

Legally Enforceable Agreements Require the Six Elements to a Binding Contract



Unlike many areas of law that restrict or restrain conduct, contract law is an area of law that expands freedoms by providing opportunity for parties to negotiate and enter into mutually benefiting voluntary relationships whereby the terms of the agreements are regulated, for the most part, by the parties. So long as the parties to a contract establish the contract in accordance to the basic rules of contract law, the parties may establish their agreement as they choose.

With the above said, some contracts may contain inequalities where a party has influenced the agreement through the use of advantageous bargaining power. When a party to an agreement lacks power, influence, or knowledge, unfair contractual agreements may arise. Although rules of contract law exist to ensure fairness, the courts are often loathe to disturb agreements.

For a legally binding contract to exist, six constituent elements must be present. The six elements are 'offer', 'acceptance', 'consideration', 'intention', 'capacity', and 'legality' (note that there are eight elements to an insurance contract, the additional elements being 'insurable interest' and 'utmost good faith'). Where one or more of these elements is lacking, an enforceable contractual agreement fails to exist and a legal action to compel compliance, or obtain compensation, for breach of this 'non'-contract shall be unsuccessful.

I. Offer

An offer is the tentative promise that 'gets the ball rolling' in contractual negotiations. It is when one party to a contract initiates and indicates a desire to enter into a relationship with another party. An offer may be made in writing, spoken words, or simply by conduct (such as a man who waves to hail a taxi cab is making an offer to procure transportation services). It is also interesting to note that merely extending an invitation to enter into a contract fails to amount to an

offer. A store publishing a catalogue of products with prices is inviting offers to buy rather than making an offer to sell. This view of what amounts to an offer is necessary to prevent a retailer from being at risk of 'breach of contract' should too many people wish to purchase products that may in limited supply.

2. Acceptance

When an offer is made, acceptance of the offer generally requires positive conduct meaning that the acceptance is deemed only to have occurred when the accepting party acts in some way or form that confirms acceptance. The offering party must avoid making an offer that requires the other party to reject the offer or be bound; however, an exception does exist where the parties have an established relationship with an agreement that silence following an offer shall be deemed as acceptance.

3. Consideration

Consideration as an element to a legally binding contract is without the same meaning as the word consideration in common language. While 'giving thought' (common language meaning of consideration) is prudent in contractual negotiations, the word 'consideration' as it applies to contract law means the existence of a value for value exchange between the parties to a contract. The value exchanged may be tangible such as goods for money, or intangible such as a service for service. Even a promise may be valid consideration such as the promise of an insurance company to provide financial protection against the possibility of a future peril.

4. Intention, *ad idem* (meeting of the minds)

The element of intention involves a genuine desire to establish legal relations. Where a reasonable bystander listening to 'negotiations' would fail to perceive sincerity among one or more of the parties, formation of a contract has failed; and accordingly, the element of intention requires an objective rather than subjective review as was confirmed in, among others, the case of *West End Tree Service Inc. v. Danuta Stabryla*, [2010 ONSC 68](#) where it was said:

[12] In my view, the trial judge erred in law, as he used a purely subjective test to determine whether there was a contract between the parties for the cutting down of the tree. As Professor John McCamus states in *The Law of Contracts* (Toronto: Irwin Law, 2005) at 497,



Even where a consensus may be said to fail at a subjective level, the consensus may be achieved on an objective basis and the contract so created is an enforceable one.

Contract law protects the reasonable expectations of a promisee. As a result, a party may be bound to a contract, even if she does not intend to be bound, where a reasonable person would believe, based on her conduct and words, that she was assenting to the terms proposed by the other party.

A common example of a lack of intention would involve braggarts. If one friend were to say to another, "*I will pay you a million dollars if you can throw this rock, and hit that tree, from one hundred feet away, while blindfolded*", and the friend incredibly but successfully actually performs the feat, the obligation to pay a million dollars is avoided due to a lack of genuine intention; however, the promise to pay a prize or reward for the performance of feats of chance or skill may be legally binding in many circumstances ([as it is with participants in a genuine contest](#)).

5. Capacity

Some parties may attempt to enter into a contract without having capacity to do so. Minors, with some exceptions, as well as persons of unsound mind are commonly recognized examples.

An unregistered business is merely a purported entity without actual legal status and is without capacity to enter into legally binding contracts. Where contracts are purportedly made and subsequently discovered to involve a 'non'-entity this may prove costly. A person who represents himself or herself as acting on behalf of an entity without actual legal status may adversely find himself or herself individually and personally responsible for fulfilling the obligations of the contract. Additionally, it is important that persons and genuine businesses ensure where others purport to act on behalf of an entity that the entity legally exists prior to entering into a contract with the entity.

Another example includes 'voluntary organizations' (as opposed to organizations with volunteers). Note that a 'voluntary organization' is a fiction without legal capacity whereas an organization with volunteers may be a legal entity with capacity. A voluntary organization without legal capacity may include groups of

people with a common interest. They may meet regularly. They may conduct themselves formally by holding elections, by designating titles upon persons within the group, by following an agenda, by taking minutes of meetings, and by purporting the existence of an entity by use of a name for the group. However, if the group has failed to establish itself as a proper legal entity, at law the group is merely a gathering of individual persons. The 'entity' or name of the group as held out by persons within the group is without legal status and is therefore without capacity to enter into binding contracts. In this situation, similar to an unregistered business above, the person who signs a contract purporting to act on behalf of this 'non'-entity may adversely find himself or herself individually and personally responsible for fulfilling the obligations of the contract.

6. Legality

A contract must have a legal purpose and object to be enforceable. An agreement between thieves to split the proceeds of a robbery on a 50/50 basis will be ignored by the civil courts should a dispute arise (although the criminal courts may be interested in prosecuting their crimes). Of course, legality as an element of a contract may be more complicated, and less obvious, than as shown above. For example, an employer and employee may choose to sign a document purporting as a contract whereby the employee agrees to waive rights to the worker injury compensation protection afforded by the [Workplace Safety and Insurance Act](#) ("*WSIA*"); however, as the *WSIA* declares such agreements unlawful, the contract, or at least the waiver term within the contract, shall be null and void. Another example involves the [Limitations Act](#) whereby parties are forbidden from contractually amending the [limitation period](#) during which litigation may be commenced.