

Incapacity

1. Minors

Upon reaching 19, a person has full capacity. Art. 4.

Upon marriage, however, minors (18 year olds) are released from parental supervision and enjoys full capacity. Art. 807, 826-2.

Unauthorised contracts concluded by unmarried minors are binding, but they may be rescinded (voided) (Art. 5(2), Art. 140)

- by the party under age, before or after coming of age
 - Can rescission be rescinded (for reasons of incapacity, duress, etc.)?
- by his parents or guardians while he is under age
- rescission can be done within three years (from coming of age, if the rescission is done by the party who was under age). Rescission is not allowed after 10 years from the contract. Art 146.

Rescission has retroactive effect

- *restitutio in integrum*
- 'innocent' third parties not protected
- the party under age needs only to return what remains as "unconsumed benefit". Art. 141. Money presumed to remain unconsumed. 2008Da58367

Rescission is not allowed if there was

- Prior approval by parents or guardians

- Ratification by parents, guardians or the party after coming of age
- Constructive ratification. Art. 145
- Deception by a minor: where a minor resorted to deceptive manœuvres causing the counterpart to believe that he is of age or that there was an approval by parents or guardians. Art. 17. Supreme Court 71Da2045
- Burden of proof lies with the party resisting the rescission (69Da1568; conf. 68Da2147)

Approval or ratification is not required for the following:

- a transaction which benefits the minor without imposing any burden. Art. 5(1)
- a transaction within the scope of an authorised line of business or authorised disposal of assets. Art. 6, Art. 8
- routine transactions related to necessities
- exercising the right to rescission. Art 140
- How about exercising the right of termination?

Protection for the counterpart

- Counterpart may allow one month or more within which ratification can be made (either by the party after coming of age or by the party's parents or guardian). Art. 15
- No answer within the period shall be deemed to be a ratification. If, however, an approval of the auditor of guardianship is required for ratification (see Art. 950), the contract shall be deemed to be rescinded if the duly approved ratification is not dispatched within the allowed time (Art 15(3)).
- Only if the counterpart did not know the incapacity of the party under age at the time of the contract, the counterpart may rescind the contract while it has not

been ratified. Art. 16

2. Legal protection of adults

Guardianship for an adult (□□□□)

- The family court may order commencement of guardianship for an adult who is continuously lacking the ability to deal with one's own affairs due to ailment, disability, old age, or any other reasons. The order must be upon application of the person in question, his/her spouse, a relative within 4th degree, the guardian of a minor, the auditor of guardianship for a minor, the limited guardian, the auditor of limited guardianship, an ad hoc guardian, the auditor of ad hoc guardianship, a public prosecutor or the head of local government. (Art. 9)
- Guardian for a minor must be a natural person and there cannot be more than one person. But, guardian for an adult can be more than one person if appointment of multiple persons as guardians is appropriate under the circumstances. A corporate person may be appointed as guardian for an adult. (Art. 930)
- The adult under guardianship must act through the guardian (Art. 949). Transactions concluded by an adult under guardianship can be rescinded. (Art. 10) But the family court may stipulate a range of transactions which can be validly concluded by the legally protected adult. Guardian may, however, validly ratify a transaction concluded by the adult ward.

Limited Guardianship (□□□□)

- Limited guardianship: the guardian with limited powers do not have the power of representation unless the family court confers it (Art. 959-4).
- Family court will stipulate the range of transactions

which would require an approval of the the limited guardian.

“Respect” for the ward’s wishes, family court’s supervision for internment : Arts. 947, 947-2

Ad hoc guardianship (□□□□)

- Ad hoc guardianship (Art. 14-2) can be declared for a person requiring short-term assistance or assistance for a defined matter due to ailment, disability, old age or other reasons.
- Family court may confer the power of representation on the ad hoc guardian for a defined range of transactions (Art. 959-11). Ad hoc guardian may not have the power to rescind the transaction concluded by the ward. The ward has full capacity.

Guardianship contract

- Guardianship contract (Art. 959-14):The guardianship contract is a system where a a person who has or anticipates incapacity to manage affairs due to ailment, disability, old age or other reasons, can entrust all or part of one’s affairs to another person and grant the power of representation regarding the entrusted affairs.
- The guardianship contract must be in writing, must be notarized (Art. 959-14(2)), and must be registered (Art. 959-15(1)).
- The guardianship contract shall have effect as from the moment when the family court appoints an auditor of contractual guardianship (Art. 959-14(3)).

3. Case by case assessment

In the absence of statutory or judicial recognition of

incapacity, an individual contract may be void only if it is shown that the party's mental condition was so severely affected at the time of the contract that the party was unable to form an intention.

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Although the party's mental condition at the time of the contract was such as to warrant a declaration of diminished capacity or absolute incapacity, as long as there was no such declaration effective at the time, the contract may not be rescinded even if the party was subsequently declared to be of diminished capacity.

4. Liability in tort

A minor or a person declared to be of diminished capacity (or of absolute incapacity) may be held liable in tort if he was intelligent enough to appreciate the responsibility and consequences of his conduct. Art. 753. 68Da2406 (18, 17, 16, 13 year old boys attacked the victim with an iron bar, killing him.)

cf. Criminal responsibility: 14 years or older (Penal Code, Art. 9)

Juvenile "protective detention": 10 years – 18 years (Juvenile Act, Art. 4)

Parents or guardian of a minor or a ward who does not have the capacity to bear responsibility, shall be held liable for the damage caused by the minor or the ward unless the former show that they fulfilled their duty of supervision. Art. 755. (Vicarious liability). 2005Da24318 (12 year old 6th grader committed suicide due to bullying. Agressors' parents and the local education authority were jointly held liable in tort. Agressors themselves – victim's classmates – were not sued.)

Even when a minor is capable of bearing responsibility in

tort, the parents are not exonerated from the duty of supervision. If the neglect of parental supervision is causally connected to the loss, the parents shall also be held liable as co-tortfeasors. The claimant must prove the causal connection between the neglect of supervision and the wrongdoing of the minor. 96Da15374 (17 year old boy driving his uncle's truck without license; parents held liable), 93Da13605 (17 year old boy causing an accident while riding a motorbike with license; parents' negligence not proven by the plaintiff)