Requirements of a contract

Art. 1108 *Code civil*

Four requisites are essential for the validity of an agreement:

- the consent of the party who binds himself;
- his capacity to contract;
- a definite object which forms the subject matter of the undertaking;
- a lawful cause in the obligation.

Art. 1325 CC - *Requirements*

The requirements for a contract are:

1.) agreement between parties **(accordo)**;
2.) **causa**; ⇒ socio-economic function
3.) subject matter **(oggetto)**;
4.) form **(forma)**, when prescribed by law, under penalty of nullity.

Art. 1101 *Code Civil*

A contract is an agreement by which one or several persons bind themselves, towards one or several other to transfer, to do or not to do something.

Art. 1321 Civil Code (CC) - *Definition*

A contract is the agreement between two or more parties to constitute, regulate or extinguish a legal relationship having economic content.

Contracts for value/for mutual performance ⇔ **Gratuituous contracts**

Contract ⇔ Contrat / Contratto / Vertrag

Some contracts do not depend upon exchange (enforceable unilateral gratuitous promise)

Consideration

Consideration is based upon the **idea** of "**reciprocity**": that a promisee should ***not*** be able to enforce a promise unless he has given or promised to give something in exchange for the promise or unless the promisor has obtained (or been promised) something in return.

Cf **Script p. 185**

N.B: A valuable **consideration**, **[…]**, may consist either in some right, interest, profit or benefit accruing to one part or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other (*Carrie v Misa* (1875) LR 10 Exch 153, 162).

Consideration means something which is of **some value** in the eye of the law, moving from the plaintiff; it may be some detriment to the plaintiff or some benefit to the defendant but in all event must be moving from the plaintiff (Patteson J in *Thomas v Thomas* (1842) QB 851, 859).

Consideration must be sufficient but it need ***not*** be adequate.

N.B: "A contracting party can stipulate for what consideration he chooses. A peppercorn does ***not*** cease to be good **consideration** if it is established that the promisee does not like pepper and will throw away the corn."

Having largely rejected formal requirements, English law developed a doctrine of **consideration** to play the principal role in selecting those agreements to be given a "**badge of enforceability**".

Enforcement of a claim

A promise ***not*** to enforce a valid claim is good **consideration** for a promise given in return, as is a promise not to enforce a claim which is doubtful in law.

On the other hand, it is clear that a promise ***not*** to enforce a claim which is known to be invalid is ***not*** good **consideration** for a promise given in return.

Part payment of a debt

Performance of an exisiting contractual duty owed to the promisor does ***not*** constitute **consideration**.

Similarly, a promise to accept part payment of a debt in discharge of the entire debt is ***not*** supported by **consideration**.

The debtor is already contractually obliged to repay the entire debt and so provides no **consideration** for the creditor's promise to accept part payment (unless, for example, the debtor agrees to repay the debt at an earlier date, in which case he does provide **consideration**).

Past consideration

A promise to reward somebody for acts which have already been performed in the past prior to the promise does ***not*** constitute **consideration**.

Past **consideration** means that **consideration** was already completed before the other party made his/her promise, so that nothing was given in return for the promise of the other party.

The rule that past **consideration** is not good **consideration** is closely linked to the bargain theory of **consideration**. The fatal objection is that there is ***no*** «reciprocity».

Causa ⇒ socio-economic function of the contract

The **idea** underpinning the notion of **causa** is that **every** transfer of wealth by one party to another requires a "**justification**". In other words, the transfer must be directed towards interests deserving of protection according to law (cf Art. 1322 CC).

According to ***Common law***, a **gift** is ***not*** a contract since there's ***no*** **consideration**.
According to the **Italian legal system**, a **gift** ***is*** a contract.

The **causa** (socio-economic function of the contract) is conferred by the intention ***only*** to **enrich** the recipient **(spirito di liberalità).**

Example 1: If a small business grants, with no consideration, a patent which it holds, to a large company to which it is a supplier, the contract is **void** because there is no **causa**.

In fact: ⇒ the contract is ***not*** a sale, since no price is paid;

⇒ the contract is ***not*** an exchange; there is no consideration (different from the price);

⇒ the contract is ***not*** a gift, because there is not the intention ***only*** to **enrich** the recip.

Example 2: Bill promises to pay his debtor Paul the next day. Promise of **payment**

= Bill acknowledges that he is indebted to Paul = **Acknowledgement of debt (IOU)**

If Bill promises to pay € 1.000 reward to whoever finds his dog, an obligation arises (a public promise). Promise to the **public**

⇒ *Will Bill be required to pay Paul following his promise of payment/recognition of debt? Does the promise of payment/acknowledgem. of debt generate an obligation?*

Either Bill was **already** Paul's debtor before the promise/acknowledgement …

… in this case the obligation **already** existed, and thus does ***not*** arise from the promise/acknowledgement

… or Bill was ***not*** Paul's debtor before the promise/acknowledgement …

… in this case the promise/acknowledgement does ***not*** give rise to an obligation; in fact …

… every transfer of wealth requires a **causa**.

In summary: the notion of **causa** and **consideration** do ***not*** coincide. They are, however, both expression … of the **mistrust** of Legal systems of "unilateral" (= with ***no*** inherent payment) transfers of wealth. Clearly, in the case of the Italian Legal system, that holds for situations ***not*** expressly provided for by law.

It confirms **mistrust** of the Italian Legal system of gratuitous contracts

In contracts provided for by law with ***no*** «reciprocity», the **mistrust** of the Italian Legal system towards unilateral transfers of wealth is confirmed by additional elements restricting the **"area of enforceability"**:(gift, *gratuitous* loan, guarantee etc.).

Real contracts

Explicit consent

⇒ *But if no obligation arises, is a person free to promise anything he/she wants to a third person with* ***no*** *fear of legal consequences?*

Inversion of the **burden of proof** (≠ Art. 2697 CC).

Form

1.) Private writing (scrittura privata) ⇒ it has to be signed;

2.) Written document *with* authenticated signatures (scrittura privata autenticata)

Signatures must be authenticated by an authorised person (generally, in contract law, a notary [notaio]).

If someone claims that the signature is **false**, that person must initiate a criminal suit ⇒ risk of criminal sanctions.

3.) Public deed ⇒ the content is "authenticated" (atto pubblico)

The authorised person (notary) ascertains that the content of the document corresponds with the will - **as shown to him** - by the declarants ⇒ eg, in the case of the **gift** of real estate

If someone claims that what the notary **ascertained was declared to him** is **false**, that person must initiate a criminal suit ⇒ risk of criminal sanctions.

⇒ ***Very strong* proof** It covers: the **signing** in case of **2.)** ⇔ the **whole content** in case of **3.)**

Requirements of form are ***not*** a significant feature in English Contract law.

Formal requirements which are **necessary** in order to render a **contract binding:**

a.) - a contract must be **evidenced in writing**;

b.) - a contract must be made **in writing**;

c.) - a contract must be **made by deed**;

A document bearing the word **deed** or some other indication that it is intended to take effect as a **deed** must be signed by the individual maker of the **deed**.

Form requirements have **three functions**:

- **Evidentiary function**;
- **Cautionary function** ("it acts as a check against inconsiderate action");
- **Chanelling function** (formalities provide a simple and external test of enforceability).

⇒ *What is the difference between a* **written contract** *and a contract* **evidenced in writing**?

When a give Legal system prescribes the **written form** on pain of **nullity**, the question arises as to **what** has to be stated in written form.

1. According to Art. 1351 CC, ***every*** contract which transfers **ownership** or **property interests** in **immovable property** must be in writing.

2. **Bill**, the prospective seller of a **right of usufruct** in an immov. property, and **John**, the prospective usufructuary, reach an oral agreement as to the price.

⇒ *Does the signing of the cheque book meet the form requirement laid down by Art. 1351 CC ?*

4.

Before handing over the cheque, **John** asks **Bill** to sign the **cheque book** as a "receipt".

3. In order to confirm his "willingness" to pay for the right of usufruct, **John** makes an advance payment of € 1.000 to **Bill** by cheque.

N.B: In order to meet the **written form** requirement, the **reciprocal will** to enter into the relevant contract has to be fixed in written form (including ***all*** essential elements of the contract parties intended to enter into).

Therefore a simple signature is ***not*** sufficient to meet the written form requirement for a sale of the right of **usufruct** in an immovable.

Parties to a contract did ***not*** put his will to, respectively, sell and buy the right of usufruct in writing … nor is there any way to determine – by merely referring to the cheque book - essential elements of the contract, for instance the **price agreed** and the **right transferred**.

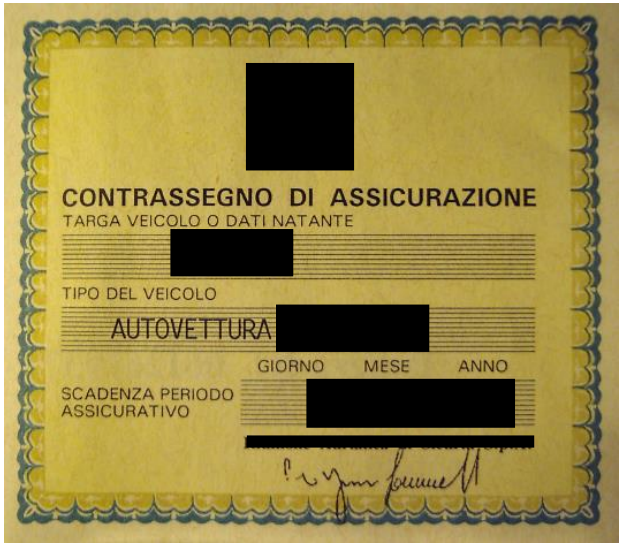
A different rule applies when the Legal system requires the contract to be **evidenced in writing**. In this case **some written memorandum or note of the contract** is sufficient to meet the requirement to have a contract **evidenced in writing**.

Example:

Art. 1888 CC – Evidence of the contract (of insurance)

"A contract of insurance shall be evidenced in writing."

Even though the **insurance tag** does ***not*** indicate such essential elements of the contract as the **premium paid**, the **risks covered**, the **limit of liability** of the insurance company … it meets the requirement of **"written evidence"**.



Written contract ⇔ Contract **evidenced in writing**

Written form refers to the **contract**

Written form refers to the **evidence/proof**

Digital/Electronic Signature

The **idea** underpinning **digital signature** is to have the **same** **legal requirements** inherent in signing any «tangible» document … even ***in the absence*** of such a «tangible» document.

⇒ *What are the legal requirements implicit in signing a physical document?*

DIGITAL SIGNATURE

«Tangible» document:

1.) **imputability:**	the document comes from the person who is the signatory;	Implicit in the ***signing***
2.) **integrity:**	the document has ***not*** been altered;	
3.) **confidentiality/secrecy:**	contents of the document can be known ***only*** by authorised persons;	***Envelope*** postcard ⇔ letter
4.) **inability to repudiate:**	a party who has sent/received a message cannot deny having sent/received it;	***Registered*** *letter*
5.) **authentication:**	identity of the author is witnessed by an authorised person (eg: notary);	*Written document with* ***authenticated*** *signatures*
6.) **certainty of the date:**	**date** is "authenticated" by an authorised person/"public body"	***Postmark;*** **(Uff. del Registro)**

Digital/Electronic **form** ⇔ *Tangible* **form**