void, and so Youran can get Sitek's car back from Dara.

In many jurisdictions, contracts made by parties declared incompetent by a court are void. In these situations, it appears that courts generally award restitution of anything the parties received under the contract. In this case, Sitek had been judicially declared incompetent before he agreed to sell his car to Dara. So his guardian Youran can recover the car Sitek sold to Dara, even though the contract was fair.

*** ***WHY IS THIS IMPORTANT?*** Why does the law treat judicially declared incompetent persons differently from undeclared incompetent persons? Why does it say that judicially declared incompetent persons' contracts are void, rather than voidable?

In many jurisdictions, the main reason such contracts are void, rather than voidable, is that when a court officially declares a person to be incompetent, the court appoints a guardian to handle the incompetent person's affairs. From that point on, the incompetent person does not have the authority to make her own contracts. So any contract made with her is really no contract at all, unless the court-appointed guardian consents. The guardian is the only person with the power to make such a contract for the person who has been declared incompetent. This helps the guardian to do her job of protecting the incompetent person.

The effect of this rule seems to be to discourage persons from contracting with those who have been adjudicated incompetent even more strongly than the law discourages contracting with minors. That is because it appears that no one (not even the incompetent person or her guardian) can enforce such a contract. It may be that the law believes these judicially declared incompetent persons need even more protection than minors.

4.5b Contracts of Incompetent Persons Who Have Not Been Adjudicated Incompetent Are Generally Voidable

If a person is incompetent at the time she makes a contract, but she has not been declared incompetent by a court at that time, then that contract is generally voidable. So such a person can avoid--disaffirm--such a contract if she wishes. This gives such a person about the same protection as a minor. The reasons for this protection are also similar to those for the protection of minors: to protect persons who are unable to protect themselves from their own lack of full competence, and from the unscrupulous conduct of others, and also to deter others from making contracts with such persons. Of course, like a minor, an incompetent person may also ratify a voidable contract, either expressly or by her conduct.

However, an important difference between minors and unadjudicated incompetent persons is that it appears that an unadjudicated incompetent person can disaffirm or ratify only after she has acquired capacity, or before then through a guardian--but not by herself while she is still incompetent. By contrast, minors can disaffirm by themselves even before they gain full capacity at the age of majority. Of course, in practice, if a party tried to enforce a contract against an unadjudicated incompetent person who had not yet recovered from her incapacity, it seems likely that the incompetent person would be able to find a guardian to help her disaffirm--perhaps through the court that was asked to enforce the contract.

Of course, a court will not allow anyone to avoid a contract just because she claims to be incompetent! In fact, when an unadjudicated incompetent person asks a court to help her avoid a contract, that court must carefully examine all the evidence to see whether the person was sufficiently "incompetent," under the rules explained in Section 4.5 above, at the time the contract was made.

In addition, if an undeclared incompetent person disaffirms a contract, she must generally return anything of value which she has received under the contract. That is, she must provide restitution. It appears that most courts require the incompetent person to return what she has received even if she no longer has the item, although some jurisdictions do not require this if the other party took advantage of the incompetent in some way. This requirement for incompetent persons is more strict--harder on the person with the right to avoid--than the general rule about what happens when minors disaffirm contracts. This may be because it is usually fairly easy to determine whether someone is a minor. But it is often less certain whether a court would consider an adult to be “incompetent.” Perhaps for this reason, the law gives greater protection to persons who contract with those whom a court later finds to be mentally incompetent.

***** CASE STUDY 112**

FACTS Narom is incompetent. Before any court can declare him incompetent, however, he makes a contract to work as a night guard for one year at the headquarters of the Prosperity Company. The manager gives Narom a new flashlight, as provided in the contract, and tells him to return next week for his first night of work.

However, a few days later, Narom regains his competence and realizes that this new job may cause him to miss some of his favorite television programs. So he immediately returns to the Prosperity Company and disaffirms his contract.

QUESTION OF LAW Can Narom avoid his contract in this way?

DECISION Yes. Narom can avoid this contract because he was mentally incompetent at the time he made it.

Contracts made by those who are mentally incompetent are generally voidable. In this case, Narom was incompetent at the time he made his employment contract with the Prosperity Company. But he had not been declared incompetent by a court. So this contract is voidable. Narom can avoid it if he wishes, either after regaining his capacity, or before then through a guardian. In this case, Narom regained his capacity.

However, when mentally incompetent persons disaffirm their voidable contracts, they must generally provide restitution of whatever items they have received under the contracts. Therefore, in this case, Narom must return the flashlight to the Prosperity Company.

4.5c Temporary Incompetence

As noted in Section 4.5 above, temporary incompetence occurs where someone suffers mental incompetence which is not permanent. That is,

it occurs where someone is incompetent only for a limited time, and the person later regains competence.

Where someone regains her competence after a period of temporary incompetence, there are two different rules about how that person regains her capacity. Where a court has already declared someone to be incompetent, most courts say that person does not regain capacity to contract until a court officially declares that person to be competent again. But where a person has not been judicially declared incompetent, that person regains her full capacity to contract automatically at the time she actually regains her competence.

4.5d Limits on the General Rule about Incompetent Persons' Capacity to Make Contracts

As is the case with minors, there are some limits on the general rule that mentally incompetent persons can disaffirm contracts if they wish to do so. Two of these limits relate to:

- (1) contracts for necessaries; and
- (2) fair contracts where disaffirmance might be unjust to the other party who had no reason to know of the incompetence.

However, as with the rules about minors, these limits may not apply in every jurisdiction, and other limits may apply in some jurisdictions. So it is important to check the local law in this difficult area.

The first of these limits applies to contracts which incompetent persons make to purchase "necessaries." As is the case with minors, incompetent persons may disaffirm such contracts. However, the incompetent person is liable for the reasonable value--restitution--of any such necessities she has received. As with minors, it appears that an incompetent person may disaffirm a fully executory contract for necessities with no liability. However, if the contract is partly or fully executed, the incompetent person must pay the reasonable value of anything she has already received under the contract, whether she still has it or not. Actually, this limit is close to the general rule about voidable contracts by incompetent persons, under which most courts say such persons must return whatever they have received to the other party. The only difference appears to be that this special rule as to "necessaries" seems to be applied just about everywhere, whereas it is not clear that so many courts apply the general rule that incompetent persons must return whatever they have received.

The second limit on the general rule as to incompetent persons is applied only in some jurisdictions. Under this limit, an undeclared incompetent person cannot disaffirm a contract if:

- (1) the contract is fair to the incompetent person;
 - (2) the person with whom the incompetent person contracted had no reason to know of the incompetence;
- AND (3) allowing disaffirmance by the incompetent person would be unjust to the other party.

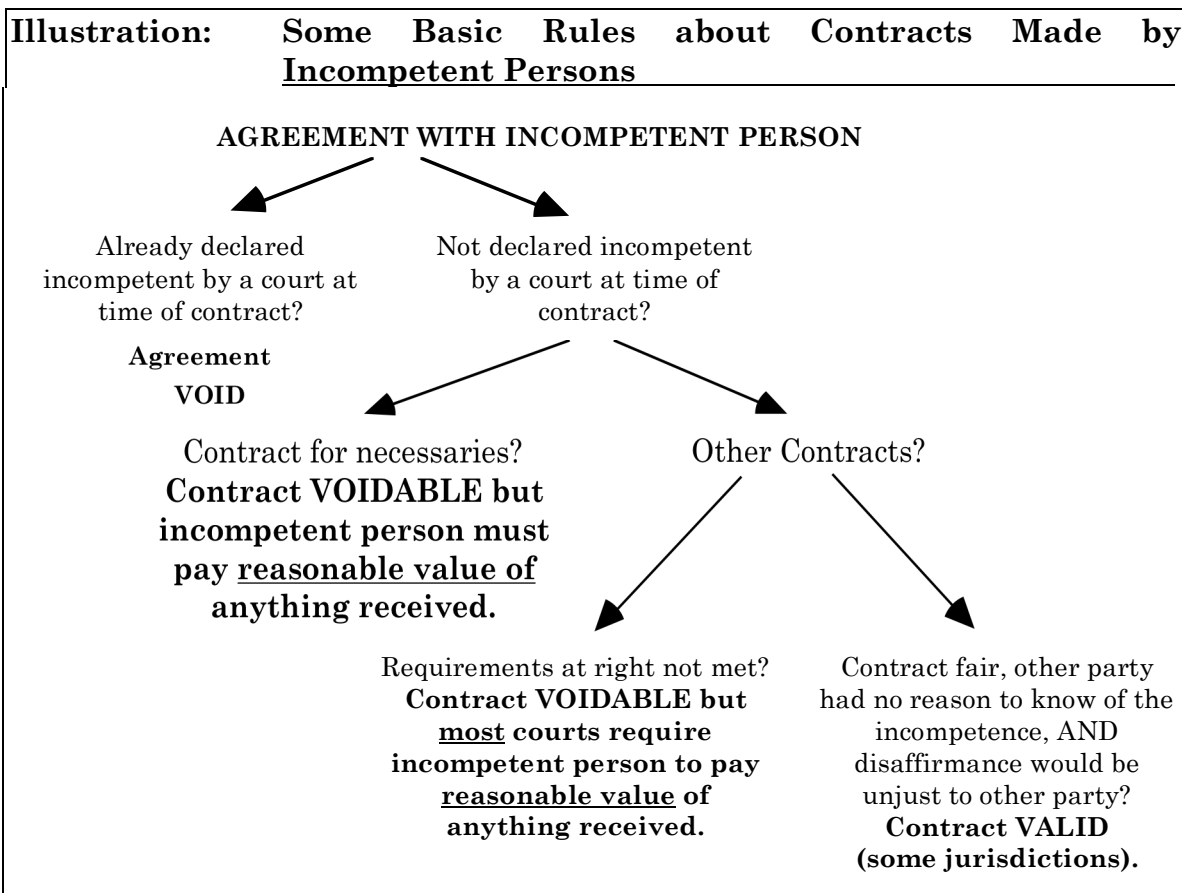
It appears that a contract that met all of these requirements would be valid in these jurisdictions. However, if a contract fails to meet any one of these requirements, then these jurisdictions say that the incompetent person may disaffirm the contract.

For example, in the Case Study 112 situation, suppose Narom's guard contract was fair, and that the Prosperity Company had no reason to know of his mental incompetence, because he seemed about the same as anyone else. Finally, suppose Narom's disaffirmance would cause the Company to need to pay a much higher salary to a temporary guard for a few weeks until it could find another permanent guard. But it could not recover for that cost if Narom was permitted to disaffirm, since Narom would be required only to return what he had received from the Company. So allowing Narom to disaffirm might be unfair to the Company. In that situation, some jurisdictions might say the contract was valid. If Narom did not properly perform, courts would probably not order him to perform, because of difficulties in enforcing orders like that. But they might order him to provide the Company with some other remedy to compensate it for the damage his failure to perform caused.

***** ADDITIONAL REFERENCE:** Chapter 10 ("Remedies") contains further discussion of remedies courts may order.



4.5e Summary of Some Basic Rules about Contracts Made by Incompetent Persons



4.6 Contracts Intoxicated Persons Make Are Often Voidable

Contracts made by persons who have become so intoxicated through drugs (including alcohol) that they lack capacity are often voidable, although they may be valid, depending on the situation. An intoxicated person generally lacks capacity if she cannot understand the meaning of the contract, or cannot control her behavior with respect to the contract. The legal standard for how much intoxication is required for such contracts to be voidable is generally similar to the standard for mentally incompetent persons.

Contracts made by intoxicated persons are often voidable. Specifically, such contracts are voidable if the persons are sufficiently intoxicated because they are:

- (1) taking medication for an illness;
- (2) drugged involuntarily; OR
- (3) drugged voluntarily and the other party had reason to know of the intoxication.

However, contracts made by intoxicated persons are valid if the person is voluntarily intoxicated for reasons other than illness and the other party has no reason to know of the intoxication. Of course, contracts made by intoxicated persons are also valid if the intoxicated person does have sufficient capacity to make the contract despite the intoxication.

***** WHY IS THIS IMPORTANT?** What is the reason for the rule that the contracts of persons who are voluntarily intoxicated for reasons other than illness are valid if the other party has no reason to know of the intoxication?

The reason for this rule is that courts are generally reluctant to allow avoidance of a contract because of voluntary intoxication. Courts want to discourage voluntarily intoxicated people from making contracts, because this can lead to many problems that could probably have been avoided. Courts also wish to protect the reasonable expectations of the other parties.

So courts will allow a voluntarily intoxicated person to avoid a contract only where the other party has made a contract with someone who was clearly incompetent--where the other party had reason to know about the impairment. An example of this would be where the person was obviously drunk, perhaps stumbling and slurring her speech, when she made the contract. Of course, courts may have trouble deciding whether the other party had “reason to know” about the intoxication. It is not clear exactly how impaired a person’s behavior must be before the other party has “reason to know” about the intoxication.

To decide whether a person is so intoxicated that she lacks capacity to contract, the law asks whether the person did not, at the time of making the contract, have the mental capacity to understand the nature and consequences of what she was doing, or whether she understood but could not control her behavior in making the contract. In order for the contract to be voidable, the intoxicated person's ability to reason and make judgements must really be impaired to the extent required--a lower level of intoxication is not enough. Of course, this is basically the same analysis as the law makes for mentally incompetent persons, as discussed in Section 4.5, above.

***** CASE STUDY 113**

FACTS Sochivin spent all afternoon playing billiards and drinking beer. Eventually he became very drunk. As he stumbled past the market on his way home, he saw a shirt he really liked in Dararith’s shop. Sochivin asked Dararith what the price of the shirt was. Dararith could see how drunk Sochivin was, so although the shirt normally cost 10,000 riels, Dararith said the price was 20,000 riels. In response, the drunken Sochivin offered to pay 30,000 riels for the shirt. Dararith thought carefully, then accepted this offer. The parties exchanged the money for the shirt.

The next day, when Sochivin woke up and saw his new shirt, he decided that he did not like it so much after all. In addition, he could not afford it. So he returned to the market with the shirt and asked Dararith for his money back. But Dararith said the contract was binding.

QUESTION OF LAW Can Sochivin avoid this contract with Dararith on the grounds that he lacked capacity?

DECISION Yes. This contract is voidable because, even though Sochivin was drunk voluntarily, Dararith could see that Sochivin was drunk when he made the contract.

Contracts made by parties who lacked capacity because they were drugged voluntarily are voidable if the other party had reason to know of the intoxication. In this case, the drunken Sochivin bought a shirt from Dararith, who could see that Sochivin was drunk. Sochivin can avoid this contract because, although Sochivin became drunk voluntarily, it was apparent that he was drunk, and Dararith took advantage of the situation. So Sochivin can disaffirm the contract, return the shirt and get his money back.

The result in Case Study 113 would be the same even if the price had been fair. The reason is that Sochivin was obviously drunk when he made the contract. And where a person who was voluntarily intoxicated wishes to disaffirm a contract, the law requires only that the other party had reason to know of the intoxication--such as if the person was obviously drunk. The fairness of the contract is not part of the analysis. Sometimes it is not wise to make a contract even when the price is fair, such as when a person cannot afford to pay that price. A mistake like that could result in a great loss of money, and could affect not only the intoxicated person, but also her family. The law wishes to protect clearly intoxicated persons from such mistakes.

However, if Dararith had no reason to know that Sochivin was intoxicated--such as if Sochivin had somehow managed to conceal this fact--then the contract would have been valid. In that case, Sochivin would not be allowed to avoid the contract. This rule is designed to protect the reasonable expectations of the other parties to such contracts.

4.6a Disaffirmance and Ratification of Contracts Made by Intoxicated Persons

The general rules about disaffirmance and ratification by intoxicated persons are similar to the rules that apply to unadjudicated mentally incompetent persons. These rules were discussed in Section 4.5b above.

When an intoxicated person who has the right to disaffirm becomes sober, she may disaffirm any voidable contracts she made while intoxicated, as Sochivin could in Case Study 113. But it appears that many courts will not allow an intoxicated person to disaffirm without providing restitution to

the other party of anything the intoxicated person received under the contract—even if she no longer has what she received. The reasons for this rule are similar to those for the disaffirmance rule about unadjudicated incompetent persons. It may also be that courts wish to discourage intoxicated persons from making contracts. If a person delays unreasonably in disaffirming a contract she made while intoxicated, she may lose the right to disaffirm the contract. Intoxicated persons may also ratify contracts once they become sober. As with minors and mentally incompetent persons, disaffirmance and ratification by intoxicated persons may be express or implied.

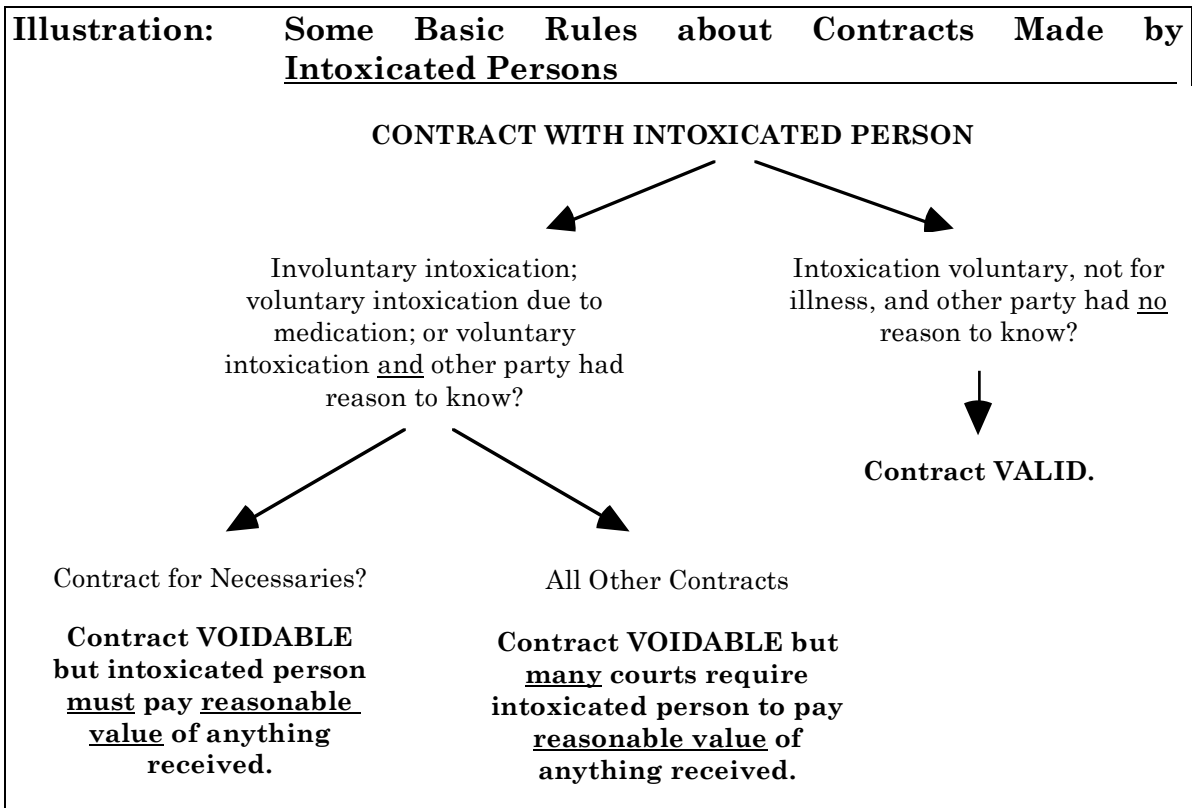
4.6b Limits on the General Rule about Intoxicated Persons' Capacity to Make Contracts

As is the case with minors and mentally incompetent persons, there are some limits on the general rule that intoxicated persons can disaffirm contracts if they wish to do so. First, as with other groups of persons who lack full capacity, an intoxicated person is liable for the reasonable value of any necessaries provided to her. And as with incompetent persons, the only difference between this exception and the general rule seems to be that the “reasonable value” requirement of the exception is applied everywhere. In contrast, the requirement in the general rule that intoxicated persons return whatever they have received does not seem to be applied everywhere.

There may be other limits in different jurisdictions. So it is very important to check the local law in this area.



4.6c Summary of Some Basic Rules about Contracts Made by Intoxicated Persons



4.7 Persons Convicted of and Imprisoned for Serious Crimes May Have a Limited Capacity to Make Contracts

Many jurisdictions limit the capacity of a person convicted of and imprisoned for a serious crime to make a contract. The laws of various jurisdictions differ in this regard.

Generally, such limits apply only to a person convicted of a major criminal offense, such as a felony. Some jurisdictions place a partial disability on a convicted person's capacity to contract. For example, in some jurisdictions, such persons cannot make a valid transfer of property. Other jurisdictions place a total disability on such a person's capacity, which would appear to mean any agreements she made would be void. These rules may further punish the convicted person, and perhaps protect the public from persons who are being punished for crimes. However, the rules could also protect the convicted person, who might have trouble starting or defending lawsuits about her contracts from prison.

In any case, it appears that such disabilities generally last only while the convicted person is imprisoned. After the convicted person is released, she can generally make valid contracts like anyone else.

CASE STUDY 114

FACTS Song lived in a jurisdiction where persons convicted of serious crimes lacked any capacity to make contracts while they were in prison for such crimes. Song was convicted of armed robbery and sent to prison for two years.

On the day after Song was released from prison, he made a contract to buy a shipment of tanks from the Peacekeeper Corporation. But later Song decided he did not want to buy tanks after all. He sought to avoid the contract on the grounds that he lacked capacity to make a valid contract because he had been convicted of a serious crime.

QUESTION OF LAW Can Song avoid this contract on the basis of incapacity?

DECISION No. Song had full capacity to contract when he made the contract.

Some jurisdictions limit the capacity of parties who are convicted of and imprisoned for serious crimes. In this case, Song was convicted of a serious crime--armed robbery--and sent to prison. However, although Song lacked capacity while he was in prison, he regained full capacity when he was released. So when he was released and then made a contract to buy some peacekeeping equipment, the contract he made was valid--assuming there were no other problems with the contract, such as legality.

4.8 Foreigners Generally Have Full Capacity to Make Contracts

A foreigner is a citizen of a nation which is different from the nation in which she is located, or the nation with which she is conducting affairs. Although previously some nations limited the rights of foreigners to make contracts, foreigners now generally have the capacity to make valid contracts in free market nations.

Some nations do restrict the ability of foreigners to own land. In these nations, contracts involving the sale to foreigners of land covered by such laws would probably be void. For this reason, these contracts could not be enforced, and they would probably be illegal as well. In any nation, analyzing whether such laws are a good idea would probably require balancing the effects of the laws in protecting the nation from foreign control and the increased investment that may occur if foreigners are allowed to own land.

Another important exception to the general rule that foreigners have full capacity to make contracts occurs when the foreigner's nation is actually at war with the nation of the other party to the proposed contract. In this situation, the foreigner is often considered to be an "enemy" foreigner. In many jurisdictions, it appears that any new contracts such foreigners make

with citizens of the jurisdiction are void, and that the foreigner cannot enforce existing ones in that jurisdiction. However, an "enemy" foreigner may still make a defense in court when sued about an existing contract. The reason for this exception appears to be to hurt the enemy nation, and to control the war effort against that nation by not allowing trade with it. In any case, when the war is over, the "enemy" foreigner regains her usual capacity to contract.

CASE STUDY 115

FACTS Pheap makes a contract to buy a large quantity of electrical wiring from Phuong, a citizen of a foreign nation with which Pheap's nation is not at war. Before delivery occurs, Pheap decides he no longer wishes to go through with the contract. He tells Phuong that he is disaffirming the contract, arguing that he can do that because Phuong is just a foreigner.

QUESTION OF LAW Can Pheap avoid this contract because Phuong is a foreigner?

DECISION No. The contract for the sale of the electrical wiring is valid and Pheap cannot avoid it.

Foreigners generally have the capacity to make valid and enforceable contracts like anyone else, unless some exception applies. In this case, the nations of Pheap and Phuong are not at war with each other, and there is no other reason the contract would not be valid. So the contract for the sale of the wiring is valid. Pheap must honor the contract or provide a remedy.

WHY IS THIS IMPORTANT? Why do free market nations say that foreign citizens generally have the capacity to make valid contracts in the same way as citizens of those nations?

There are several reasons why foreigners are generally allowed to make valid contracts like anyone else. First, it would be economically unwise to refuse to enforce contracts made by foreigners, because this would deter foreign trade and investment. A foreigner would be less likely to deal with a nation if she thought that her contracts would not be enforced there, because she would have no good way to protect her business! The result of this would be to isolate the nation that refused to enforce such contracts from the global economy. This would probably make economic development more difficult to achieve. In addition, it would probably be poor foreign relations to discriminate against foreigners in the enforcement of contracts without a very good reason, such as an actual war. This is because the foreign government and the people of the foreign nation would be very unhappy with such a policy—it would hurt them economically and otherwise. Another potential reason for the general rule is that, in most cases, it would seem unfair to discriminate against persons and businesses solely on the basis of their nationality, which is not relevant to their ability or character in performing the contract.

4.9 Capacity in the Cambodian Legal Tradition and the Civil Law Tradition

The approaches to capacity of the current Cambodian Contract Law (Decree #38D) and the civil law tradition are generally compatible with the approach discussed in this Chapter. In fact, there appear to be no significant differences, except possibly the Cambodian provisions related to “interdicted persons,” as discussed below.

***** CAMBODIAN LAW PERSPECTIVE:** The current Contract Law of Cambodia (Decree #38D (1988)) and other Cambodian laws contain many provisions relevant to our discussion of “Capacity.” Some of these are discussed below.

Basic Provisions

Article 3 of Decree #38D explicitly requires that, for a contract to be valid, the contract must be made by “parties who have capacity to enter into a contract.” In addition, Article 6 provides that a contract is voidable if a party to the contract lacks capacity. And Article 16 provides that persons who contract with those who lack capacity cannot avoid the contract on the grounds that the other party lacks capacity. All of these basic provisions are consistent with the general law about capacity discussed in this Chapter.

Article 1 discusses who generally has capacity. It provides that both “natural persons” and “legal entities” can be parties to contracts. Presumably this means that not only human beings but also legal organizations such as corporations and government bodies can make contracts. This is consistent with the law discussed in this Chapter.

Rights of the Parties Where One Party Lacks Capacity

Articles 16 and 19 of Decree #38D describe the rights of the respective parties where one party lacks capacity. Article 19 provides that where a contract is voidable because of incapacity (or other defects), the “aggrieved party” or “any person who has a lawful interest in the claim” may avoid the contract. Article 16 states that, if one party to a contract lacks capacity, the other party cannot avoid the contract on the basis that the first party lacks capacity. These provisions seem basically consistent with the law discussed in this Chapter.

Minors and “Interdicted Persons”

Article 14 of Decree #38D provides that “all persons who are fully 18 years old can enter into a contract at any time, except interdicted persons as provided in the law.”

Minors

Under Article 14, the age of majority in Cambodia is 18 years old. This means that persons under 18 lack full capacity, and that contracts they make are voidable, under Article 6. This is consistent with the principles discussed earlier in this Chapter.

Article 15 talks more specifically about the capacity of minors to contract. It states that minors cannot "create rights or duties" nor make a contract without consent from a guardian. This language, which seems absolute, might be read to mean that no one could enforce such an agreement. If it meant that, it might conflict with Article 6, which states that every contract made by a party lacking capacity is voidable (not void). So perhaps Article 15 means that minors cannot generally create their own contract duties, or that minors can create only duties they can avoid.

Article 15 does seem to make contracts of minors enforceable by the other party in two special situations. First, Article 15 provides that a contract made by a minor without her guardian's consent can be "executed" if the guardian agrees to the contract after it has been made. It is not clear if this would bind the minor, the guardian, or both.

As for the second special situation, Article 15 provides that a minor does not need the consent of a guardian to make contracts "to meet every day life needs." This exception would seem to be the equivalent of the exception discussed above for contracts involving necessaries. It is not clear how the other rules discussed earlier might apply under Decree #38D, such as whether the minor is liable for the actual contract price, or for the reasonable value. It may be that contracts to meet "every day life needs" under Article 15 are actually valid, since there is nothing to suggest otherwise in the Decree. If such contracts were valid, it would be somewhat different from the law we have discussed, which says such contracts are still voidable but that the minor must pay the reasonable value of necessities received.

Interdicted Persons

Article 14 also provides that "interdicted" persons lack capacity, and it appears that contracts of such persons would (like those of minors) be voidable under Article 6. It is not clear from Decree #38D who the "interdicted" persons in Article 14 are. However, a definition of this term has been found in a pre-1970 Cambodian legal glossary which has been appended to the current Cambodian Land Law (Decree #100D (1992)). The definition of an interdicted person given in this source is "a person of low awareness and intelligence, a stupid person, or a person convicted by either the penal law or the civil law and restrained from having the freedom to administer his own property."

The first parts of this definition of "interdicted" persons ("low awareness and intelligence" and "stupid") appear roughly to accord with the limits

discussed above with regard to the ability of mentally incompetent persons to contract. It is not clear how incompetent a person would have to be to meet this definition. Under the approach we have discussed in this Chapter, a mere mental weakness is not incompetence if the person was actually able to understand the contract at the time it was made. Decree #38D's definition of interdicted persons would arguably include intoxicated persons also, since they also might have "low awareness and intelligence" when they are intoxicated. As noted above, it seems that contracts made by such persons of "low awareness and intelligence" are voidable under Article 6, since that Article says contracts of persons who lack capacity are voidable. This is basically consistent with the approach discussed in this Chapter. However, it is not clear if "interdicted persons" are must pay for any "necessaries" they purchase, as is the case with incompetent and intoxicated persons under the law discussed in this Chapter. It may be that this exception does not apply to interdicted persons, since the exception is contained in Article 15 about minors, but is omitted from Article 14 about interdicted persons. In addition, there is no reference to any possibility that contracts of interdicted persons may be void, as are the contracts of persons who have been adjudicated incompetent in some other jurisdictions.

The second part of the definition of "interdicted persons" is more difficult. It appears to mean that persons lack contractual capacity if: (1) they have been "convicted" under either the penal law or the civil law; AND (2) they have been "restrained" (presumably by a court) from having the freedom to administer their own property. This appears to mean that, where a person has been "convicted" of something, courts have the option to declare such persons to be "interdicted" or not. It is not clear what standards courts may apply here. If there is no other limit on this judicial discretion, it would appear to be different from the law in many other jurisdictions. Such jurisdictions may place limits on the contractual capacity of persons convicted of serious crimes while they are in prison, but those jurisdictions do not generally appear to give courts this kind of discretion to take away capacity.

In addition, it appears that contracts made by such "interdicted persons" are voidable, under Article 6. If this is the case, it would seem to be the interdicted person who could avoid the contract if she wished, since the other party cannot avoid the contract, under Article 19. This would mean that the law would be providing the same legal protection and advantage to those convicted of crimes as it does to minors and the mentally incompetent. It is not clear if this is the meaning of Article 14.

Foreigners and Land Contracts

Decree #38D does not appear to create any general restriction on the capacity of foreigners to make contracts. However, several other Cambodian laws provide that foreigners cannot own Cambodian land, which would appear to have the effect of making any contract to sell Cambodian land to foreigners void. In particular, the Constitution of Cambodia (1993) states in Article 44

that “[o]nly Khmer legal entities and citizens of Khmer nationality shall have the right to own land.” It is not clear who “Khmer legal entities and citizens of Khmer nationality” are under this provision. In addition, the Investment Law of Cambodia (1994) in Article 16 basically says that only Cambodian citizens or entities can own the land used for the investment activities promoted by that Law. Moreover, Article 2 of the Land Law of Cambodia ((Decree #100D) 1992) appears to limit land ownership to Cambodians, although that provision actually speaks in terms of possession and use; Article 1 of the Land Law appears to reserve ownership to “the State.” In any case, the basic result of these laws would appear to be that foreigners lack capacity to make contracts to buy Cambodian land, and that would make such contracts void. Such contracts would also be void because they would be illegal, which will be discussed in more detail in Chapter 5 (“Legality”).

***** CIVIL LAW PERSPECTIVE:** It appears that the civil law approach to capacity is generally compatible with the approach discussed in this Chapter.

For example, certain provisions of the French *Code Civil* relate to capacity. Under Article 1123, “everybody is free to contract, so long as the law does not declare these persons incapable.” According to Article 1124, such incapable persons include non-emancipated minors (minors who have not persuaded a court that they should be treated legally as adults) and “protected adults.” Protected adults appear to include persons such as those described in this Chapter as mentally incompetent. Contracts of such incapable persons are voidable, since the law believes it is important to protect them. In addition, as in the approach discussed in this Chapter, contracts made by incompetent persons in France may be disaffirmed or ratified. A “protected adult” may ratify a contract after her mental troubles are over and she has regained capacity to contract.

In addition, under French law, contracts are void when they are contrary to public policy. And it appears to be contrary to public policy for certain kinds of persons to have full capacity to contract.

Of course, the exact rules about capacity often differ from one jurisdiction to another. So it is important to check the relevant local law.

4.10 Questions for Review

CHAPTER 4 -- QUESTIONS FOR REVIEW

1. Who generally has the capacity to make contracts?
2. List five types of persons who may not have full capacity to make contracts.

3. What is the legal status of most contracts made by minors?
4. Why does the law have the rule described in your answer to Question 3?
5. What does disaffirmance mean?
6. What does ratification mean?
7. Describe four situations where a minor's ability to avoid a contract may be limited.
8. How can a person contract more safely with a minor?
9. When is a person considered to be mentally incompetent?
10. When are contracts void, and when are they voidable, on the basis of mental incompetence?
11. When are contracts voidable on the basis of intoxication?
12. What are some possible restrictions on the capacity of persons convicted of and imprisoned for serious crimes?
13. Do foreigners generally have capacity? What are some possible restrictions on the capacity of foreigners?
14. Is the approach to capacity discussed in this Chapter generally compatible with the current Cambodian law's approach to capacity?
15. Is the approach to capacity discussed in this Chapter generally compatible with the civil law approach?

