Contractual capacity in private international law

Fredericks, E.A.

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To my beloved family

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PROEFSCHRIFT

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1 Introduction

This study investigates the contractual capacity of natural persons in private international law. The concept of "private international law" in the title is used in a narrow sense to denote reference rules only (the conflict of laws). The investigation therefore deals with the law applicable to the competence of a natural person to create rights and duties by concluding a contract with another (natural or juristic) person or other persons.[1] The law in this regard in South Africa (a mixed jurisdiction) and in many common-law jurisdictions is far from clear. However, finding the legal system applicable to contractual capacity is an important practical issue and therefore more certainty and predictability is required.[2]

Sometimes it is implied that contractual capacity is no longer such an important issue in private international law due to, for instance, the emancipation of married women.[3] However, it is suggested that this development indeed increases the relevance of the topic, as today a husband's contractual capacity could be dependent on the consent of his spouse, while a century ago this was invariably the position only in respect of the wife's contractual

1 See for the South African substantive law on contractual capacity, Hutchison *et al* (eds) (2012: 149) and Nagel *et al* (eds) (2011: 73).

2 Indeed, as far as Cheng (1916: 2) was concerned, "the most important branch [of private international law] is the part that deals with the capacity to act; for in most problems of private international law, the question raised is whether a certain transaction entered into by a certain individual in a certain country is valid or not; and this depends on the further questions, whether the individual has capacity to perform the act or not, and what law should determine it". Contractual capacity may, according to Cheng (1916: 19 and 126), be defined as "the legal qualification, independent of contract, but absolutely by law on a person as the average member of the community, to enter into legal relations binding on himself without the interference of others".

3 *Cf* Tilbury, Davis and Opeskin (2002: 770). On the other hand, Schwenzer, Hachem and Kee (2012: 203) state, in general: "The legal capacity to enter into contracts is sometimes a neglected topic in the context of the sale of goods."

capacity.[4] In any event, there may be many non-Western legal systems where a married women's contractual capacity remains limited. In respect of the age of majority, it is true that many legal systems now accept 18 years as the legal age. Nevertheless, a substantial minority of legal systems adhere to ages above or below.[5] Contractual capacity may also be affected by mental illness, curatorship (for instance, in the case of prodigality and insolvency) or emancipation.[6] It is therefore clear that contractual capacity continues to play an important role in private international law.

The objective of this study is the formulation of conflicts rules in respect of the contractual capacity of natural persons that could be used in the development of the law in South Africa[7] and other mixed jurisdictions, as well as in common-law countries. For that purposes, the proposed rules will be formulated in a narrative form.[8] The proposed rules may also be used as a model for national, regional, supranational and international instruments.[9] In particular, they may be used in future regional model laws of the African Union, provisionally called the African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts,[10] both projects of the Research

4 Sonnekus (2002: 145). In South African law, the husband, in marriages concluded in community of property before 1 November 1984, was the sole administrator of the estate and was entitled to manage and alienate all the assets. In terms of the Matrimonial Property Act 88 of 1984, spouses married in community of property since 1 November 1984, have equal capacity to manage the joint estate and equal powers regarding the estate (Section 14). Section 15 of the Act requires that consent of the other spouse must in specified circumstances be obtained before a juristic act which binds the estate can be performed. Three forms of consent are distinguished: consent without any formalities; written consent; and written consent attested by two witnesses. The patrimonial consequences of civil marriages entered into by people of African origin were brought into line with those of other races in terms of the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. See Skelton *et al* (eds) (2010: 14) in this regard. *Cf* Section 6 of the Recognition of Customary Marriages Act 120 of 1998 and Clause 3 of the Muslim Marriages Bill of 2010. See, on the constitutionality of the Muslim Marriages Bill, Neels (2012a: 486) and, on the recognition of foreign Muslim marriages in South Africa, Neels (2012b: 219-230).

5 Staudinger/Hausmann (2013: 74-104); Reithmann/Martiny/Hausmann (2010: 1878-1880); and Schwenzer, Hachem and Kee (2012: 204-205 and 2011). However, the age of majority in South Africa is now 18 years (Children's Act 38 of 2005) and no longer 21 (as in Staudinger/Hausmann (2013: 98)).

6 Hutchison *et al* (2009: 149); and Nagel *et al* (2011: 73).

7 in terms of Section 173 of the Constitution of the Republic of South Africa of 1996: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power … to develop the common law, taking into account the interests of justice." Also see Sections 8(3)(a) and 39(2).

8 See Chapter 6, paragraph 6.6.

9 See the preamble to the Hague Principles on Choice of Law in International Commercial Contracts (2015) *per* www.hcch.net. *Cf* the preamble to the UNIDROIT Principles of International Commercial Contracts (2010).

10 See Chapter 2, paragraph 2.2.5 and Chapter 6, paragraph 6.5.

Centre for Private International Law in Emerging Countries at the University of Johannesburg.[11] For these purposes, the proposed rules will also be provided in a codified form.[12]

In order to formulate these rules, a wide comparative study is undertaken, comprising civil-law, common-law and mixed jurisdictions, as well as regional, supranational and international instruments. Chapter 2 deals with the law in South Africa as a mixed civil-law / common-law jurisdiction. Included here is a discussion of the views of the Roman-Dutch authors and an exposition of the content of the relevant connecting factors in South African private international law. Chapter 3 investigates jurisdictions without codified rules in respect of contractual capacity in the conflict of laws. All of these, with the exception of Scotland (a mixed jurisdiction), are common-law jurisdictions. Chapter 4 covers legal systems with codified rules in respect of the law applicable to contractual capacity. Most of these are civil-law jurisdictions, but some common-law (Israel; and Oregon) and mixed systems (Louisiana; Puerto Rico; and Quebec) are included. Chapter 5 canvasses a variety of regional, supranational and international instruments, of both a substantive-law and a conflicts nature. Finally, in chapter 6, the advantages and disadvantages of all possible legal systems are taken into account in order to arrive at the proposed rules in both a narrative and a codified form.

Legal systems were chosen from the following regions: Africa; Australasia; Europe; the Far East; the Middle East; North America; and South America. Considerations for inclusion in this regard included the availability of information; language (with a preference for materials available in English); the importance of countries from a cultural, economic or social perspective; and the modernity and originality of the relevant rules. In total, 65 legal systems are referred to.[13] In Chapters 2 and 3, references are made to case law and the opinions of authors, while in Chapter 4 and 5 the focus is on the relevant legislative instruments.

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11 The Institute for Private International Law in South Africa was founded at the then Rand Afrikaans University during 2001. The name was changed to Institute for Private International Law in Africa during 2006 and to the Research Centre for Private International Law in Emerging Countries during 2013.

12 See Chapter 6, paragraph 6.7.

13 *Africa*: Algeria; Angola; Burkina Faso; Egypt; Ghana; Mozambique; Nigeria; and Tunisia. *Australasia*: Australia and New Zealand. *Europe*: Austria; Belarus; Belgium; Bulgaria; the Czech Republic; England and Wales; Estonia; France; Germany; Greece; Hungary; Italy; Lithuania; the Netherlands; Portugal; Romania; Russia; Scotland; Slovakia; Slovenia; Spain; Switzerland; and the Ukraine. *The Far East*: China; India; Japan; Korea; Macau; Malaysia; Mongolia; the Philippines; Singapore; Taiwan; Thailand; and Viëtnam. *The Middle East*: Azerbaijan; Iran; Israel; Qatar; Syria; Turkey; the United Arab Emirates; and Uzbekistan. *North America*: Canada (including the common-law territories and Quebec); Louisiana (United States of America); Oregon (United States of America); and the United States of America. *South America*: Argentina; Brazil; Mexico; Puerto Rico; Uruguay; and Venezuela.

The study deals with the contractual capacity of a natural person *per se*.[14] It does not concern the capacity of natural persons to bind companies or other corporations; nor does it deal with the authority to contract on behalf of an incapacitated natural person.[15] Also excluded are the law applicable to (and the recognition and enforcement of) measures taken by relevant authorities, including courts (for instance, in respect of emancipation or curatorship), which may influence contractual capacity.[16] Of course, such measures will determine the *content* of the legal system to be applied;[17] it may also influence the content of the legal systems in which such a measure would be recognised.[18] As such, these foreign (and local) measures may play a role in the determination of contractual capacity. Whether such local or foreign measures (when duly recognised for the purposes of domestic law) will take priority in this regard,[19] is an issue that is specifically excluded from the scope of this study.[20]

Some terminological issues have to be clarified at this stage. The following Latin terms are used for applicable legal systems: the *lex domicilii* (the law of domicile); the *lex patriae* (the law of nationality or citizenship); the *lex loci contractus* (the law of the country where the contract was concluded); the *lex loci actus* (the law of the country of the juristic act, for instance, the *lex loci contractus*); the *lex causae* (the applicable law, customarily employed in respect of a contract – in common-law terminology: the proper law of the contract);

14 The study concerns active and not passive legal capacity. See Labuschagne (2004: 263 and 454). It also excludes forms of active capacity not related to contractual capacity such as the capacity to make a will or to enter into marriage.

15 See, for instance, Article 16 and 17 of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996), which determine that the law of the habitual residence of the child applies to parental responsibility (including parental authority) (see Article 1(2)). It may be noted that the existence of, for instance, parental authority may feature as a question incidental to the capacity of a minor. See on the incidental question in private international law, in general, Forsyth (2012: 103-105).

16 See the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); and the Hague Convention on the International Protection of Adults (2000). South Africa is not a contracting state to either convention.

17 *Cf* Vonken (2015: 5990-5991).

18 *Cf Guggenheim v Rosenbaum (2)* 1961 4 SA 21 (W) 31G-32H; and Forsyth (2012: 444-445 and 454).

19 This is the position at least within the scope of the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996) (see Article 1(1)(d) and Chapter 4); and the Hague Convention on the International Protection of Adults (2000) (see Article 1(2)(d) and Chapter 4).

20 The role of *renvoi* is not investigated as the doctrine was never applied in this context (or, indeed, at all) by a South African court. See, in general, Forsyth (2012: 91-102). In any event, the application of *renvoi* is excluded when domicile is the connecting factor: see Section 4 of the Domicile Act 3 of 1992. Also see Section 3 *bis* of the Wills Act 7 of 1953.

the *lex loci solutionis* (the law of the country of performance); the *lex situs* or the *lex rei sitae* (the law of the country where the (immovable) property is situated); and the *lex fori* (the law of the country of the forum).

The notion of the primary applicable legal system(s) refers to the law or laws that apply in any event, that is: without reference to conditions or requirements. In most legal systems, these are the law of nationality or citizenship, the law of domicile and / or the law of habitual residence. These three legal systems, either individually or in combination, are also referred to as an individual's personal law(s).

The common-law term "proper law of the contract" is employed to denote the legal system generally applicable to the substance of a contract. In the context of a legal system applicable to contractual capacity, the proper law must invariably refer to the putative proper law, as in the absence of contractual capacity no contract comes into existence. The putative proper law is therefore the law that would have been the proper law of the contract if a contract were indeed concluded. The putative proper law may be subjectively determined, when a choice of law by the parties, either expressly or tacitly, indicates the applicable law, or objectively, where there is no choice of law or the choice is for some reason not taken into account.

A combined reference to particular legal systems, as in *lex loci contractus / lex fori*, denotes the phenomenon that the first-mentioned system is the applicable one but that it will always coincide with the second one due to the specific requirements for its application. In some legal systems, for instance, the *lex loci contractus* only applies if the contract was concluded in the forum state.[21] The *lex loci contractus* will then always be the *lex fori*.

The terms, on the one hand, "capable party", and, on the other hand, "incapable" or "incapacitated party" are employed throughout for the sake of convenience, irrespective of the fact that contractual capacity may still have to be determined in terms of the applicable legal system. The terms "contract assertor" and "contract denier" are also used indiscriminately for the purposes of convenience: the capable person is usually the party that requests the court to uphold the contract and the incapable party usually attempts to escape liability, but this, of course, is not invariably the case.

21 See the discussion of the law in Angola, Belarus, the Czech Republic, Egypt, France, Germany, Hungary, Iran, Israel, Macau, Mongolia, Mozambique, Portugal, Qatar, Slovakia, Spain, Syria, Taiwan, Thailand, the United Arab Emirates and Vietnam in Chapter 4.

The vast majority of legal systems apply an alternative reference rule in the context of the contractual capacity of a natural person.[22] This entails that an individual must be deemed to have contractual capacity if he or she has such capacity at the time of the conclusion of the contract in terms of at least one of a possible two or more legal systems. These legal systems then govern the issue of capacity simultaneously.[23] Often one or more conditions are set for the alternative application of an extra legal system, especially in respect of the *lex loci contractus* as an additional legal system to the personal law. If no such conditions are required, the legal systems are said to apply on an equal level (the primary applicable legal systems).

22 See, in particular, Chapter 6, paragraph 6.4. All legal systems canvassed apply (partial) *depeçage* in respect of contractual capacity, with other words: the proper law of the contract does not (exclusively) govern contractual capacity. *Cf* Symeonides (2014: 232-234).

23 A cumulative reference rule in the context of contractual capacity would entail that an individual must comply with the requirement for capacity in terms of two or more legal systems before he or she may be deemed to indeed be capable to conclude a contract. Also here it may be said that two or more systems apply simultaneously. Only Van der Keessel proposed a cumulative reference rule in the context of contractual capacity. See Chapter 2, paragraph 2.3.

2 South Africa

2.1 Introduction

In this chapter the views of the South African common-law authors in respect of the contractual capacity of natural persons in private international law will be investigated,[1] followed by a discussion of the position in contemporary South African law, including case law and the opinions of authors.

There is authority in South African law for the application of connecting factors such as the *lex situs*, the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. In paragraph 2.2, the content of the relevant connecting factors is discussed.

2.2 The content of relevant connecting factors in South African private international law

2.2.1 Introduction

According to South African private international law, the content of a connecting factor must be established by the *lex fori*.[2] Contractual capacity in South African private international law may be governed by the *lex rei sitae*, in which case the location (*situs*) of the property would be the connecting factor. It may be governed by the *lex loci domicilii*, where the domicile of the relevant individual (*locus domicilii*) would be the connecting factor. Also, it may be governed by the *lex loci contractus* and then the place of conclusion of the contract (*locus contractus*) would be the connecting factor. The objective proper law may also be applicable as governing law. This legal system will be determined by reference to a variety of connecting factors.[3] The content of the most important connecting factors is discussed below.

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1 For discussions on this topic see van Rooyen (1972: 15-23) and Forsyth (2012: 337-338).

2 *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W); *Chinatex Oriental Co v Erskine* 1998 (4) SA 1087 (C) 1093H; Edwards and Kahn (2003: par 284); Forsyth (2012: 135-137); Hahlo and Kahn (1975: 529-674); Kahn (2001: 599); and Schoeman, Roodt and Wethmar-Lemmer (2014: par 24). But the connecting factor of nationality or citizenship should rather be determined by the law of the country of nationality: Forsyth (2012: 11); Schoeman, Roodt and Wethmar-Lemmer (2014: par 24); and Vischer (1999: 22). Also see Section 13(1)(a) of the Divorce Act 70 of 1979. However, nationality is not a connecting factor in respect of contractual capacity in South African law.

3 See paragraph 2.4 and 2.5 on the legal system/s applicable to contractual capacity in South African private international law.

2.2.2 *Situs*

The connecting factor of the *situs* or the *locus rei sitae* is utilised, in as far as contractual capacity is concerned, only in the context of immovable property. The *situs* refers to the country where the immovable property is situated.

2.2.3 *Locus domicilii*

Domicile is an important connecting factor in South African private international law in general and in the context of contractual capacity in particular. An individual's domicile has to be determined according to the provisions of the Domicile Act.[4] The most important provisions of the Act are the following:

> "Every person who is over the age of 18 years … shall be competent to acquire a domicile of choice, regardless of such a person's sex or marital status."[5]

> "A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period."[6]

> A child is "domiciled at the place with which he is most closely connected."[7]
> If in the normal course of events, a child has his home with his parents or with one of them, it shall be presumed, unless the contrary is shown, that the parental home concerned is the child's domicile."[8]

> "No person shall lose his domicile until he has acquired another domicile, whether by choice or by operation of law."[9]

Section 4 of the Domicile Act[10] excludes *renvoi* when domicile is a connecting factor. Section 5 determines that the acquisition or loss of a person's domicile shall be determined by a court on a balance of probabilities.

The Act entered into force on 1 August 1992 and in terms of Section 8(2) does not have retrospective effect. If, for example, the domicile of a contractant who concluded a contract in 1990 has to be determined, the common-law rules apply in this regard.[11]

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4 3 of 1992.
5 Section 1(1).
6 Section 1(2).
7 Section 2(1).
8 Section 2(2).
9 Section 3(1).
10 3 of 1992.
11 For discussions of the law of domicile in the context of private international law, see Edwards and Kahn (2003: par 296-304); Forsyth (2012: 129-166); and Schoeman, Roodt and Wethmar-Lemmer (2014: pars 25-36).

2.2.4 *Locus contractus*

In South African law, the information or communication theory is in general applied to determine the time and place of the formation of a contract. In terms of this theory, the contract is concluded when and where the offeror is informed that the offeree has accepted his or her offer.[12] The acceptance of the offeror's offer must be communicated, as opposed to merely received by him or her.

This rule applies to instantaneous contracts. A contract may be instantaneous where parties are either actually or presumed to be in each other's presence. Actual presence refers to the situation where the parties are physically in each other's presence when the offer is accepted, while presumed presence refers to an acceptance by way of, for instance, telephone or Skype. The expression of acceptance and its communication to the offeror thus either occurs at the same place and time or at least at the same time.[13] An example of the application of this theory would be where a seller in Johannesburg telephonically accepts an offer from a buyer in Istanbul to buy certain goods from him or her. According to South African law, the contract of sale between them would be concluded in Istanbul as that is where the acceptance of the offer was communicated to the offeror. Of course, the opposite is also true, should, for example, the Turkish party telephonically accept an offer emanating from the South African party, the contract is concluded in Johannesburg.

Where the acceptance of the offer and its communication to the offeror is not instantaneous, as in the case of postal communications, the expedition theory is applied.[14] In terms of this theory, the contract is concluded when and where the acceptance was signified and sent, not where the offeror received and read the acceptance.[15] In other words, the contract is concluded when and where the letter of acceptance was written and posted. An example of the application of this theory would be where a seller in Johannesburg makes a postal offer to sell certain goods to a buyer in Istanbul. The Turkish buyer then accepts the offer by way of a letter of acceptance. According to South African law, the contract was then concluded in Istanbul at the time the letter was posted there.[16]

The application of the expedition theory, however, is based on a waiver of the information theory by the offeror, in that he or she tacitly indicates that the post should be used for the purposes of acceptance. This theory will thus not apply where the offeror neither expressly nor tacitly authorised accep-

12 For a discussion on offer and acceptance in domestic South African law, see Van Niekerk and Schulze (2011: 67-69).
13 Van Niekerk and Schulze (2011: 70).
14 Van Niekerk and Schulze (2011: 70).
15 as it is in terms of the information theory.
16 Van Niekerk and Schulze (2011:70).

tance by post,[17] or where the offeree utilised a different method of communicating his or her acceptance in relation to that requested by the offeror, or where the offeror specifically stated that he or she will only be bound subsequent to an actual receipt of the offeree's acceptance.[18]

In respect of communication via electronic means, the provisions of the Electronic Communications and Transactions Act[19] would have to determine the *locus contractus* under South African private international law. In terms of this Act, an electronic contract is concluded where acceptance of the offer is received by the offeror.[20] In this regard, acceptance must be considered to have been received at the offeror's place of business or residence.[21] The application of the provisions of the Act could be illustrated by assuming that the seller in Johannesburg e-mails an offer to the buyer in Istanbul for the selling of certain goods. The Turkish buyer e-mails his acceptance of the offer to the offeror, which is received in the offeror's inbox. The contract is concluded in Johannesburg as the message was received there in the offeror's information system. Were the South African seller to read the acceptance message while he was on vacation in Mauritius, the answer would remain the same as the message is regarded as having been received at the adressee's usual place of business or habitual residence.

However, there is uncertainty in South African law on where and when a contract is concluded if the contractants have utilised telegram or telefax as a method of communication.[22] The answer would depend on whether the communiqué between the contractants may be regarded as instantaneous. Should this be the case, the information theory shall apply. Regard must, however, always be had to the facts of a particular case especially in the context of international trade.[23]

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17 where he, for example, requested a telephonic acceptance.

18 Van Niekerk and Schulze (2011: 70).

19 25 of 2002.

20 Section 22(2).

21 Section 23(c). The description of "received", in terms of Section 23(b), is "when the complete data message enters an information system designed or used for that purpose by the addressee".

22 Van Niekerk and Schulze (2011: 71).

23 A message may, for example, be sent during office hours from one country and received instantaneously in another country outside office hours. The addressee may also be someone other than the operator of the machine. See also *Ex Parte Jamieson; In re: Jamieson v Sabingo* 2000 (4) All SA 591 (W). *In casu* the seller in Johannesburg communicated with the buyer in Luanda (Angola) via telefax. Quotations were telefaxed from Johannesburg and the acceptance was telefaxed from Luanda. Van Niekerk and Schulze (2011: 71) submit that this case was decided incorrectly as the court failed to consider the facts appropriately and handed down judgment without offering detailed reasons. The court *in casu* held that "the principles relating to letters sent by post rather than agreements concluded by telephone should more appropriately apply to determine the place where the agreement was concluded". As such, the contract was held to be concluded in Luanda, where the acceptance of the offer was sent to the offeror.

2.2.5 Objective proper law of contract

There are two basic approaches in South African case law[24] on how to determine the law[25] applicable to a contract (the proper law of a contract)[26] in the absence of an express or tacit[27] choice of law.[28] The first is found in *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd*[29] and in two decisions of the Labour Court.[30] In terms of this approach, the proper law is determined

24 There exists no legislation in this field and case law therefore constitutes the primary source of the law.

25 It has been submitted that this may be a national legal system or another system of rules and principles of law. See Fredericks and Neels (2003a: 64-66); and Neels and Fredericks (2004: 175-178 and 190). See Article 3 of the Hague Principles on the Choice of Law in International Contracts (2015): "In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise." Also see *Van Zyl v Government of the Republic of South Africa* 2005 (4) All SA 96 (T) par 75 on the choice of "international law" as the governing law. On the question whether a religious or traditional legal system may be chosen, see Bälz (2001: 37); (2005: 44); and Neels and Fredericks (2004: 178-179). See, in general, Jayme (2003: 211).

26 either as the presumed intention of the parties (*Standard Bank of SA Ltd v Efroiken and Newman* 1924 AD 171 185) or the legal system of closest connection (*Improvair (Cape)(Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C) 146-147; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) 526D-H and 530H-I; *Ex Parte Spinazze* 1985 (3) SA 633 (A) 665H; *Kleinhans Parmalat SA (Pty) Ltd* 2002 (9) BLLR 879 (LC) pars 19 and 29; *Parry v Astral Operations Ltd* 2005 (10) BLLR 989 (LC) par 40; and *The Society of Lloyd's v Romahn* 2006 (4) SA 23 (C) par 82). In *Society of Lloyd's v Price; Society of Lloyd's v Lee* 2006 (5) SA 393 (SCA) the court refers to the law of the closest and most real connection in the context of gap in the classification of liberative prescription rules (see pars 14, 26, 28 and 32). Support for the law of the closest and most real connection as the proper law may be found in par 28: "It seems logical that English law [the proper law of the contract] is also the legal system which has the closest and most real connection with the question of the extinction or non-enforceability of such rights because of the expiry of a prescription / limitation period...." The *dictum* may be read to suggest that the proper law is the law closest related to the contract. *Cf Herbst v Surti* 1991 (2) SA 75 (Z) 79C; and *Henry v Branfield* 1996 (1) SA 244 (D) 249E-F. See Du Toit (2006: 53, 60 note 56); Edwards and Kahn (2003: pars 328 and 330); Forsyth (2012: 329-330); Fredericks (2006a: 77); Fredericks and Neels (2003a: 66-67); and Schoeman, Roodt and Wethmar-Lemmer (2014: pars 92-102).

27 See the *Spinazze* case (*supra*: 665H); the *Kleinhans* case (*supra*: pars 25-29); the *Parry* case (*supra*: pars 81-83); and Neels and Fredericks (2004: 179-180).

28 See Neels (1994: 289-292); and Fredericks (2006a: 78-80). The following exposition is primarily based on Fredericks and Neels (2003a) and Neels and Fredericks (2008b: 533).

29 *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (*supra*) per Booysen J. See the discussion by Forsyth (1987: 4).

30 the *Kleinhans* case (*supra*: pars 20-21, 85 and 105); and the *Parry* case (*supra*). See the discussions of the *Kleinhans* case by Fredericks (2006a) and by Roodt (2003: 135).

by weighing[31] all relevant factors[32] that connect the contract and the parties to a legal system. These factors may include the following: the place of performance;[33] the place of conclusion of the contract;[34] the place of offer;[35] the place of acceptance;[36] the place of agreed arbitration;[37] a choice of jurisdiction;[38] the domicile of the parties;[39] the place where the parties carry on business;[40] the domicile of the agents or mandatories of the parties;[41] the (habitual) residence of the parties;[42] the nationality of the parties;[43] the

31 The factors cannot merely be counted to determine the proper law as not all the factors have the same weight. See the *Laconian* case (*supra*: 528G-H): "Whilst counting contacts or factors favouring one or the other country's law is an unsatisfactory way of deciding legal issues, a large number of *important* factors pointing one way is a strong indicator" (own italics). For instance, whereas the monetary unit of a contract was not deemed to be an important factor, the place of agreed arbitration was awarded more significant consideration (the *Laconian* case (*supra*: 528-530). Also see the *Kleinhans* case (*supra*: par 21); Fredericks and Neels (2003a: 69); Schoeman, Roodt and Wethmar-Lemmer (2014: par 100); *Jones v Jones* (*supra*); and *Chinatex Oriental Co v Erskine* (*supra*).

32 The content of the connecting factors must be determined according to the *lex fori*: see note 2.

33 See for example *Hulscher v Voorschotkas voor Zuid-Afrika* 1908 (TS) 542 at 546; the *Standard Bank* case (*supra*: 185-186); *Shacklock v Shacklock* 1948 (2) SA 40 (W) 51; *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) 31A, C-D; the *Improvair* case (*supra*: 151H-152A); the *Laconian* case (*supra*: 528C-I, 529E-F and 530H-I); *Blanchard, Krasner & French v Evans* 2002 (4) SA 144 (W) 149 note 5; the *Kleinhans* case (*supra*: pars 2.1, 36 and 85); and the *Parry* case (*supra*: par 85). *Cf* the *Spinazze* case (*supra*: 665G) and the *Henry* case (*supra*: 249E). See, however, the minority decision in *Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries* 1987 (1) SA 842 (A) 864D-F.

34 See the *Standard Bank* case (*supra*: 185-186) (the interpretation of the *Standard Bank* case (*supra*) in the *Van Zyl* case (*supra*: par 75) is clearly incorrect); the *Laconian* case (*supra*: 528G-H); the *Henry* case (*supra*: 249F); and the *Kleinhans* case (*supra*: par 31). See, however, Neels and Fredericks (2008b: 536 note 132); the minority decision in the *Shooter* case (*supra*: 864D-F); and the *Improvair* case (*supra*: 148E-H). *Cf* the *Guggenheim* case (*supra*: 31D-E). Also see the text at notes 19-21 on how to determine the *locus contractus* in the case of electronic contracts.

35 See the *Laconian* case (*supra*: 528B E-F). One could add the place of negotiations: see Van Rooyen (1972: 99).

36 See the *Laconian* case (*supra*: 528B-C and F-G). Once again, one could add the place of negotiations: see Van Rooyen (1972: 99). In the *Laconian* case (*supra*), the judge also refers to the place where the charterparty was drawn (528B and E-F).

37 See *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 (3) SA 1020 (T); and the *Laconian* case (*supra*: 528D, 528G and 529F-G). The judge in the *Laconian* case (*supra*) also refers to the place where the arbitrators carry on business (528D). Forsyth (2012: 328-329) refers to the *adagium qui eligit iudicem elegit ius* in the context of a tacit choice of law. Also see Van Niekerk (1990: 117, especially at 123-128).

38 Forsyth (2012: 328 note 78); and the *Parry* case (*supra*: par 81).

39 See *Collisons (SW) Ltd v Kruger* 1923 PH A 78 (SWA); the *Guggenheim* case (*supra*: 31D-E); the *Spinazze* case (*supra*: 665F-G); the *Improvair* case (*supra*: 151G-H); and the *Laconian* case (*supra*: 528A and E).

40 See the *Lacanion* case (*supra*: 528A).

41 See the *Laconian* case (*supra*: 528A-B and E-F).

42 See the *Spinazze* case (*supra*: 665F-G); and the *Henry* case (*supra*: 249F).

43 See the *Kleinhans* case (*supra*: par 32).

form, terminology[44] and language of the contract;[45] the currency in which the contractual obligation of payment is expressed;[46] and many others.[47] This approach makes it difficult to predict the judge's decision beforehand. It leaves much room for individual reasonableness and fairness but cannot be supported due to the lack of certainty.[48]

The second approach employs the default position that the law of the country of the performance (the *lex loci solutionis*) constitutes the proper law of the contract, unless specific circumstances[49] clearly indicate that another legal system has to be applied.[50] However, the *locus solutionis* in respect of the characteristic performance[51] of the contract may differ from the *locus solutionis* in respect of payment. In this type of scenario there are two possibilities: application of either the scission principle or the unitary principle. There is authority for both principles in South African case law.[52] In terms of

44 for example contractual terms used in a technical sense. See Van Niekerk and Schulze (2011: 198-201) and cases referred to; *cf* the *Improvair* case (*supra*: 145D-E) ("concepts peculiar to a particular system").

45 See the *Spinazze* case (*supra*: 665F). Also see the minority decision in the *Shooter* case (*supra*: 863-865). In determining the tacit intention of the parties in respect of the law applicable to a maritime insurance policy, the judge states: "In the instant case the contract was entered into in this country and the payment of premiums was to have been effected in South African currency. This, in my view, however, is not important. What is important is the form of the policy under consideration and the language in which it has been couched" (864E-F). See, however, the *Improvair* case (*supra*: 148B-E). As the form of and terminology employed in a documentary letter of credit are internationally standardised, mainly due to the existence of the International Chamber of Commerce's Uniform Customs and Practice for Documentary Credits (UCP), the same weight cannot be attached to this connecting factor in the context of letters of credit. *Cf* Van Niekerk (1984: 92-93); and *Transvaal Alloys (Pty) Ltd v Polysius (Pty) Ltd* 1983 (2) SA 630 (T).

46 See the *Laconian* case (*supra*: 528C, 528F and 529H-I); and the *Kleinhans* case (*supra*: par 36). *Cf* the *Shooter* case (*supra*: 865D-E) (tacit agreement).

47 See further Fredericks and Neels (2003a: 67-69); the *Kleinhans* case (*supra*); and the *Parry* case (*supra*). The location of payment of taxes was held not to be a very strong connecting factor in the *Parry* case (*supra*). But see Neels and Fredericks (2008a: 363 note 61).

48 Also see Neels (1994: 291-292); and Fredericks (2006a: 80).

49 For instance, in the *Collisons* case (*supra*), the concurring *lex domicilii* of the parties to the contract was applied in preference to both the *lex loci solutionis* and the *lex loci contractus*.

50 See Fredericks (2006a: 80); Fredericks and Neels (2003a: 69); Neels (1994: 289); Van Rooyen (1972: 104); the *Hulscher* case (*supra*: 546); the *Standard Bank* case (*supra*: 185) (but also see 186); the *Shacklock* case (*supra*: 51); and the *Guggenheim* case (*supra*: 31A). Also see the *Blanchard* case (*supra*: 149 note 5); and Visser (1999: 277).

51 terminology from Article 4(2) of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention) and Article 4(2) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). The characteristic performance is usually the performance for which payment is due. This is not found in the convention or regulation but is generally accepted – see the Giuliano-Lagarde Report (1980) as referred to by Fawcett and Carruthers (2008: 712).

52 See the cases in note 53 (scission principle) and note 54 (unitary principle).

the scission principle, each obligation has its own proper law.[53] In terms of the unitary principle, however, the same proper law governs both (or all) the obligations.[54] As the obligations of the parties are, naturally, always closely connected, their contractual relationship should indeed be governed by one proper law.[55] The scission principle complicates matters by making more than one legal system applicable to the same contract. It comes as no surprise that the unitary principle is the standard approach in comparable modern legal systems. The two most recent decisions on choice of law in contract in South Africa fortunately seem to adopt the unitary principle.[56]

Proceeding, then, from the unitary principle, which legal system should be applied if the *locus solutionis* in respect of the characteristic performance differs from the *locus solutionis* in respect of payment? It is suggested that the choice between the two legal systems should be made in the light of all the other connecting factors.[57] In South African private international law there is support for each of the following three approaches for the situation that the other factors do not provide a clear answer:

a) Van Rooyen[58] supports the unitary principle but is of the opinion that in these particular circumstances, the only option a court has is to apply the scission principle. The present author submits, however, that it would in all circumstances be desirable that one legal system governs the whole contract.[59]

53 See the *Standard Bank* case (*supra*: 188); and the *Laconian* case (*supra*: 528I-529E and 530H-I). Also see Forsyth (2012: 333).

54 See the *Improvair* case (*supra*: 147B-G); the *Kleinhans* case (*supra*) as interpreted by Fredericks (2006a: 80); and the *Parry* case (*supra*). Also see Forsyth (2012: 333-334); Fredericks (2006a: 80); Fredericks and Neels (2003a: 69-70); and Du Toit (2006: 62).

55 Forsyth (2012: 333-334).

56 the *Kleinhans* case (*supra*) (interpreted by Fredericks (2006a: 80); and the *Parry* case (*supra*).

57 Fredericks (2006a: 81); Fredericks and Neels (2003: 70); and Neels (1990: 554-555). See above (notes 33-47) for a list of thirteen factors that could be taken into consideration. Forsyth states that, in the above circumstances, the different *loci solutionis* would be of little use in assigning a governing law to the contract (Forsyth (2012: 334)). This will often mean that the *lex loci contractus* must play the role of proper law, as the author also states: "The *locus contractus* and *locus solutionis* are the most important factors weighing with the courts in assigning a governing law" (Forsyth (2012: 334)); "The central rule generally followed in the older cases in assigning the appropriate law is that the *lex loci contractus* governs unless the contract is to be performed elsewhere, in which case the *lex loci solutionis* applies" (Forsyth (2012: 331)).

58 Van Rooyen (1972: 200 note 29).

59 Fredericks and Neels (2003a: 70 note 98).

b) The decision in *Maschinen Frommer GmbH & Co KG v Trisave Engineering & Machinery Supplies (Pty) Ltd*[60] concerned a CIF[61] contract. The judge applied the rule in the *Standard Bank* case[62] in favour of the law of the country of performance and interpreted this to mean the law of the country where the bill of lading had to be delivered in terms of the contract[63] – that is: the law of the country of the characteristic performance. This approach has the advantage of harmony with the approach in the Restatement (Second) in respect of contracts of sale of movables,[64] which is by far the single most important approach (perhaps the majority approach) in the United States of America.[65] This is a factor of some significance as the USA is usually listed as the second most important trading partner of South Africa.[66]

c) The final approach is based on an *obiter dictum*[67] in the *Laconian* case[68] where the judge seemed to suggest that in the type of circumstances under discussion the place of payment has priority over the place of the characteristic performance.[69] Such an approach will often have the same

60 2003 (6) SA 69 (C). Also see the discussion by Fredericks (2003).

61 Costs, insurance, freight. CIF is one of the standard incoterms drafted by the International Chamber of Commerce in Paris. See, in general, International Chamber of Commerce *ICC Rules for the Use of Domestic and International Trade Terms: Incoterms 2010* (2012); and Ramberg (2011).

62 *Standard Bank of SA Ltd v Efroiken and Newman* (*supra*).

63 *Standard Bank of SA Ltd v Efroiken and Newman* (*supra*: 77H-78C).

64 § 191 of the Restatement (Second) contains a presumption in favour of the law of the country of agreed delivery.

65 See Symeonides (2006: 64-65 and 88-91); (2011: 300); and McDougal, Felix and Whitten (2001: 513-517). American private international law is discussed in Chapter 3, paragraph 3.4.2.

66 See note 72 *infra*.

67 The judge indeed applied the scission principle (see Neels and Fredericks (2008b: 536 note 128). It is possible, though, that the *dictum* was not intended to be *obiter*, and that the judge came to the conclusion on the basis of both the scission and the unitary principles, without choosing between them (see the *Laconian* case (*supra*: 528-529 and 530H-I).

68 "Be that as it may, the *lex loci solutionis* of all payments is English law whereas the performance of applicant's obligations of carriage and delivery had to take place in Argentine, upon the high seas and in Columbia. If I have to strike a balance it seems to tilt towards English law from amongst the *leges loci solutionis*" (*Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* (*supra*: 529E-F) (per Booysen J).

69 *Cf* the *Kleinhans* case (*supra*) interpreted by Fredericks (2006a: 81); *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* 1981 (1) NSWLR 366 as discussed by Sykes and Pryles (1991: 607); *First National Bank of Chicago v Carroway Enterprises Ltd* [1990] 2 HKLR 10 as discussed by Johnston (2005: 194 and 196); and Forsyth (2012: 334): "It may be in such cases that the place of payment enjoys some preference over the place of delivery or other performance other than payment." In the *Parry* case (*supra*), the judge refers to the fact that, although payment took place in Malawi and the Isle of Man, the applicant was on the payroll of the respondent's South African head office (par 81 read with par 26). But Fawcett, Harris and Bridge (2005: 705 note 294) suggest that the place of payment should not be an important connecting factor in the context of Article 4(5) of the Rome Convention.

> result as application of the Rome I Regulation[70] as payment would usually have to take place (at a bank) in the country of habitual residence or business of the party that has to effect the characteristic performance.[71] This is a factor of great significance because the European Union is by far the most important trading partner of South Africa[72] and harmony of decision remains one of the primary aims of private international law.[73] The approach under discussion is therefore supported for purposes of contemporary positive law,[74] not necessarily based on its inherent merits[75] but merely on the ideal of international harmony of decision.[76]

It is unclear in which direction South African private international law of contract will develop and severe uncertainty remains in respect of the determination of the proper law of a contract. But steps are taken to remedy the situation in a broader context. One of the stated objectives of the Research Centre for Private International Law in Emerging Countries[77] at the University of Johannesburg is the drafting of model laws (or legislative instruments) in the field of private international law for utilisation by the African Union.[78] The first project of the research centre in this context is the drafting of the African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts.[79] The Hague Principles on Choice of Law in International Commercial Contracts (2015)[80] and the Rome I Regulation on the Law Applicable to Contractual Obligations (2008)[81] are conceived to be some of the most important models in its creation.

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70 See Article 4 of the Rome I Regulation (note 51).

71 Of course, payment need not take place there (see Forsyth (2012: 334 note 113), but in the usual scenario it probably will.

72 Exports to and imports from the EU account for approximately 40% of South Africa's total foreign trade. The top ten trading partners of South Africa are (in order of importance): Germany, the United States of America, the United Kingdom, Japan, Saudi Arabia, Italy, the Netherlands, China, France and Belgium. See Burger (ed) (2003: 171-172).

73 According to Forsyth (2012: 72-73), uniformity of decision should be the guiding principle in the development of private international law. Also see the case law referred to by Forsyth (2012: 71 note 278).

74 But see the next paragraph on the intended codification of private international law of contract in the African context.

75 See the critical discussions of the Rome Convention (note 51) in Blom (1980: 186-188); Juenger (1994: 384-386); and (1997: 204-206); and Patocchi (1993: 113). But also see the equally critical discussion of the *lex loci solutionis* as an alternative by Mankowski (2003: 467-468).

76 Fredericks (2006a: 81); Fredericks and Neels (2003a: 70-71); Neels (1990: 554-555); and Du Toit (2006: 62 note 69).

77 Also see Chapter 1.

78 See www.african-union.org.

79 See Chapter 6.

80 www.hcch.net.

81 See note 51.

2.3 The common-law authors[82]

Common-law authors as Rodenburg,[83] Paulus Voet,[84] Johannes Voet,[85] Huber[86] and Van der Keessel[87] were of the opinion that, in general, the *lex domicilii* should govern status and contractual capacity (at least as far as movable property is concerned).[88] Rules in this regard were namely seen to be personal in nature in terms of the then prevalent statute theory.[89] The applicable rules would determine, for example, "whether a woman or minor is or is not to be allowed to make a contract without the consent of husband or guardian".[90]

Van der Keessel provided the following examples. If a person from the Veluwe of 21 years old concluded a contract in Holland, he would be held to possess contractual capacity, although the majority age in Holland was 25 years. The reason is that the *lex domicilii*, the law of the Veluwe, provided that a male person became a major at age 20 and a female at 18. However, if a young man from Holland of 21 years old concluded a contract in the Veluwe, he would not have the required capacity to do so as his law of domicile regarded him as a minor.[91]

The author further employed the example of a 20-year old domiciliary from Holland who obtained majority status by marriage according to the law of that province. In Friesland, majority was not acquired by marriage. If the person from Holland concluded a contract in Friesland, he would be regard-

82 References to the recognition of foreign court orders in the common-law texts are excluded. However, some South African authors refer to instances of the recognition of foreign court orders in the context of the legal systems applicable to contractual capacity. See, for example, Forsyth (2012: 338); Kahn (1991: 126-127); Schoeman, Roodt and Wethmar-Lemmer (2014: par 109); and Van Rooyen (1972: 15-19).

83 Rodenburg (1653: *De Jure Conjugum* 1.3.1) as referred to by Van Rooyen (1972:15).

84 P Voet (1661: *De Statutis* 4.3.3 and 4.3.4)

85 J Voet (1829: *Commentarius* 4.1.29, 4.4.8 and 27.10.11).

86 Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41).

87 Van der Keessel (1961: *Praelectiones* 73 (*Th* 27)); Van der Keessel (1961: *Praelectiones* 75 (*Th* 27)); Van der Keessel (1961: *Praelectiones* 98 (*Th* 42)); Van der Keessel (1961: *Praelectiones* 101 (*Th* 42)); and Van der Keessel (1961: *Praelectiones* 102 (*Th* 42)). Van der Keessel submitted that applying the law of domicile is sensible – a traveller could not be a minor (lacking contractual capacity) in one instance and a moment later be a major (possessing such capacity), depending on his or her geographical presence: (1961: *Praelectiones* 98 (*Th* 42)).

88 See the text at notes 108-114 in respect of immovable property.

89 P Voet (1661: *De Statutis* 4.3.3); P Voet (1961: *De Statutis* 4.3.17); J Voet (1829: *Commentarius* 1.4 App 2); and Van der Keessel (1961: *Praelectiones* 75 (*Th* 27)). On the statute and comity theories and their influence in Roman-Dutch law, see Forsyth (2012: 30-45).

90 J Voet (1829: *Commentarius* 1.4 App 2).

91 Van der Keessel (1961: *Praelectiones* 102 (*Th* 42)).

ed as a major, as he had this status in Holland. The law of Holland *qua lex domicilii* applied.[92]

The *lex domicilii* was often said to apply on the basis of comity.[93] For instance, Johannes Voet stated that

> "the question whether one is a major or a minor … is to be decided by the law of the domicile, so that one who is a minor at the place of his domicile is to be deemed to be such anywhere in the world, and *vice versa* – whether you would have that to be the rule in strict law, or (more correctly) as a matter of comity".[94]

Huber was of the opinion that minors, married women and others with limited capacity, as determined under the relevant law of domicile, "enjoy the rights that persons of like capacities possess or are subject to in each place".[95] For instance, a young man of 20 or 21 years old, domiciled in Utrecht, could sell (immovable) property[96] in Friesland as he was recognised as a major in Friesland on the basis of the law of Utrecht (the *lex domicilii*) and a major, in terms of the law of Friesland (the *lex loci contractus*), of course, had the capacity to alienate property.[97]

Various authors therefore suggest that Huber distinguished between status, governed by the law of domicile, and the consequences of that particular status, governed by the *lex loci contractus*.[98] A distinction between status and its consequences was supported by Van der Keessel, referring to the work of Huber in this regard.[99] However, Van der Keessel added that individuals could not obtain a wider capacity than they would have possessed in terms of the *lex domicilii*.[100] It seems that Van der Keessel proposed a cumulative

92 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

93 P Voet (1661: *De Statutis* 4.3.17); J Voet (1829: *Commentarius* 4.1.29, 4.4.8 and 27.10.11); Van der Keessel (1961: *Praelectiones* 98 (*Th* 42)); Van der Keessel (1961: *Praelectiones* 102 (*Th* 42)); and Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

94 J Voet (1829: *Commentarius* 4.1.29). In another text, the author also draws a distinction between the *ius strictum* and *comitas* (*Commentarius* 27.10.11). Although the text involves the declaration of a foreign court with regard to prodigality, it is apparent that Johannes Voet was of the opinion that the *lex domicilii* applied out of comity and not in accordance with the *ius strictum*. *Cf* Rodenburg (1653: *De Jure Conjugum* 2.1) as referred to by Van Rooyen (1972:15), who saw the application of the *lex domicilii* as a legal duty, a *necessitas iuris*.

95 Huber (1768: *HR* 1.3.38); Huber (1768: *HR* 1.3.40); and Huber (1768: *HR* 1.3.41).

96 Some of the authors would apply the *lex situs* in respect of immovable property: see the text at notes 108-114. Also see Huber (1768: *HR* 1.3.40).

97 Huber (1768: *HR* 1.3.40). Of course, a major would also have that capacity in terms of the law of Utrecht. See the example at note 102 which more clearly illustrates Huber's view and that of Van der Keessel.

98 Forsyth (2012: 338); Schoeman, Roodt and Wethmar-Lemmer (2014: par 109). However, Huber elsewhere unequivocally and repeatedly states that *capacity* is governed by the *lex domicilii*: see Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41).

99 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

100 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

reference rule in this regard:[101] an individual would be held to have capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex loci contractus*.

An example involving the *Senatusconsultum Macedonianum*,[102] as provided by Van der Keessel,[103] is useful in illustrating the different views of Huber and Van der Keessel in this regard. A young man of 25 from Friesland concluded a contract of loan in Holland. His father was still alive. In terms of Frisian law, where the *Senatusconsultum* was received and applied unabridged, the son, although a major, would have a perpetual exception at his disposal against a claim for repayment of the loan (unless, of course, his father was already deceased at the conclusion of the contract of *mutuum*). In terms of the law of Holland, the *Senatusconsultum* was a defence only available to minors (persons under 25).[104] If one were to apply Huber's view[105] here, one would recognise the status as major of the son on the basis of the law of domicile (the law of Friesland). However, the consequences of that status would be governed by the *lex loci contractus*, the law of Holland, where the defence was not available to majors. Van der Keessel, again, was of the opinion that the son would nevertheless be able to invoke the *Senatusconsultum Macedonianum* as he would be able to do so in terms of the law of Friesland. He required the son to have capacity in terms of both the law of Holland and that of Friesland before being liable.[106]

Van Bijnkershoek proposed the application of the *lex loci contractus* as the general rule. A certain case, which was presented before the *Hoge Raad*, involved a minor Dutch domiciliary who effected a donation in Austria, where he would have been a major. The court decided that Dutch law should

101 On this terminology, see Neels (2001: 707).

102 *D* 14.6.

103 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

104 See Lokin, Brandsma and Jansen (2003: 38-39); and Zimmermann (1992: 177-181).

105 See the text at notes 95-97.

106 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)). Another example may be provided, not based on any common-law authority: In terms of the *lex domicilii* (the law of A) a minor does not possess contractual capacity whatsoever. In terms of the *lex loci contractus* (the law of B) a minor between 7 and 18 years of age, in general, does not have the capacity to conclude contracts, but he or she is able to conclude contracts in respect of essential goods (*cf* Paragraph 15 [2] and [3] of the Hungarian Private International Law Code (1979)). Natural person X, aged 20 and domiciled in country A, is a minor in terms of the law of A but would be a major in terms of law of B. Assume that X concludes a contract for essentials in country B. According to the distinction between status and the consequences of that status, as ascribed to Huber, X is, for the purposes of the law of B (including its private international law), recognised as a minor as the *lex domicilii* applies in respect of status. However, the law of B applies in respect of the consequences of the incapacity of minors. As such, X will be bound to the contract in respect of essential goods. However, according to Van der Keessel, X will not be bound as he or she does not have the capacity to conclude such contracts in terms of the *lex domicilii*.

govern, but Van Bijnkershoek advocated the application of Austrian law *qua lex loci contractus*.[107]

With regard to contracts relating to immovable property, Johannes Voet[108] and Van der Keessel[109] in principle supported the application of the *lex situs*.[110] Voet referred to the Flemish author Burgundius in this regard:

> "[A] man of[111] Ghent who has passed the twentieth year of his age can sell and solemnly transfer feudal properties in Hainault … because in Hainault anyone is deemed a major who has completed his twentieth year, though at Ghent it is only the fulfilment of the twenty-fifth year which brings majority."[112]

Van der Keessel, however, submitted that the application of the *lex situs* could not confer a wider capacity than the *lex domicilii*.[113] An individual therefore had capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex situs*. Van der Keessel clearly advocated a cumulative reference rule also in the context of immovable property.[114]

Johannes Voet, Huber and Van der Keessel all proposed exceptions to the primarily applicable rules in favour of the *lex loci actus/contractus*. Examples of these are found only in cases where foreign court orders were involved. However, the same principle would probably have applied to determine the applicable legal system in cases where no such court order was relevant.

In this regard, Johannes Voet[115] and Van der Keessel[116] required fraud on the part of the incapable party (having brought the contract assertor under the impression that he or she did possess contractual capacity) for the *lex loci contractus* to be applicable. Voet,[117] in addition, required the ignorance (or

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107 Van Bijnkershoek (1926: *Obs Tum* no 71). There is, however, evidence to suggest that Van Bijnkershoek did not regard the *lex loci contractus* to be applicable in all situations. This is deduced from Van Bijnkershoek's commentary on another decision of the *Hoge Raad* (*Obs Tum* no 1523), as referred to by Van Rooyen (1972: 21). Although the case concerned a declaration of *venia aetatis* (emancipation) by a foreign court, it is clear that he would prefer the application of the *lex domicilii* in certain circumstances.

108 J Voet (1829: *Commentarius* 4.4.8).

109 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).

110 One text of Huber (1768: *HR* 1.3.45) may be cited in favour of the *lex situs* but another (Huber (1768: *HR* 1.3.40)) in favour of the *lex domicilii* as the governing law in respect of immovable property.

111 Read "domiciled in".

112 Burgundius (1634: Treatise 1, nn 7 and 8), as referred to by J Voet (1829: *Commentarius* 4.4.8).

113 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).

114 See note 101 *supra*.

115 J Voet (1829: *Commentarius* 27.10.11).

116 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).

117 J Voet (1829: *Commentarius* 27.10.11).

good faith) of the contract assertor but also that the ignorance was reasonable in the circumstances.[118] He provided the following example:

> "Of course if a person who is altogether ignorant of an order of court, and who lives in another country where the order has not been published, has made a contract with a prodigal who craftily conceals that he has been formally interdicted from his property, it would be just for the person who has been so cozened by the prodigal to be relieved on the ground of just mistake, so that he has just as effective an action as if he had contracted with another who had not been interdicted from his property. This assumes that the ignorance is quite reasonable, and that, if it is demanded, he shall himself confirm his good faith by the scruple of an oath."[119]

Van der Keessel also required the *bona fides* of the contract assertor[120] but, in addition, that the fraud of the incapable contractant would have prejudiced the first-mentioned party.[121]

Huber formulated a more general approach, namely that the primary applicable legal system may be excluded "for reasons of equity".[122] He provided an example in terms of which the contract assertor "had been kept in ignorance of the fact" of the incapacity, referring to his or her *bona fides*, as well as the fraud of the incapacitated party.[123]

According to Van Rooyen, it is difficult to get a clear picture from the works of the common-law authors.[124] Forsyth agrees, stating that the old authorities "spoke with an uncertain voice on the question of capacity", recognising "the need for flexibility" in this regard.[125]

As will be discussed,[126] the application of the *lex domicilii*, the *lex loci contractus* and the *lex situs* were received in South African case law. This is not the case with the differentiation between status and its consequences, ascribed to Huber and advocated by Van der Keessel as it never formed part of the argumentation of any of the courts involved.[127] The cumulative reference rules proposed by Van der Keessel[128] have never been considered. The exceptions to the general rules are also not referred to in the South Afri-

118 This was the position where the incapable individual fraudulently concealed his incapacity and, while the other contractant was in good faith, he was deceived by the other party. See J Voet (1829: *Commentarius* 27.10.11).
119 J Voet (1829: *Commentarius* 27.10.11).
120 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).
121 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
122 Huber (1768: *HR* 1.3.39).
123 *ibid*.
124 Van Rooyen (1972: 23).
125 Forsyth (2012: 338).
126 See paragraph 2.4 below.
127 See the text at notes 98-100. However, according to Forsyth (2012: 339), the distinction could provide an explanation for the decision in *Kent v Salmon* 1910 TPD 637.
128 See the text at notes 106 and 113-114.

can decisions. It nevertheless remains important, as formulated by Huber in a general statement, that the primary applicable legal system(s) may be excluded "for reasons of equity",[129] leaving the door wide open for possible future developments in this field.[130]

2.4 The South African courts

2.4.1 Introduction

The legal position in South African private international law in respect of contractual capacity is not entirely clear.[131] Not many reported cases are available in this regard. *Ferraz v d'Inhaca*[132] is the only South African decision in which the court addressed capacity in respect of contracts relating to immovable property. This case will be investigated first, followed by a discussion of the five cases dealing with other types of contracts.

2.4.2 *Ferraz v d'Inhaca*[133]

In casu the plaintiff agreed to sell immovable property situated at Matolla Bay in Lourenço Marques in Mozambique, then a Portuguese colony, to the defendant. The contract was concluded in Johannesburg (South Africa) but both parties were Portuguese nationals domiciled in Delagoa Bay (Mozambique). Since the transfer had to be completed at Delagoa Bay and the purchase price[134] was payable simultaneously at or after registration, it is clear that Delagoa Bay was the *locus solutionis*.[135] The relevant deposit was duly paid upon the signing of the contract but the defendant committed breach of contract by refusing to complete the purchase.

The court *inter alia* had to address the issue of whether or not contractual capacity was governed by Portuguese law (the colonial law of Mozambique). Under this law, the contract would be void because of a lack of contractual capacity as it was not co-executed by the plaintiff's wife to whom he was married in community of property. In addressing the issue, Bristowe J stated:

129 Huber (1768: *HR* 1.3.39).
130 For a discussion on the views of the common-law authors, see Fredericks (2015).
131 See, in general, Forsyth (2012: 292-295 and 337-341); Schoeman, Roodt and Wethmar-Lemmer (2014: pars 107-115); Edwards and Kahn (2003: pars 308 and 333); and Van Rooyen (1972: 120-126).
132 1904 TH 137.
133 *ibid*.
134 and compensation monies.
135 *Ferraz v d'Inhaca* (*supra*: 140).

> "I apprehend, no doubt that according to the law of this country … the *lex situs* must govern all questions with regard to the capacity to enter into a contract for the alienation of immovable property, or with regard to the interpretation of such contract or the respective rights and obligations of the parties under it."[136]

Accordingly, Portuguese law was applicable to the issue of contractual capacity since the property in question was situated in Portuguese Delagoa Bay. Bristowe J further stated that even if Dicey's proper law approach[137] was applied to the matter, the result would be the same: "[I]t can hardly be doubted that, seeing that both the plaintiff and the defendant are domiciled Portuguese subjects, the law with reference to which they intended to contract and conceive themselves to be contracting was their own, *viz*, the law of Portugal."[138] The proper law referred to is a subjectively ascertained proper law, the application of which is a possibility which Bristowe J in any event expressly rejects.[139]

Bristowe J does not refer to direct authority in arriving at his decision[140] and his discussion of the various legal sources,[141] the present author submits, holds no relevance to contractual capacity; it merely illustrates divergent approaches to private international law of contract in general.[142] Nevertheless, the decision provides clarity on the issue of contractual capacity in respect of immovable property: the *lex rei sitae* is applicable.[143]

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136 *Ferraz v d'Inhaca* (*supra*: 142-143).

137 The court refers to Dicey *The Conflict of Laws* (undated edition: 769 *et seq*). At p 143 of the *Ferraz* case, Bristowe J states that, according to Dicey's approach, the proper law of the contract is "not the law of the *locus contractus*, but the law with reference to which the parties intended to contract".

138 *Ferraz v d'Inhaca* (*supra*: 144).

139 *Ferraz v d'Inhaca* (*supra*: 143). Also see van Rooyen (1972: 120).

140 *Ferraz v d'Inhaca* (*supra*: 143). It may be assumed that he consulted Dicey on the English legal position as he refers to the author in the context of determining the proper law of a contract (Dicey (undated edition: 769 *et seq*)).

141 The judge refers to *D* 44.7.21; J Voet (1829: *Commentarius* 4.1.28); *Stewart v Ryall* 1887 5 SC 154; Burge (1838b: 843); *Jacobs v Credit Lyonnais* 12 QBD 589; *Hamlyn v Talisker Distillery* 1894 AC 202; *Spurrier v La Cloche* [1902] AC 446 (Bristowe J *in casu* (*Ferraz v d'Inhaca* (*supra*: 143) incorrectly referred to the respondent as "Clarke"); and Dicey (undated edition: 769 *et seq*).

142 The cases and authors discussed in the case do not refer to immovable property directly; they all support the application of the *lex loci solutionis* instead of the *lex loci contractus* as the proper law of the contract. The issue is not relevant with regard to the matter in question.

143 The majority of the South African authors agree with this rule and offer no alternative approaches in this regard. See Forsyth (2012: 338); Schoeman, Roodt and Wethmar-Lemmer (2014: par 114); and Van Rooyen (1972: 120). Kahn (1991: 128) refers to the *Ferraz* decision as authority for applying the *lex situs*, his fourth testing law. Also see Edwards and Kahn (2003: par 333).

2.4.3 *Hulscher v Voorschotkas voor Zuid Afrika*[144]

The respondent sued the appellant for an amount outstanding in terms of a contract of loan entered into by his wife before her marriage and when she was still a minor. The parties were married in community of property. The appellant's defence was that his wife lacked the necessary capacity at the time of contracting, as she was a minor at that stage.

Innes CJ refers to authority in favour of the *lex domicilii* and authority in favour of the *lex loci actus*.[145] It was, however, not necessary to choose between the possibilities as the *lex domicilii* and the *lex loci contractus* coincided *in casu*.[146]

In a subsequent passage, however, only the *lex loci contractus* is mentioned as the applicable legal system:

> "But of course that assumes that the parties to the contract are capable, *at the place where they contract*, of entering into a binding contract at all. If either of them is incapable of contracting at the time, he is incapable of agreeing that any other law than that of the place where the contract is *made* should regulate the validity and extent of his obligation."[147]

But in a quotation from *Cooper v Cooper*,[148] reference is again made to both the *lex domicilii* and the *lex loci contractus*.[149]

Edwards and Kahn refer to the above quotation from the *Hulscher* case as follows: "In respect of commercial dealings especially, modern textwriter opinion favours the test of the putative proper law, namely an objectively ascertained one, which would accord with the *dictum* of Innes CJ in *Hulscher v Voorschotkas voor Zuid Afrika*."[150] In a footnote it is then stated: "It cannot be selected by the parties."[151] Kahn[152] and Forsyth[153] read the dictum as a rejection of a subjective proper law approach to the determination of contractual capacity.

The present author suggests that the passage merely states that the *lex loci contractus* governs contractual capacity and that contractual capacity is a

144 1908 (TS) 542.
145 *Hulscher v Voorschotkas voor Zuid Afrika* (*supra*: 545).
146 *Hulscher v Voorschotkas voor Zuid Afrika* (*supra*: 545-546).
147 *Hulscher v Voorschotkas voor Zuid Afrika* (*supra*: 546) (italics added). Van Rooyen (1972: 120) therefore interprets this case as support for the *lex loci contractus*. The judge, however, at 546-547 expressly leaves the question open. See Forsyth (2012: 338-339).
148 (1888) 13 App Cas 88 at 106.
149 *Hulscher v Voorschotkas voor Zuid Afrika* (*supra*: 546-547).
150 Edwards and Kahn (2003: par 333).
151 Edwards and Kahn (2003: par 333 note 9).
152 Kahn (1991: 128).
153 Forsyth (2012: 339).

prerequisite for choosing a legal system to govern the contract.[154] The case cannot be read as support for a putative proper law approach to contractual capacity, nor for rejection of the application of the subjective proper law of the contract.

In casu Innes CJ decided that the law of the Netherlands was to be applied to the matter.[155] This legal system was both the *lex domicilii* and the *lex loci contractus*. It is therefore not clear whether the judge made a choice between the two approaches. As such, this case only holds limited value in determining the law applicable to contractual capacity in South Africa today.

2.4.4 *Kent v Salmon*[156]

Kent, the appellant, a married woman, concluded a contract of sale with Salmon, the respondent in the Transvaal (South Africa). At the time, in terms of the law of Transvaal, married women lacked contractual capacity except where they acted as the agents of their husbands, they were public traders, their separate property was excluded from the community by antenuptial contract, the marital power was excluded or the contract concerned household necessities.[157] The appellant apparently breached the contract by only effecting partial payment of the purchase price. In the court *a quo*, the respondent successfully sued the appellant as a married woman assisted by her husband. This case is the appeal against the decision of the latter court.

On appeal, the respondent argued that the appellant was liable on the ground that she was married in England and this country remained her country of domicile since there was no evidence to suggest that she changed it. She consequently possessed the same rights and liabilities as a married woman in England, including the capacity to be sued on a contract in terms of the Married Woman's Property Act of 1893. The court therefore had to pronounce on the issue of whether contractual capacity is regulated by the *lex domicilii* or by the *lex loci contractus*.

Smith J held that the appellant's domicile was that of her husband, who was resident in South Africa. Due to a number of factors (such as: residence in South Africa since 1907; the conducting of business there; and the acquisition of interests in South Africa), the court arrived at the conclusion that Mrs Kent was domiciled in the Transvaal (South Africa).[158] The only factor in

154 Strangely enough, it is implied that a party without contractual capacity is still able to choose the *lex loci contractus* as the proper law of the contract. Perhaps the reference to the *lex loci contractus* is here employed to denote that the proper law objectively determined will then govern.

155 *Hulscher v Voorschotkas voor Zuid Afrika* (*supra*: 547).

156 1910 TPD 637.

157 *Kent v Salmon* (*supra*: 640).

158 *Kent v Salmon* (*supra*: 638-639).

favour of a domicile in England, on the other hand, was the fact of a residence there for an unknown period of time before the parties relocated to the Transvaal.[159]

In respect of the question of capacity, Smith J stated that authority[160] suggests the application of the *lex loci contractus* in the case of commercial contracts instead of the *lex domicilii*. He stated:

> "[T]here are strong grounds for holding that in the case of ordinary commercial contracts, such as the one in question, the contractual capacity of the person entering into them is to be decided not by the law of domicile, but by that of the place where the contract is made."[161]

In this context, he cited a passage by the editor of von Bar,[162] commenting on Lord Fraser's opinion on Scottish private international law, to the effect that the status of a natural person is governed by the *lex domicilii*.[163] According to the editor, this rule must be qualified in cases of the capacity to contract. The question will then be whether the capable contractant was aware of the incapacity of his or her counterpart at the time of contracting or whether he lacked knowledge thereof as a result of negligence. If the capable contractant acted "prudently and with reasonable care, and if there was nothing in the appearance of the other party, or the nature of the transaction, to raise inquiry, justice requires that the *lex loci contractus* should govern the rights of the parties".[164] In these circumstances, the counterpart would not be allowed to rely on his or her incapacity in terms of the *lex domicilii*.[165]

Smith J then cites Burge,[166] who states:

> "The obstacles to commercial intercourse between the subjects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by means within his reach, but by recourse to the law of domicile of the person with whom he is dealing, whether the latter has attained the age of majority, and consequently, whether he is competent to enter into a valid and binding contract."[167]

It is therefore the present author's view that Smith J preferred the application of the *lex loci contractus* to capacity in all cases involving commercial contracts, without the requirement of the absence of fault. The fact that it was not Mrs Kent who attempted to rely on her English domicile for the purposes of

159 *Kent v Salmon* (*supra*: 639).
160 Story, Dicey, Burge and von Savigny.
161 *Kent v Salmon* (*supra*: 639).
162 Von Bar-Gillespie (1892: 310).
163 *Kent v Salmon* (*supra*: 639).
164 *ibid.*
165 *Kent v Salmon* (*supra*: 640).
166 Burge (1838a).
167 Burge (1838a: 132).

escaping contractual liability, but rather Salmon who asserted the existence of such liability in order to bind her contractually, was inconsequential; capacity was governed by the *lex loci contractus*, the law of the Transvaal (South Africa), in terms of which she lacked capacity. The court held: "In my opinion, the capacity of the defendant to enter into this contract, even if her English domicile were established, is dependent upon the local law, and not upon the English Statute of 1893."[168] As a result, in contrast to the decision of the court *a quo*, Smith J held that Mrs Kent was not liable for the balance of the purchase price of the goods sold to her.

The decision has been interpreted in various ways. According to Forsyth, Smith J adopted an approach similar to that advanced by Huber and Van der Keesel.[169] In terms of this approach, one should distinguish between status and the consequences thereof. Status is determined by the *lex domicilii* while the consequences of status are determined by the *lex loci actus* (*lex loci contractus*).[170]

According to Kahn, the decision shows that, since some aspects of a wife's contractual capacity are so closely related to the proprietary consequences of her marriage, they should be governed by the legal system determining those consequences.[171] In the absence of an antenuptial contract, this system would be the *lex domicilii* of the husband at the time of the marriage.[172] Without further discussion, the author adds that he is not convinced that fairness dictates that local contracting parties are entitled to assume that the personal law of a married woman gives her the same contractual capacity that would be yielded by local law as the *lex loci contractus*.[173]

According to Sonnekus,[174] Smith J *in casu* arrived at the conclusion that contractual capacity in commercial contracts should be governed by the *lex loci contractus* by strongly relying on the fairness approach advocated by von Bar, rather than the views of Huber.[175] It would be fair for a contractant, intending to rely on the validity of an agreement, to expect that only the legal position as applied locally should be taken into consideration when dealing with a matter concerning capacity. The reason is that it would be

168 *Kent v Salmon* (*supra*: 640).
169 Forsyth (2012: 339) in this regard refers specifically to Huber (1768: *HR* 1.3.36, 1.337, 1.3.38, 1.3.39) and Van der Keessel (1961: *Praelectiones* 131 *ff* (*Th* 42)). See also Forsyth (2012: 293); Kahn (2000: 875); and Van Rooyen (1971: 121). For a discussion of the views of Huber and Van der Keessel, see paragraph 2.3.
170 Also see Schoeman, Roodt and Wethmar-Lemmer (2014: par 111).
171 Kahn (1991: 128).
172 This was the common-law rule. See for the position in South Africa today, Neels and Wethmar-Lemmer (2008: 587-596).
173 *ibid*.
174 Sonnekus (2002: 146).
175 *ibid.*

difficult for this contractant to ascertain the particular legal position applicable in the foreign system to which his or her counterpart may be subject.[176] There could, however, according to the court (as interpreted by the author), be a deviation of this principle where a reasonable person in the position of a contractant had reason to be more cautious regarding a specific limitation of his or her counterpart's contractual capacity.[177]

According to Van Rooyen, it should be questioned whether it was fair to apply the *lex loci contractus* where the woman already had contractual capacity in terms of her *lex domicilii*.[178] In addressing this question, he refers to Huber[179] and Van der Keesel[180] who, according to him, both favoured applying the *lex loci contractus* to contractual capacity. He then submits that *in casu* they would have arrived at the same conclusion as Smith J.[181] On the other hand, Van Bijnkershoek favoured the application of the *lex loci contractus* only where a contractant lacked capacity according to his or her *lex domicilii*.[182] *In casu* he would not have applied the *lex loci contractus*, as the contractant would then lack capacity, but probably the *lex domicilii*.[183]

Van Rooyen is of the opinion that the purpose of the application of the *lex loci contractus* with regard to capacity is the protection of the contract assertor and must be seen as an exception to the generally applicable *lex domicilii*.[184] Reliance on this protection must, however, be realistic and necessary.[185]

The author refers to the French *Lizardi* rule in this context. The rule emanates from the decision in *Lizardi v Chaize*[186] where a foreigner (a Mexican national), lacking capacity in terms of his personal law, concluded a contract of sale with a French national in France where he would have possessed such capacity. The court held that in such a case his incapacity should not be upheld if the French national acted "sans légèreté, sans imprudence et avec bonne foi". This means that the French national, the contract assertor, must have acted without carelessness, without imprudence and with good faith.[187]

176 *ibid.*
177 *ibid.*
178 Van Rooyen (1972: 121).
179 Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.41 and 1.3.44).
180 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
181 Van Rooyen (1972: 121). As indicated earlier, they draw a distinction between status and capacity as a consequence thereof.
182 Van Bijnkershoek (1926: *Obs Tum* no 71); and Van Rooyen (1972: 21).
183 Van Rooyen (1972: 122).
184 Van Rooyen (1972: 123).
185 *ibid.*
186 Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
187 The case is discussed in more detail in Chapter 4, paragraph 4.2.7.

Smith J refers[188] to a statement by the editor of von Bar,[189] supporting the principle in *Lizardi*[190] in terms of which the *lex loci contractus* applies only where the prejudiced contractant acts reasonably.[191] The citation by Smith J of the text of the editor of von Bar[192] has led to some confusion.[193] In the light of statements made elsewhere in the case, as referred to above,[194] the quotation from Burge[195] and the fact that the judge does not discuss the issues that would be relevant if a qualified *lex loci contractus* approach were followed (for instance, whether the contract assertor exercised reasonable care), it seems clear that the decision should be read as unconditionally in support of the *lex loci contractus* to govern contractual capacity in a commercial context.

2.4.5 *Powell v Powell*[196]

The *Powell* decision is subject to considerably dissimilar interpretation. A proper reading of *Powell* is important not only in view of the scarcity of case law in this regard but also because it formed the basis for the decision in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*,[197] which is the most recent case on the topic.

The Powells were domiciled in England at the time of their marriage. The couple subsequently settled in South Africa where they acquired domicile. Mr Powell (the applicant) purchased a motor vehicle which was registered in the name of his wife, Mrs Powell (the respondent), and it was common cause that he paid for it. It is therefore clear that the motor vehicle was a gift from the applicant to the respondent. The contract of donation was concluded in South Africa when they were domiciled in there and during the subsistence of their marriage. After the parties became estranged, the applicant informed the respondent that he revoked the gift and that it should be returned to him. The respondent refused to return it, insisting that she was entitled to possess it as the owner. The question that arose was which legal system applied to the conclusion of the contract of donation? If it was English law (the law of the matrimonial domicile), then the gift was valid, but if it was South African law, the applicant could revoke it.[198]

188 *Kent v Salmon* (*supra*: 640-641).
189 Von Bar-Gillespie (1892: 310).
190 *Lizardi v Chaize* (*supra*).
191 Van Rooyen (1972: 122-123).
192 Von Bar-Gillespie (1892).
193 See Sonnekus (2002: 146).
194 *Kent v Salmon* (*supra*: 639-640).
195 Burge (1838a).
196 1953 (4) SA 380 (W). Also see the discussion by Fredericks (2006b: 279-286).
197 2000 (1) SA 167 (W).
198 Contracts of donation between spouses are valid in South African law today: see Section 22 of the Matrimonial Property Act 88 of 1984.

Ludorf AJ decided that the issue was not one of the patrimonial consequences of marriage,[199] which are governed by the *lex domicilii matrimonii*,[200] but one of the contractual capacity of the spouses.[201] The reason for the judge's decision in this regard is to be found in the following *dictum*: "I think its retention [the prohibition against donations between spouses] in modern law is for the protection of creditors. Exceptions to the rule which were introduced by the Insolvency Act,[202] strengthen me in this view."[203]

Edwards and Kahn[204] read *Powell* as support for the *lex domicilii* in the context of contractual capacity. So do Schoeman, Roodt and Wethmar-Lemmer, but they add: "There are, however, indications that the judge applied the *lex domicilii* as the (putative) proper law of the contract."[205] Forsyth[206] writes as follows: "Ludorf AJ purported to apply the proper law,[207] and came to the conclusion that the *lex domicilii* at the time the gift was made governed...."[208] Elsewhere,[209] Forsyth quotes from the *Powell* case[210] to the effect that the proper law is applicable to contractual capacity; but it should be noted that the judge in the cited passage merely states the argument of the applicant. Van Rooyen emphasises the reference by the judge to the objective proper law.[211] Wunsh J, in the *Tesoriero* case,[212] interprets the *Powell* decision as providing support for the proper law approach in respect of contractual capacity.[213] Which of these interpretations is the most plausible?

Ludorf AJ first listed the relevant authorities on the issue of contractual capacity. He cited Cheshire[214] as follows:

199 *Contra Mair's Trustee v Mair* 1928 PH C14 (SR): see Van Rooyen (1972: 123-124 note 160).
200 This denotes the legal system of the country where the husband was domiciled at the time of conclusion of the marriage. This rule is now clearly in conflict with Section 9 of the Constitution of the Republic of South Africa, 1996. See for reform proposals Stoll and Visser (1989: 330); Schoeman (2001: 72); and Neels and Wethmar-Lemmer (2008: 587).
201 *Powell v Powell* (*supra*: 382H-383A and 383H-384A). See Edwards and Kahn (2003: par 308); Forsyth (2012: 294); and Schoeman, Roodt and Wethmar-Lemmer (2014: pars 195-196). *Cf* the discussion of *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) in paragraph 2.4.6 below.
202 24 of 1936.
203 *Powell v Powell* (*supra*: 383G).
204 Edwards and Kahn (2003: par 333 with note 4); Hahlo and Kahn (1975: 626).
205 Schoeman, Roodt and Wethmar-Lemmer (2014: par 112).
206 Forsyth (2012: 294 and 340).
207 with reference to *Powell v Powell* (*supra*: 382D).
208 with reference to *Powell v Powell* (*supra*: 384A). Also see Oppong (2013: 143).
209 Forsyth (2012: 337 note 129).
210 *Powell v Powell* (*supra*: 382E-F).
211 Van Rooyen (1972: 124 and 126).
212 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*).
213 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* Ltd (*supra*: 172B-G).
214 Cheshire (1947: 297).

> "If the woman is capable by the 'proper law' of the contract (which is generally the law of the place where the contract is made)[215] though incapable by the law of her domicile, the contract will be valid: The proper law is the legal system with which the contract has the most real connection and is usually though not always the *lex loci contractus*. The surrounding circumstances of the contract show which is the proper law. To decide therefore which is the 'proper law', one asks such questions as: Where was the contract made? Where is it to be executed? Where are the parties domiciled at the time of the contract?, and the like."[216]

The judge stated that if he were to apply this test, South African law should determine the validity of the donation.[217] He based this conclusion on the following factors: the parties were domiciled in South Africa at the time the gift was made;[218] the motor vehicle was to be used there; the creditors of the parties, if any, were probably in South Africa; and there were no aspects of the contract (of donation) that demonstrated a connection to England (the *locus domicilii matrimonii*) whatsoever.[219]

It is clear that the judge had an *objective* putative proper law in mind, as he did not refer to the intention of the parties. The judge, however, continued to refer to other authority indicating that the *lex domicilii*[220] or the *lex loci contractus*[221] should govern. He then came to the following conclusion:

> "After considering the arguments and authorities, I have come to the conclusion that the rule prohibiting gifts between spouses is a part of the local law affecting the contractual capacity of the spouses in relation to contracts of donation. It does not seem to me to be a matter which affects the proprietary rights of the spouses or the rights created at the time of the marriage in relation to property. *I think it is a local rule which prohibits donations between husband and wife while they are domiciled in South Africa*, and in these circumstances the applicant in the present case was entitled to revoke the donation as he has done."[222]

Although the court also refers to authorities with other views, the italised part in the quotation above, in the present author's view, clearly indicates that the legal system that is finally applied to contractual capacity is the *lex*

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215 This is not the position in English private international law today: see Article 4 of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). In this regard, see Neels and Fredericks (2004: 173). It is also not the position in South African private international law: see Edwards and Kahn (2003: pars 328 and 330); Forsyth (2012: 329-336); Fredericks and Neels (2003: 63); Neels (1994: 289-291); Neels and Fredericks (2008b: 533); Schoeman, Roodt and Wethmar-Lemmer (2014: pars 92-102); and Van Rooyen (1972: 101-106).

216 *Powell v Powell* (*supra*: 383A-C).

217 *Powell v Powell* (*supra*: 383C).

218 Domicile is here merely one of the relevant factors whilst under the *lex domicilii* approach it is obviously the sole connecting factor. The judge does not seem to emphasise the role of domicile above the other factors.

219 *Powell v Powell* (*supra*: 383C-D).

220 with reference to *Lee v Abdy* (1886) 17 QBD 309 at 383D-E.

221 with reference to *Kent v Salmon* 1910 TPD 637 at 383G-H.

222 *Powell v Powell* (*supra*: 383H-384A) (italics added).

domicilii (and neither the proper law nor the *lex loci contractus* which are also referred to in the listed authority).[223] In any event, the objective putative proper law, the *lex loci contractus* and the *lex domicilii* were all South African law *in casu*.[224]

2.4.6 *Guggenheim v Rosenbaum (2)*[225]

This case dealt with the inherent validity of a contract of engagement.[226] Trollip J applied the proper law of the contract,[227] South African law, to the issue of validity but added:

> "Even if I am wrong in my above approach to the problem that it is the proper law of the contract that must be regarded, and that the correct approach is simply and directly to say that according to our law, as the *lex fori*, the validity of the contract to marry is merely dependent on either (i) the plaintiff's capacity to contract, or (ii) her status at the time it was entered into, I think that, although the path I must then tread is much less clearly defined, the result would be the same."[228]

The judge then distinguishes between contractual capacity and status. The *lex domicilii* is the law that applies in respect of status.[229] The systems applicable to contractual capacity are either the *lex loci contractus* or the *lex domicilii*.[230] "In either case the law applicable would be that of the State of New York...."[231] It was therefore not necessary to choose between the possibilities.[232] Trollip J, however, cited a passage by Dicey,[233] "worth quoting in full",[234] stating that capacity in respect of an engagement contract "should ... be governed by the law of his or her domicile, no matter where the promise is made".[235] The present author thus submits that if the *lex loci contractus* and the *lex domicilii* did not coincide, the judge would probably have favoured the *lex domicilii*.

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223 Edwards and Kahn (2003: par 333); Forsyth (2012: 340); Hahlo and Kahn (1975: 626); Schoeman, Roodt and Wethmar-Lemmer (2014: par 112); and Van Rooyen (1972: 124 and 126).

224 Fredericks (2006b: 285).

225 *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W). Only Van Rooyen (1972: 125-126) and Edwards and Kahn (2003: par 333) refer to this case in the context of contractual capacity.

226 On inherent validity and legality of contracts in private international law, see Edwards and Kahn (2003: pars 336-337); Forsyth (2012: 343-349); Neels (1991: 694); Schoeman, Roodt and Wethmar-Lemmer (2014: pars 120-125); and Van Rooyen (1972: 145-175).

227 *Guggenheim v Rosenbaum (2)* (*supra*: 29H-33A).

228 *Guggenheim v Rosenbaum (2)* (*supra*: 33A-B).

229 *Guggenheim v Rosenbaum (2)* (*supra*: 32D-E and 33E-F).

230 *Guggenheim v Rosenbaum (2)* (*supra*: 33B-C).

231 *Guggenheim v Rosenbaum (2)* (*supra*: 33D-E).

232 See also Van Rooyen (1972: 126).

233 Morris *et al* (eds) (1958: 770).

234 *ibid*.

235 *Guggenheim v Rosenbaum (2)* (*supra*: 33D).

2.4.7 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[236]

The appellant, who was married in community of property in terms of Argentinean law, entered into a contract of suretyship with the respondent without the consent of her husband. When sued by the respondent, the appellant raised the defence of incapacity and the court had to decide whether she possessed the necessary contractual capacity at the relevant stage and was thus liable in terms of the contract.

After rejecting the relevance of Argentinean law to the issue at hand,[237] Wunsh J refers to *Kent v Salmon*[238] as authority for the *lex loci contractus* to be applied to contractual capacity in the context of ordinary commercial contracts. "A deed of suretyship signed by one of two equal members of a trading close corporation who is involved in its business … is an ordinary commercial contract."[239] The judge, however, remarks that the *locus contractus* "could be a matter of pure chance, especially if it is made by letter or telefax or over the telephone"[240] or – it could be added – electronically (for instance by e-mail).[241]

The judge, with approval, then refers to Dicey and Morris[242] as support for "the law of the country with which the contract is most closely connected" or the proper law or *lex causae* of the contract to govern contractual capacity.[243] He adds that this approach is consistent with the views of Ludorf AJ in the *Powell* case[244] and quotes extensively from that decision.[245] Wunsh J concludes as follows: "In any event, in the present matter the *lex loci contractus*, the only country with which the contract was connected, and the country according to the law of which the merits of the case had to be decided (the *lex causae* ...) are the same."[246] According to the present author, this *dictum*

236 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W).
237 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*) at 171 H: "In my view, the evidence and discussion about the law of Argentina was unnecessary."
238 *Kent v Salmon* 1910 TPD 637.
239 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*: 171H-I).
240 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*: 172A-B).
241 See Section 22(2) and Section 23(c) of the Electronic Communications and Transactions Act 25 of 2002, which will in a South African court determine where an electronic contract was concluded, as the *lex fori* determines the content of connecting factors (see *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W) and *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) 1093H; an exception is nationality (Forsyth (2012: 11); Schoeman, Roodt and Wethmar-Lemmer (2014: par 24); and Vischer (1999: 22)). An electronic contract is concluded where acceptance of the offer is received by the offeror (Section 22(2)). The acceptance must be regarded as having been received at the offeror's usual place of business or residence (Section 23(c)).
242 Collins *et al* (eds) (1993: 1271-1275).
243 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*: 172B-C).
244 *Powell v Powell* 1953 (4) SA 380 (W).
245 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*: 172C-G).
246 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*: 172G-H).

should be read as follows: The only legal system the contract was connected to is South African law and this legal system is both the *lex loci contractus* and the proper law. It was therefore not necessary for the court to choose between the *lex loci contractus* and the proper law. South African law governed the appellant's contractual capacity. The *lex domicilii* is not mentioned but it is probable on the facts that the appellant was domiciled in South Africa. If that were the case, the *lex loci actus*, the proper law and the *lex domicilii* all coincided.

Forsyth reads this case as support for the application of the *lex loci contractus*,[247] but "[s]ome support for the proper law may be drawn from" the decision.[248] However, it is suggested by the present author that the judge identifies with the proper law test rather than that of the *lex loci actus*.[249]

Sonnekus believes that the judgment corresponds with the fairness approach advocated by von Bar.[250] According to this approach, the claimant of the close corporation, for which Tesoriero stood surety, could certainly not have been expected to first familiarise itself with the legal position in terms of Argentinean law. It was surely both parties' obvious intention that the suretyship was a binding agreement between them.[251]

It may be remarked here that the reference by the court to the proper law of a contract is inaccurate in the context of contractual capacity. It presumes that a contract exists; yet contractual capacity – a prerequisite for the existence of a contract – still has to be ascertained. One should rather refer to the putative proper law: the legal system that would have been the proper law if the parties indeed had contractual capacity. More specifically, reference should be made to the putative objective proper law because it is unacceptable for parties to choose a legal system that would grant them capacity which they otherwise lack.[252]

2.4.8 Summary

There is thus authority in South African case law for the following legal systems to govern the contractual capacity of an individual: in contracts involving immovable property, the *lex rei sitae* or *lex situs*,[253] in respect of all other

247 Forsyth (2012: 339 note 138). Also see Oppong (2013: 142).
248 Forsyth (2012: 340 note 142).
249 Sonnekus (2002: 150) indeed interprets the case as support for the proper law approach.
250 Sonnekus (2002: 146) with reference to von Bar-Gillespie (1892: 310).
251 Sonnekus (2002: 151).
252 See Edwards and Kahn (2003: par 333); *cf* Forsyth (2012: 337, 338, 340 and 343); Kahn (1991: 128); Schoeman, Roodt and Wethmar-Lemmer (2014: pars 102 and 108); Van Rooyen (1972: 126); *Ferraz v d'Inhaca* 1904 TH 137 and 143; and *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 546-547.
253 *Ferraz v d'Inhaca* 1904 TH 137.

contracts: the *lex domicilii*,[254] the *lex loci contractus*[255] and, the (putative) (objective) proper law of the relevant contract.[256] A clear choice between these systems has not yet crystallised. There is further no Supreme Court of Appeal (nor Constitutional Court) decision and therefore no binding authority.

2.5 The contemporary South African authors

2.5.1 Forsyth

According to Forsyth, contractual capacity, as an incident of status, ought in principle to be governed by the *lex domicilii*.[257] He further states, however, that this rule is "highly inconvenient" in ordinary commercial contracts, considering the impracticality of consistent enquiries into the domicile of contractants.[258] Although the law is unclear and not settled on the issue,[259] he adds that it does appear that the *lex rei sitae* will govern contractual capacity in respect of immovable property.[260]

The author then considers the possibility of the objective proper law governing the issue, namely, the law with which (irrespective of a choice between the parties) the contract would be most closely connected if a contract were in existence.[261] However, he does not support this approach without reservation as the determination of the objective proper law is unpredictable (in terms of South African private international law) and this undermines certainty, the main concern in commercial contracts.[262]

The *lex loci contractus* is also not preferred as the sole legal system to govern.[263] Contracts that are closely connected to the personal life of the parties should be governed by the *lex domicilii* rather than the fortuitous *lex loci contractus*.[264] In these types of contracts, there should be no uncertainty in

254 *Powell v Powell* 1953 (4) SA 380 (W).
255 *Kent v Salmon* 1910 TPD 637.
256 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W). *Cf Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).
257 Forsyth (2012: 337).
258 *ibid*.
259 Forsyth (2012: 338).
260 with reference to *Ferraz v d'Inhaca* 1904 TH 137 at 142-143. Also see Forsyth (2012: 338 note 132).
261 as advocated by Van Rooyen (1972: 126); and see Forsyth (2012: 340 note 146).
262 Forsyth (2012: 340) states that predictability will not improve even if the suggested exception by Van Rooyen (1972: 126) is taken into consideration that "whatever the proper law might hold if the capacity exists by the *lex domicilii*, then the contract is valid".
263 Forsyth (2012: 340).
264 Forsyth (2012: 340) mentions marriage settlement contracts as examples of these types of contracts.

respect of incapacity as the parties would presumably be aware of each other's domiciles and contract accordingly.[265]

Forsyth therefore supports the approach advocated by Anton for the purposes of Scots private international law.[266] According to this approach, a distinction is drawn between ordinary commercial (mercantile) contracts and other (non-mercantile) contracts. The *lex loci contractus* would govern capacity in the case of mercantile contracts while the *lex domicilii* would prevail in respect of non-mercantile contracts. According to Forsyth, this approach is "clear, relatively certain, and it avoids the injustices of either extreme".[267] "[E]ither extreme" refers to the impractical approach that in all cases (without any distinction drawn between mercantile and non-mercantile contracts) capacity is governed exclusively by either the *lex loci contractus* or the *lex domicilii*.

The author therefore suggests that in the case of immovable property the *lex rei sitae* governs capacity; in respect of non-mercantile contracts the *lex domicilii* prevails; and where mercantile contracts are involved, the *lex loci contractus* should be the governing law.[268] According to the author, if this approach is followed, all the South African cases were decided correctly,[269] except *Powell* "as it suggests that the South African law applied as *lex domicilii* rather than as *lex loci contractus*".[270] The author further states that in *Hulscher* the court did not decide which law were to apply had the *locus contractus* and the *domicilium* not coincided.[271]

Forsyth, then, with particular reference to *Kent v Salmon*,[272] states that even where the *lex rei sitae* or the *lex loci contractus* is applied, it may be necessary to utilise the *lex domicilii* to determine the status of one of the contracting parties, although the *lex loci contractus*[273] is utilised to determine the incidents of this status.[274]

265 Forsyth (2012: 340).
266 Anton (1967: 199ff); and see Anton and Beaumont (1990: 276-279).
267 Forsyth (2012: 341).
268 Forsyth (2012: 341).
269 Forsyth (2012: 341) states that "all [the cases] concerned commercial contracts and in all the *lex loci contractus* was applied".
270 *Cf* the interpretation of *Powell v Powell* 1953 (4) SA 380 (W) the paragraph 2.4.5 above.
271 *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 545.
272 *Kent v Salmon* 1910 TPD 637.
273 One could perhaps add: the *lex situs* in respect of immovable property.
274 Forsyth (2012: 341). Also see Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40, 1.3.41 and 1.3.44) and Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

Forsyth finally mentions Kahn's suggestion that a party should, in respect of movables, be held to have capacity if he or she had such under his domiciliary law, or the *lex loci contractus* or the objective proper law,[275] but does not express an opinion on this proposal.[276]

2.5.2 Hahlo and Kahn

Hahlo and Kahn, who only consider contractual capacity in the context of marriage law, characterise contractual capacity as a personal and not a patrimonial (proprietary) consequence of marriage.[277] The relevance thereof is that personal consequences are, as a general rule, governed by the *lex domicilii* of the spouses at the time of the relevant juristic act, while patrimonial consequences are governed by the *lex domicilii matrimonii*.[278] There are, according to the authors, two exceptions to the rule that the *lex domicilii* governs where a wife's capacity to conclude legal transactions or to bind her husband's credit is in question. The first is the situation where certain aspects of the wife's contractual capacity are so closely connected to the proprietary consequences that they should rather be governed by the *lex domicilii matrimonii* at the time of the marriage. The second concerns the position where an application of the *lex domicilii*, as governing the contractual capacity of the wife, leads to a third party being prejudiced as a result of this legal system allowing for less extensive contractual capacity than the *lex loci contractus*. In these situations, the authors suggest a "compromise view",[279] namely that the *lex domicilii* of the wife should be applied and third parties are entitled to assume that this does not give her less extensive contractual capacity than the *lex loci contractus*. Third parties would thus be protected as they could assume that a woman contractant domiciled in another country has the legal capacity equivalent to a woman married at common law.[280] In effect, the authors argue for the alternative application of the *lex domicilii* and the *lex loci contractus*. According to the authors, the capacity of a wife to create a real right in respect of immovable property should be governed by the *lex situs*.[281] Reference to women in this regard should be understood in the context of the previous matrimonial property law where a wife was in a weaker position *vis-à-vis* her husband.

275 Kahn (1991: 128); and Kahn (2000: 876).
276 Forsyth (2012: 341).
277 Hahlo and Kahn (1975: 623).
278 See note 199 *supra*.
279 Hahlo and Kahn (1975: 624).
280 *ibid*.
281 Hahlo and Kahn (1975: 625). *Cf* the discussion of *Bank of Africa, Limited v Cohen* 1909 (2) Ch 129 in Chapter 3, paragraph 3.2.1.1.1.9.

2.5.3 Kahn

Kahn is not in favour of the *lex loci contractus* as the sole legal system to govern capacity.[282] In this context, he concurs with Wunsh J in *Tesoriero*[283] that the place of contracting might be absolutely fortuitous, especially where the contract is concluded by letter or telefax or over the telephone or as a means of evading the law.[284] He does, however, support Forsyth's submission[285] that neither the *lex loci contractus* nor the objective proper law consistently offers a satisfactory answer.[286] He suggests that, in general, a party should be held to have capacity to conclude a commercial contract relating to movables, if he has capacity at the time of contracting according to his domiciliary law or the *lex loci contractus* or the objective proper law.[287] Where an immovable is involved, capacity, according to the author, should be governed by the *lex situs*.[288]

2.5.4 Schoeman, Roodt and Wethmar-Lemmer

It appears that Schoeman, Roodt and Wethmar-Lemmer, with reference to *Ferraz v d'Inhaca*,[289] accept the application of the *lex rei sitae* to contractual capacity in respect of immovable property.[290] In respect of other contracts, they are of the opinion that the exclusive application of the *lex domicilii*,[291] the *lex loci contractus* and the putative proper law of the contract all present problems. For example, if a minor was allowed to raise his or her incapacity in terms of the *lex domicilii* as a defence, it could be unfair to storekeepers who are in any event not expected to have knowledge of the minor's domicile. The *locus contractus* may be fortuitous. Therefore, it would be unfair to allow contractual capacity to be governed by this legal system.[292] The authors also submit that, since contractual capacity pertains to the formation of a contract, the objective proper law cannot be used to ascertain whether

282 Kahn (2000: 875).
283 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) at 172A-C.
284 Kahn (2000: 875).
285 Forsyth (1996: 295-296). See for today, Forsyth (2012: 340-341).
286 Kahn (2000: 876).
287 Kahn (1991: 128); and Kahn (2000: 876). The proposed rule is a manifestation of the principle of preferential treatment in private international law, which functions in the form of outcome-based alternative reference rules favouring the existence of contractual capacity. See Chapter 6, paragraph 6.4.
288 Kahn (1991: 128); and Edwards and Kahn (2003: par 333).
289 1904 TH 137 at 142-143.
290 Schoeman, Roodt and Wethmar-Lemmer (2014: par 114).
291 Although capacity is closely linked to status, it is not governed by the *lex domicilii* (as is status) (Schoeman, Roodt and Wethmar-Lemmer (2014: par 109)). In support of this argument, the authors refer to the approach by Huber that status is governed by the *lex domicilii* while capacity, an incident of status, is governed by the *lex loci contractus*. Huber (1687: *De Conflictu Legum* s 12).
292 Schoeman, Roodt and Wethmar-Lemmer (2014: par 114).

the parties were capable of concluding the contract.[293] The proper law subjectively determined is also not preferred as it is unacceptable for parties to intentionally elect a particular legal system for the purposes of attaining contractual capacity, which they would not otherwise have had.[294]

They refer to the approach advocated by Anton for purposes of Scots private international law, where a distinction is drawn between commercial and non-commercial contracts.[295] In the case of the former, the *lex loci contractus* shall apply whereas in respect of the latter, the *lex domicilii* shall prevail. They suggest that under this approach the determining factor would be the involvement of third parties in a contract (that is, additional to the spouses themselves).[296] The authors also mention the approach by Kahn as another possibility,[297] but do not offer any commentary. The authors therefore, with the possible exception of the position relating to immovable property, refrain from suggesting any possible legal systems to govern contractual capacity and they do not identify with any of the approaches of the other authors.

2.5.5 Sonnekus

Sonnekus agrees with Forsyth that the application of the *lex loci contractus* and the proper law may yield unsatisfactory answers in certain circumstances.[298] He views the approach favoured by the English authors Dicey and Morris,[299] that capacity is governed by the law of the country with which the contract has its closest connection, as too rigid: it may be unsatisfactory in some situations and would clearly lead to unfair results.[300]

The author identifies with the approach advocated by Kahn. As far as possible, one should give effect to the evident intention of the parties: to be bound to the agreement which they apparently concluded. This would best be achieved if it were accepted that a contracting party has capacity if, at the time of contracting, he or she indeed has such capacity under the *lex domicilii*, the *lex loci contractus*, the subjective proper law or the objective proper law.[301] With this approach, the proverbial net is cast wide enough to intercept all possible technical defences which a contractant may attempt to uti-

293 Schoeman, Roodt and Wethmar-Lemmer (2014: par 107).
294 *ibid*.
295 Schoeman, Roodt and Wethmar-Lemmer (2014: par 115). See Anton and Beaumont (1990: 276-279).
296 Schoeman, Roodt and Wethmar-Lemmer (2014: par 115).
297 Schoeman, Roodt and Wethmar-Lemmer (2014: par 115 note 282) with reference to Kahn (1991: 128).
298 Sonnekus (2002: 147). See also Edwards and Kahn (2003: par 333); and Kahn (2000: 875).
299 Collins *et al* (eds) (1993: 1271-1275).
300 Sonnekus (2002: 147-148).
301 *ibid*. See note 307 and Chapter 6, paragraph 6.4.

lise to escape liability.[302] According to the author, the most striking feature of an approach that seizes technical evasive-manoeuvres is the obvious fairness that it provides.[303]

2.5.6 Van Rooyen

Van Rooyen's approach on the issue of contractual capacity[304] may be interpreted as follows: A contractant should be held to have contractual capacity if he or she is capable under the objective proper law or under the *lex domicilii*. The subjectively ascertained proper law does not play a role. The objective proper law is not applied where the contract assertor knew, or reasonably should have known of his counterpart's incapacity under the *lex domicilii*.[305] In this case only the *lex domicilii* governs.

The determination of reasonableness involves a substantive-law standard but the author does not state which system is applicable to ascertain the reasonableness of the prejudiced contractant's conduct. The issue will be further discussed in Chapter 6, paragraph 6.2.5.

Van Rooyen's support for the objective *lex causae* (proper law) approach is based on the fact that it was already applied in Canada[306] and recognised in South African law.[307] The subjectively ascertained proper law is rejected because it would be in conflict with the social function of the protective measures of the *lex fori* if a choice of law was allowed in this context.[308] The exception to the application of the objective proper law is clearly inspired by the French decision of *Lizardi v Chaize*.[309]

According to the author, the *lex domicilii* is excluded in the specified circumstances as its application would greatly hinder international trade. Where parties have chosen a legal system, the application of the objectively determined proper law could be regarded as a third country's legal system which overrides the chosen *lex causae*. The *lex domicilii* could also be regarded as a

302 *ibid.*
303 *ibid.*
304 Van Rooyen's approach reads (van Rooyen (1972: 126): "Aangesien die objektiewe *lex causae*-benadering al toegepas is in Kanada en in 'n mate hier by ons ook erken is en dit strydig met die sosiale funksie van die beskermende maatreël sou wees om 'n regskeuse toe te laat, word hier aan die hand gedoen dat die objektief bepaalde *lex causae* in die eerste plek moet geld. Derdelandsreg kan egter in die volgende gevalle hier inwerk: (1) waar 'n kontraktant bevoeg is volgens sy *lex domicilii* is die *lex domicilii* toepaslik; (2) waar die ander kontraktant weet of redelikerwys behoort te weet van sy onbevoegdheid, geld die *lex domicilii* ook."
305 Also see Forsyth (2012: 340 note 145).
306 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240.
307 with reference to *Powell v Powell* 1953 (4) SA (W) 380 at 383.
308 Van Rooyen (1972: 126).
309 *Lizardi v Chaize* (*supra*); and Van Rooyen (1972: 114).

third country's legal system, the author concludes, where, in the absence of a choice of law, it is applied and does not correspond with the objectively applicable *lex causae*.[310] The term "third country" is used by the author to denote a country the law of which is neither the proper law of the contract nor the *lex fori*.

Finally, in respect of immovable property, the author submits that the *lex rei sitae* would "usually" be applicable as the objectively applicable legal system.[311]

2.6 Summary

The common-law law authors utilised the *lex domicilii* and the *lex loci contractus*[312] with some flexibility, taking into account the need for an equitable outcome in the particular case.[313]

There is no binding judicial authority in South Africa in this regard. The *Hulscher* case refers to the *lex domicilii* and the *lex loci contractus* as possible systems to govern contractual capacity, without choosing between them.[314] *Kent v Salmon*[315] is clear authority in favour of the *lex loci contractus* and *Powell v Powell*[316] should be read as support for the *lex domicilii*. The court in *Guggenheim v Rosenbaum (2)*[317] refers to authority in favour of the *lex loci contractus* and the *lex domicilii* but it is clear that the *lex domicilii* would have been favoured if the two did not coincide *in casu*. The court in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[318] is critical about the application of the *lex loci contractus* and clearly favours the proper law of the contract to govern capacity. *In casu* no choice had to be made as these legal systems were the same on the facts. *Ferraz v d'Inhaca*[319] is the only case dealing with immovable property; here it was decided that the *lex rei sitae* should apply.

Forsyth[320] identifies with the proposal of Anton and Beaumont[321] that the *lex loci contractus* applies in respect of mercantile and the *lex domicilii* in respect of non-mercantile contracts. The author is in favour of the *lex rei sitae*

310 Van Rooyen (1972: 126).
311 Van Rooyen (1972: 126) with reference to *Ferraz v d'Inhaca* 1904 TH 137 at 142-143.
312 and some the *lex situs* in respect of immovable property.
313 See paragraph 2.3; and Forsyth (2012: 338).
314 *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542.
315 1910 TPD 637.
316 1953 (4) SA 380 (W).
317 1961 (4) SA 21 (W).
318 2000 (1) SA 167 (W).
319 1904 TH 137.
320 Forsyth (2012: 341).
321 Anton and Beaumont (1990: 276-279).

applying in respect of contracts involving immovable property.[322] Schoeman, Roodt and Wethmar-Lemmer[323] also refer to the proposal of Anton and Beaumont[324] and accept the *lex situs* as the governing law in respect of immovable property.[325] Hahlo and Kahn[326] seem to be in favour of the alternative application of the *lex domicilii* and the *lex loci contractus* where third parties are involved. The *lex situs* should apply in respect of immovable property.[327] Kahn[328] proposes an alternative reference rule involving the *lex domicilii*, the *lex loci contractus* and the objective proper law of the contract. Where the contract involves immovable property, the *lex situs* should apply.[329] Sonnekus[330] identifies with the proposal by Kahn,[331] while Schoeman, Roodt and Wethmar-Lemmer[332] merely refer to it.[333] Van Rooyen is in favour of the alternative application of the *lex domicilii* and the objective proper law – but the proper law should not be applied where the contract assertor knew, or reasonably should have known, of his counterpart's incapacity under the *lex domicilii*.[334] The *lex situs* will usually be applied in respect of immovable property.[335]

Forsyth[336] and Schoeman, Roodt and Wethmar-Lemmer[337] refer to the distinction made by some common-law authors between status (governed by the *lex domicilii*) and the consequences thereof (governed by the *lex loci contractus*) in passing. It is, however, clear that this distinction has not been received by the South African courts. The same applies to the exceptions advocated by Johannes Voet,[338] Huber[339] and Van der Keessel.[340] These exceptions are also not echoed by contemporary South African authors. The proposal by Van Rooyen[341] contains the exception that the objective proper law will not be applied (and therefore only the *lex domicilii* will be applicable) if there is fault on the part of the capable party. The common-law excep-

322 Forsyth (2012: 338).
323 Schoeman, Roodt and Wethmar-Lemmer (2014: par 115).
324 Anton and Beaumont (1990: 276-279).
325 Schoeman, Roodt and Wethmar-Lemmer (2014: par 114).
326 Hahlo and Kahn (1975: 624-625).
327 Hahlo and Kahn (1975: 625).
328 Kahn (1991: 128); and Kahn (2000: 876).
329 Kahn (1991: 128). Also see Edwards and Kahn (2003: par 333).
330 Sonnekus (2002: 147-148).
331 Kahn (1991: 128); and Kahn (2000: 876).
332 Schoeman, Roodt and Wethmar-Lemmer (2014: par 115).
333 Also see Edwards and Kahn (2003: par 333).
334 Van Rooyen (1972: 126). *Cf Kent v Salmon* (*supra*: 639-640); Forsyth (2012: 340 note 145); and Sonnekus (2002: 146) in respect of the *lex loci contractus*.
335 Van Rooyen (1972: 126).
336 Forsyth (2012: 337 and 338 note 131).
337 Schoeman, Roodt and Wethmar-Lemmer (2014: par 109).
338 J Voet (1829: *Commentarius* 27.10.11).
339 Huber (1768: *HR* 1.3.39).
340 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).
341 Van Rooyen (1972: 126).

tions, on the other hand, deal with the application of the *lex loci contractus* as primary applicable legal system to capacity (and therefore not the *lex domicilii*) in the absence of fault on the part of the capable contractant.[342]

342 See the discussion in paragraph 2.3.

3 Jurisdictions without Codified Rules in Respect of Contractual Capacity in Private International Law

3.1 Introduction

In this chapter a comparison will be made between the private international law rules applied in various jurisdictions with non-codified rules regarding the issue of contractual capacity of natural persons. All of these are common-law jurisdictions, except Scotland, a mixed jurisdiction. Although the Restatement (Second) is the single most important conflicts approach in the United States of America, it is not discussed in Chapter 4 (where jurisdictions with codified rules on contractual capacity are discussed), but rather in Chapter 3, as the Restatement (Second) only constitutes persuasive authority.

The discussion focuses on five regions: Europe (the United Kingdom: England and Wales, and Scotland); Australasia (Australia; and New Zealand); North America (the common-law provinces of Canada; and the United States of America); the Far East (India; Malaysia; and Singapore); and Africa (Ghana; and Nigeria).

3.2 Europe

3.2.1 United Kingdom

In the United Kingdom, the provisions of the Rome Convention[1] and the Rome I Regulation[2] govern the law applicable to contractual obligations. In general, the status or legal capacity of natural persons is excluded from the scope of the Convention and the Regulation,[3] perhaps because it could be seen to form part of the law of persons and not of obligations.[4] Member states therefore apply their domestic private international law rules to the issue of contractual capacity.[5] This is, however, subject to the provisions of Article 11 of the Convention and Article 13 of the Regulation, which both contain a case-specific rule directed at protecting innocent parties who have

1 Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention). The convention applies in respect of contracts concluded before 17 December 2009.

2 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). The regulation applies to contracts concluded as from 17 December 2009.

3 Article 1(2)(a) of both the Rome Convention and the Rome I Regulation.

4 See Clarkson and Hill (2011: 249); Collier (2001: 208); and O'Brien (1999: 350).

5 Fawcett and Carruthers (2008: 750).

contracted with a contractant lacking capacity. Articles 11 and 13 are discussed in Chapter 5 as the Rome Convention is a regional and the Rome I Regulation a supranational instrument.

3.2.1.1 England and Wales

There is uncertainty regarding the position in England and Wales on the law applicable to contractual capacity.[6] It is clear, however, that the choice lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. Some support also exists for the application of the *lex situs* in respect of immovable property.

3.2.1.1.1 The courts

3.2.1.1.1.1 Introduction

The most important cases applying the *lex domicilii* to contractual capacity are *Sottomayor v De Barros (1)*,[7] *Cooper v Cooper*[8] and *Baindail v Baindail*.[9] These cases relate to the conclusion of marriages and antenuptial contracts. However, the courts make general statements in respect of contractual capacity that have been accepted as authority for the application of the *lex domicilii* to contractual capacity in general,[10] and, in respect of *Baindail v Baindail*,[11] for the application of the *lex loci contractus*.

3.2.1.1.1.2 Sottomayor v De Barros (1)[12]

Sottomayor and De Barros were Portuguese nationals and domiciled in Portugal. They relocated to England in 1858 with their families and jointly occupied a house in London. The decision of the court was based on the assumption that they retained their domicile in Portugal. Although they were first cousins,[13] they married in London on 21 June 1866. In November 1874, Sottomayor petitioned the court *a quo* that her marriage to De Barros be declared null and void on the grounds that they were natural and lawful first cousins, and that, according to their domiciliary law (Portuguese law), such relatives were incapable of concluding a marriage contract on account of consanguinity. Sir R Philmore, however, rejected the petition because he

6 Carter (1986: 23); Cheng (1916: 3 and 63); Clarkson and Hill (2011: 249); Collier (1987: 168); Collier (2001: 208); Collins *et al* (eds) (2012b: 1866); Fawcett and Carruthers (2008: 750); Fawcett, Harris and Bridge (2005: 657); Hill and Chong (2010: 550); McClean and Beevers (2009: 385); and O'Brien (1999: 318).

7 (1877) 3 PD 1.

8 (1888) 13 App Cas 88.

9 [1946] P 122.

10 See, for instance, Cheng (1916: 113-121); Collins *et al* (eds) (2012b: 1867); and Fawcett and Carruthers (2008: 750).

11 *Baindail v Baindail* (*supra*).

12 (1877) 3 PD 1.

13 This means that Sottomayor and De Barros were the children of siblings.

considered himself bound by the decision in *Simonin v Mallac*,[14] where it was held that the validity of a marriage is determined by the *lex loci celebrationis* (the law of the country where the marriage is concluded). The marriage was valid as no such prohibition existed in English law. The current case is the appeal by Sottomayor against the decision taken by Sir Philmore.

The Court of Appeal, through Cotton LJ, held that it was a well-established principle that "the question of personal capacity to enter into any contract [was] to be decided by the law of domicile".[15] The law of the country where the marriage was solemnised only addressed issues relating to the validity of the ceremony by which the marriage was constituted; it played no role in personal capacity as this would "depend on the law of domicile".[16] The court also stated that if the laws of any country prohibit a marriage between parties because of it being incestuous, this would impose personal incapacity on them that would continue for as long as they are domiciled in the country where this rule prevails.[17] As such, the court reversed the judgment by Sir Philmore and declared the marriage null and void.

For current purposes, the general statement of the court is relevant that contractual capacity is governed by the *lex domicilii*.[18]

3.2.1.1.1.3 Cooper v Cooper[19]

Mr and Mrs Cooper were married in Dublin (Ireland) in October 1846. At that stage, the parties were domiciled in Scotland and Ireland respectively. At the time of marriage, Mrs Cooper was a minor and had no legal guardians. An antenuptial contract was concluded between the parties in Dublin, whereafter they relocated to Scotland. Here they resided for the remainder of their married lives. In terms of the contract, Mrs Cooper, in consideration of provisions made by her husband, purported to relinquish her rights to

14 2 Sw & Tr 67; 29 L J (P M & A) 97. This case concerned the validity of a marriage concluded in England between a Frenchman of 29 and a Frenchwoman of 22. Although both parties had attained the age of majority in terms of Article 148 of the French Civil Code (25 years for men and 21 for women), the advice of their parents still had to be obtained through a "respectful and formal act" according to Article 151. The parties were not successful in obtaining this and apparently failed to effect repeated attempts described in Article 152 of the code. The marriage was therefore not permitted. The marriage was, however, held lawful in England as it was valid in terms of English law.

15 *Sottomayor v De Barros (1)* (*supra*: 5).

16 *ibid*.

17 *ibid.*

18 *ibid.*

19 (1888) 13 App Cas 88.

terce[20] and *jus relictae*.[21] Upon Mr Cooper's death, she instituted action for the setting aside of this contract on the grounds that she was a minor at the time of concluding it and that, in terms of Irish law, she lacked capacity to enter into an antenuptial contract.

The court held that Mrs Cooper's incapacity, in terms of Irish law, was a sufficiently substantial ground for setting aside the contract. The court added that Mrs Cooper's capacity to bind herself by the antenuptial contract had to be determined by the law of the country of her domicile, which *in casu* was Irish law.[22] In applying Irish law, the court held that a minor could not incur any contractual liability when this was clearly not to his or her benefit and, consequently, Mrs Cooper was at liberty to avoid the contract and claim her rights as a widow in terms of the law of Scotland.[23] With regard to the law applicable to capacity, Lord Macnaughten made the following important remarks:

> "It has been doubted whether the personal competency or incompetency of an individual to contract depends on the law of the place where the contract is made or on the law of the place where the contracting party is domiciled. Perhaps in this country the question is not finally settled, though the preponderance of opinion here as well as abroad seems to be in favour of the law of the domicil. It may be that all cases are not to be governed by one and the same rule. But when the contract is made in the place where the person whose capacity is in question is domiciled there can be no room for dispute. It is difficult to suppose that Mrs. Cooper could confer capacity on herself by contemplating a different country as the place where the contract was to be fulfilled, if that be the proper expression, or by contracting in view of an alteration of personal status which would bring with it a change of domicil."[24]

The court states its preference for the *lex domicilii* as the governing legal system. A party should be unable to confer capacity on him- or herself by contracting in a country other than the country of domicile. In any event, where

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20 In Scottish law, this related to a widow's legal entitlement to a liferent of one-third of her husband's heritable property (her entitlement in respect of his moveable property being the *jus relictae*). A liferent was a right entitling a person (called a "liferenter") to use and enjoy another's property for life, provided this was done without wasting it. The liferent might be a sum of money paid yearly, or the income from a piece of land. If a special alternative provision had been made for her in her marriage contract (the jointure), she would, after 1681, have lost her right to a terce, unless it had been specified in the contract that she should have that as well. See http://www.scan.org.uk/index.html.

21 Literally translated, "the right of the relict" (the widow). It refers to the share of the moveable goods of a marriage to which a widow was entitled on the death of her husband. If there were children, one-third would go to them as the bairn's pairt of gear (children's legal share of their parents' moveable property on their death, also called the *legitim*), a further one-third would be the portion the deceased could bequeath and the *jus relictae* was the other. See http://www.scan.org.uk/index.html.

22 *Cooper v Cooper* (*supra*: 106).

23 *ibid*.

24 *Cooper v Cooper* (*supra*: 108).

the *lex domicilii* and the *lex loci contractus* coincide, it will unquestionably be the *lex domicilii / lex loci contractus* that applies.

3.2.1.1.1.4 Baindail v Baindail[25]

On 1 May 1928, the respondent, Mr Baindail, while domiciled in India, married an Indian lady according to Hindu rites in the United Provinces, India. The marriage was polygynous in nature according to the Hindu faith.[26] On 5 May 1939, while his wife was still alive, he entered into marriage with the petitioner, Lawson, in Holborn (England). The couple cohabited in England and they had one child, a daughter, born on 22 February 1940. The petitioner, however, became aware of the respondent's Hindu marriage and, on 20 May 1944, petitioned for a decree that her marriage was null and void and that she might obtain custody of the child.

In addressing the issue of capacity to contract, Lord Greene MR held that, in general, the *lex domicilii* should be applied. Applying this legal system (which was Indian law *in casu*), he arrived at the conclusion that the respondent was a married man on 5 May 1939, the date of his purported English marriage. As to the polygymous nature of the marriage, Lord Greene stated: "[W]hatever Hindu law may say and whatever his position may be in India, this country will not recognize the validity of the Hindu marriage."[27] Nevertheless, as he did not have the capacity to conclude a marriage at the time of his English marriage, the latter was declared null and void. The petitioner was declared to be the custodian of the child.

Although the *lex domicilii* was applied to capacity in a marital context, Lord Greene clearly favoured the application of the *lex loci contractus* in commercial transactions. He stated *obiter* that: "In the case of infants where different countries have different laws, it certainly is the view of high authority here that capacity to enter in England into an ordinary commercial contract is determined not by the law of domicile but by the *lex loci*."[28] In the statement that follows this remark, he clearly demonstrates his objection to the exclusive application of the *lex domicilii*: "[T]here cannot be any hard and fast rule

25 [1946] P 122.

26 In India, Hindu marriages can since 1955 no longer be concluded on a polygynous basis: see the Hindu Marriage Act, 1955.

27 *Baindail v Baindail* (*supra*: 127). Of course, this is no longer the position in the law of the United Kingdom (see for example Rule 73 of Dicey, Morris and Collins (Collins *et al* (eds) (2006b: 850)).

28 *Baindail v Baindail* (*supra*: 128). Van Rooyen (1972: 117), on account of this statement, accepts that the court supported the application of the *lex loci contractus* to commercial contracts, while Carter (1986: 24-25) adds that the judgment *prima facie* only applies to contracts concluded in the forum state. There does not seem to be any support in the judgment for this limitation.

relating to the application of the law of the domicile as determining status and capacity for the purpose of transactions in this country."[29]

3.2.1.1.1.5 Male v Roberts[30]

In this decision and the case to follow (*Sottomayer v De Barros (2)*),[31] it was indeed decided that the *lex loci contractus* governs contractual capacity. Roberts, a minor and a circus performer domiciled in England, incurred liquor debt while in Edinburgh (Scotland). He consequently induced a friend, Male, to supply funds to pay for the debt as he was arrested *in meditatione fugae*. After Male settled the debt, he sued Roberts for the amount in England, but the latter defended the action stating that he was a minor and in terms of his domiciliary law, which was English law, he was incapable of concluding contracts unassisted.

Lord Chancellor Eldon rejected the incapacity contention by the minor and decided that the law of the country where the contract was concluded, which in this case was Scotland, should apply to contractual capacity. He stated: "[T]he contract must be … governed by the laws of that country where the contract arises."[32]

3.2.1.1.1.6 Sottomayer v De Barros (2)[33]

This case involves an appeal against the decision by the Court of Appeal in *Sottomayor v De Barros (1)*,[34] where first cousins domiciled in Portugal concluded a marriage in England. In the first reported *Sottomayer* case, the appellant (Sottomayor) approached the court to reverse the judgment of the court *a quo*, which held that their marriage was valid. On appeal, the court held that the personal capacity of an individual had to be determined by the *lex domicilii*. The Court of Appeal consequently reversed the findings of the court *a quo* in the first *Sottomayer* case, rendering the marriage null and void.[35] The Queen's Proctor, however, referred the case to the Probate Division for further questions to be addressed, *inter alia* whether at the time of their marriage the couple was not perhaps domiciled in England. In attending to this issue, the court had to pronounce on the law applicable to contractual capacity.

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29 *Baindail v Baindail* (*supra*: 128). Collins *et al* (eds) (2006b: 1623) regard this statement as encouraging development in the field.

30 (1800) 3 ESP 163.

31 (1879) 5 PD 94. This is the remittance of *Sottomayor v De Barros (1)* (1877) 3 PD 1 from the Court of Appeal, notwithstanding the difference in spelling of the wife's surname.

32 as referred to by Collins *et al* (eds) (2012b: 1868). This decision is discussed by Anton and Beaumont (1990: 277); Crawford and Carruthers (2006: 437); and Fawcett and Carruthers (2008: 751). The case perhaps dealt with an enrichment rather than a contractual claim: *cf* Collins *et al* (eds) (2012b: 1868).

33 *Sottomayer v De Barros (2)* (1879) 5 PD 94.

34 *Sottomayer v De Barros (1)* (1877) 3 PD 1. This case is discussed in the text at notes 12-18.

35 See the discussion at par 3.2.1.1.1.2.

In casu the court held that Sottomayer was indeed domiciled in Portugal at the time of the marriage but that De Barros had changed his domicile from Portuguese to English.[36] Therefore, according to the Probate Division, the decision by the Court of Appeal was incorrect. The Court of Appeal applied the *lex domicilii* on the supposition that both parties were domiciled in the same place, namely, Portugal: "Our opinion in this appeal is confined to the case where both the contracting parties are at the time of their marriage domiciled in a country the laws of which prohibit their marriage."[37] But, according to the Probate Division, this was factually incorrect, as the matter clearly concerned a "marriage of a domiciled Englishman in England, with a woman subject to the law of her domicil [Portugal]".[38] In any event, the *lex domicilii* was not to be applied. The Probate Division indeed severely criticised the Court of Appeal's view that the *lex domicilii* was generally accepted to govern contractual capacity in all matters. The Probate Division stated: "On the contrary, it appears to me to be a novel principle, for which up to the present time there has been no English authority. What authority there is seems to me to be the other way."[39] This refers to authority in favour of the application of the *lex loci contractus*. The Probate Division also found that the principle enunciated by the court regarding the applicability of the *lex domicilii* in all cases was "much wider in its terms as was necessary for the determination of the case before them".[40] The Probate Division, heavily relying on the decisions in *Male v Roberts*,[41] *Scrimshire v Scrimshire*[42] and *Simonin v Mallac*,[43] held that contractual capacity should be governed by the "law of the country where the contract arose",[44] the *lex loci contractus*. In applying this legal system (English law) the court concluded that the marriage was lawful and binding upon Sottomayer.

3.2.1.1.1.7 Republica De Guatemala v Nunez[45]

In this case, the court had to decide on the law applicable to contractual capacity where the *lex domicilii* and the *lex loci contractus* coincided. *In casu* the former president of the Republic of Guatemala, Manuel Cabrera, domiciled in Guatemala, deposited a sum of money with a bank in London, England. In 1919 he donated the funds by way of a cession contract to his son Nunez, who was a minor at the time and also domiciled in Guatemala. It was common cause that the cession would have been valid if English law were applicable. In terms of Guatemalan law, however, a cession without

36 *Sottomayer v De Barros (2)* (*supra*: 99).
37 as stated in *Sottomayer v De Barros (1)* (*supra*: 5).
38 *Sottomayer v De Barros (2)* (*supra*: 100).
39 *ibid*.
40 *ibid*.
41 (1800) 3 ESP 163.
42 2 Cons 412.
43 *Simonin v Mallac* 2 Sw & Tr 67; 29 L J (P M & A) 77).
44 *Sottomayer v De Barros (2)* (*supra*: 100).
45 [1927] 1 KB 669 (CA).

consideration was void unless it was effected by a notary on official documentation signed by both parties. Further, according to this law, a minor could not accept a benefit under a cession voluntarily; it had to be addressed to, and accepted by, his or her legal representative, who should have been appointed by a judge. It was proven that none of these requirements were met *in casu*. After Cabrera was overthrown in 1920, the state of Guatemala laid claim to the funds on the grounds that he had wrongfully misappropriated them and that they actually were the Republic's property. On appeal, the court had to address the issue of which law governed the cession contract. This would automatically indicate whether the state's or Nunez's claim to the funds should be successful.

Scrutton LJ arrived at the conclusion that the cession contract had to be governed by Guatemalan law and was therefore void. With regard to the question of the capacity of a minor to benefit from a cession, the court held that *in casu* Nunez's domicile coincided with the location where the cession contract was concluded (both were in Guatemala). Consequently, it was unnecessary to determine which legal system would have applied if they had differed.[46] The court was convinced that Nunez was a minor in terms of the law of Guatemala (which was both the *lex domicilii* and the *lex loci* contractus) and therefore lacked the capacity to receive the donation.

Collier regards this case as "confused and indeterminate".[47] In fact, he states that the *ratio decidendi* of the case is impossible to decipher. The only possible *ratio decidendi*, the author continues, is that capacity to benefit under a cession contract is governed by either the *lex domicilii* or the *lex loci actus* (*contractus*), but this is unhelpful and inaccurate. The author submits that the proper law of the contract objectively determined should govern in this regard. If this legal system were applied to the case, Guatemalan law would almost certainly be the applicable law and would render the cession contract void.[48] The result would therefore remain identical.

O'Brien is also uncertain whether any clear *ratio* can be extracted from the case. Without providing references, he indicates that some are of the opinion that the case may be taken as authority for the suggestion that capacity in respect of a cession contract should be governed by the proper law of the contract as determined by the *lex loci actus* (*contractus*).[49] In conclusion he submits that "[t]he question of the capacities of the assignor and the

46 as discussed by Clarkson and Hill (2011: 485); Collins *et al* (eds) (2012b: 1867); McClean and Beevers (2009: 387); and Van Rooyen (1972: 117).

47 Collier (2001: 255).

48 Collier (2001: 256).

49 O'Brien (1999: 573). Such a view would entail that the court applied the doctrine of *renvoi*.

assignee, which are outside the Convention,[50] should be governed by the general principles applicable to contracts – preferably the putative applicable law – rather than the old authorities, which should now be regarded as obsolete".[51]

3.2.1.1.1.8 The Bodley Head Ltd v Flegon[52]

This is the most recent case on the issue of contractual capacity of individuals in English private international law. The court in this case decided that contractual capacity should be governed by the proper law of the contract. Alexander Solzhenitsyn, the Russian author, signed a power of attorney in Moscow in favour of one Dr Heeb, a Swiss lawyer, to manage business relating to his literary works outside the Soviet Union. In terms of the power of attorney, Swiss law was applicable to any disputes between the parties. Dr Heeb ceded certain rights to a German publishing house, Hermann Luchterhand Verlag GmbH, which authorised the plaintiff, Bodley Head Ltd, to publish Solzhenitsyn's work in the United Kingdom. The defendant, Flegon, however, intended to publish his own edition of Solzhenitsyn's work and disputed Bodley Head's rights in this regard. He submitted that in English private international law, contractual capacity was regulated by either the *lex domicilii* or the *lex loci contractus*. He further argued that, because these legal systems coincided *in casu* (Russia was both the country of Solzhenitsyn's domicile and the location where the contract of agency was concluded), Russian law was applicable irrespective of which test is applied. Accordingly, he submitted, the agreement between Solzhenitsyn and Dr Heeb was invalid as the former lacked capacity to enter into an international contract of agency in terms of Russian law.

With regard to the issue of the invalidity of the contract of agency in Russian law, Brightman J held that this was the position not as a consequence of a lack of capacity, but because it was unlawful for a Russian citizen to conduct international trade for his or her own account. He stated, "in Russia there is a state monopoly of foreign trade under article 14 of the Russian constitution; the carrying on of business by a Russian author would also offend article 9 of the constitution".[53] In other words, it was a rule of material validity rather than capacity that the court had to deal with. The judge indicated that the contract of agency was more closely connected to Switzerland[54] than

50 namely the Rome Convention (note 1) or, today, the Rome I Regulation (note 2).

51 O'Brien (1999: 573).

52 [1972] 1 WLR 680.

53 *The Bodley Head Ltd v Flegon* (*supra*: 688).

54 *The Bodley Head Ltd v Flegon* (*supra*: 689). The contract was subject to Swiss law; the engrossment was delivered in Switzerland and the signed document was later handed to Dr Heeb in Switzerland. None of the parties intended that any performance should be effected in Russia but rather Switzerland.

Russia[55] and consequently that Swiss law was applicable to the contract. The proper law of the contract (Swiss law) was applied to the issue of material validity and the contract of international agency was therefore valid. Brightman J indicated that, even if the issue was classified as pertaining to contractual capacity, the proper law of the contract would still be applicable. Solzhenitsyn possessed the relevant capacity in terms of Swiss law, the proper law of the contract. The judge stated: "I have not been referred to any reported case which prevents my holding that, in such circumstances, the author's capacity should be tested by Swiss law. There is no evidence of the author's incapacity under that law."[56]

Hill and Chong submit that to the extent that the court *in casu* accepted that the (putative) proper law of the contract should, in the first instance, be determined by reference to the law of express or tacit choice, as opposed to the law of the country with which the contract has its closest and most real connection, it cannot be supported in principle.[57] There is, however, no indication in the case that the proper law should primarily be subjectively determined.

3.2.1.1.1.9 Bank of Africa, Limited v Cohen[58]

The court in this case had to address the issues of the contractual capacity of an individual where immovable property is involved. The respondent, Mrs Cohen, was a married woman domiciled in England. She agreed, in terms of a deed executed in England, to mortgage or transfer to the appellant, the Bank of Africa, certain land that she owned in Johannesburg, Transvaal, South Africa. The title deeds of the property were already in the possession of the bank, which held it in safe custody. The purpose of the mortgage (or transfer) was security for advances made or to be made by the bank to Mr Cohen (the respondent's husband). She was, in terms of the agreement, free from any personal liability. She conferred power of attorney to Mr Wight, the bank's manager at the Johannesburg branch, who was responsible for arranging all the necessary instruments for this purpose and affecting the actual transfer. However, the bank was refused the registration of the property by the Land Registry because the mentioned deed was invalid and ineffectual in terms of the law of the Transvaal. The reason for this was that a married woman lacked the capacity to be bound as a surety for her husband, "even when she executes the deed by her own hand".[59] The court thus had to pronounce on the contractual capacity of Mrs Cohen in respect of the

55 *The Bodley Head Ltd v Flegon* (*supra*: 689): "the agency contract has no relevant connection with Russia".
56 *The Bodley Head Ltd v Flegon* (*supra*: 689).
57 Hill and Chong (2010: 551).
58 [1909] 2 Ch 129.
59 *Bank of Africa, Limited v Cohen* (*supra*: 145).

immovable property in Johannesburg and address the issue of whether the bank had a right to possess the title deeds.

The court commenced by stating the general rule that "in regard to immovable property the *lex situs*, or, as it is sometimes styled, the *lex rei sitae*, prevails in respect to all rights, interests, and titles in and to such property".[60] It accordingly applied the *lex situs* and arrived at the conclusion that the instrument of suretyship (the deed) was void due to the incapacity of one of the parties and therefore invalid against the respondent. The bank consequently could not hold Mrs Cohen liable on the deed. In respect of the title deeds, the court held that the bank did not hold them as mere custodians but by virtue of the agreement contained in the mentioned deed. The latter, as established *in casu*, was void and the right which the bank had to retain the deeds against the will of the defendant had ceased to exist.

This decision is, however, subject to considerable criticism. Clarkson and Hill[61] submit that there are no apparent reasons for applying a different rule for capacity to conclude a contract relating to immovables than the rule applied in respect of any other contract. According to the authors, the contract was most closely connected to the law of England,[62] which should have been applied *in casu* as the proper law of the contract instead of the *lex situs*. If the proper law was applied, Mrs Cohen would have had the capacity to conclude the contract of suretyship.[63]

Collier concurs with Clarkson and Hill regarding the submission that English law (the proper law) should have been applied, but adds that Mrs Cohen should have been liable for damages due to breach of contract.[64] The case, according to the author, concerned a transfer contract which is governed by its own applicable law. This law is determined (as it is with other contracts) by ascertaining the law of the country with which the contract has its closest connection.[65] In this context, the presumption is employed that the *lex situs* is the applicable law.[66] However, the presumption can be rebutted.[67] The author implies that this case presented the circumstances that would warrant such a rebuttal.

60 *Bank of Africa, Limited v Cohen* (*supra*: 146).
61 Clarkson and Hill (2011: 476).
62 the country where the defendant was both domiciled and resident.
63 Clarkson and Hill (2011: 476).
64 Collier (2001: 267).
65 The author refers to Article 3 of the Rome Convention (note 1). See, for today, Article 3 of the Rome I Regulation (note 2).
66 The author refers to Article 4(3) of the Rome Convention (note 1). See, for today, Article 4(1)(c) of the Rome I Regulation (note 2).
67 Collier (2001: 267).

Dicey, Morris and Collins *inter alia* submit the following in respect of the decision:

(a) The court was not dealing with a mortgage but a contract to create one. It was generally accepted that contracts involving immovable property were governed by their proper law, usually, but not necessarily, the *lex situs*. However, the court made no attempt to determine the proper law of the contract.[68]

(b) The court omitted to ascertain the rules applicable in the Transvaal or how the Transvaal courts would have addressed the matter. It may for instance have discovered that the law of the Transvaal did not apply to a contract concluded in England by a woman domiciled there. In that case, the court should have applied domestic English law, the law which the *lex situs* would have applied.[69] The authors seem to suggest that the court should have considered the application of *renvoi* in this context.

O'Brien agrees with the other authors that English law should have been applied and provides the following critique of the decision:

(a) the decision serves as authority for the faulty proposition that the capacity to conclude a contract involving foreign immovables and the capacity to transfer are governed by the *lex situs*;
(b) the case actually concerned contractual obligations and not conveyance (read: the creation of a limited real right *per se*),[70] therefore the relevant legal system should have been the proper law of the contract;
(c) the decision was based on statements in an older edition of Dicey,[71] which was criticised by Westlake[72] as failing to draw a clear distinction between capacity to contract and the capacity to transfer;
(d) with regard to American law, the authorities were moving toward applying the *lex loci contractus* to capacity in respect of contracts involving foreign immovable property;
(e) Transvaal law probably had no interest in protecting a married woman not domiciled there;
(f) an action for damages should nevertheless have succeeded despite Transvaal law hindering an order for specific performance;
(g) there should have been a clear distinction between contractual rights and proprietary rights *in casu*;

68 Collins *et al* (eds) (2012b: 1333).
69 *ibid*.
70 *Contra* Collier (2001: 267). *Cf* Cheng (1916: 77).
71 The author probably refers to Dicey (1908).
72 The author probably refers to Westlake (1905).

(h) the court should have enforced the contractual obligation since the defendant was capable of effecting the transfer and had unconditionally undertaken to do so; and
(i) the case did not concern capacity at all: Transvaal law at the time stipulated certain formalities but it did not create any incapacities.[73]

3.2.1.1.1.10 Summary

There are only eight prominent English cases focussing specifically on contractual capacity. In respect of contracts relating to immovable property, the decision in *Bank of Africa, Limited v Cohen*[74] indicates that the *lex situs* should be applied. The position is not that obvious with regard to other contracts. In *Sottomayor v De Barros (1)*,[75] *Cooper v Cooper*[76] and *Baindail v Baindail*,[77] which concerned the capacity to marry or to conclude an antenuptial contract,[78] the courts applied the *lex domicilii*, while in *Sottomayer v De Barros (2)*[79] (on the capacity to marry) the court applied the *lex loci contractus.* The court also applied this legal system in *Male v Roberts*,[80] which related to a loan agreement. In *Republica De Guatemala v Nunez*,[81] which concerned a contract of cession, the court refrained from indicating the legal system that should apply to the capacity of a minor to benefit from a contract of cession as the *lex domicilii* and the *lex loci contractus* coincided. In the most recent case, *The Bodley Head Ltd v Flegon*,[82] which related to a contract of agency, the court decided that contractual capacity should be governed by the putative objective proper law of the contract.

3.2.1.1.2 The authors

3.2.1.1.2.1 Briggs

According to Briggs, the English common law finds capacity to be present if it exists in terms of the personal law (the law of domicile) or the law governing the contract.[83] The *lex situs* (usually) governs contractual capacity in

73 O'Brien (1999: 552-553). The author also submits that the decision was lacking parity with the earlier case of *Re Courteney ex P Pollard* (1840) Mont & Ch 239, which did not concern incapacity.
74 [1909] 2 Ch 129.
75 (1877) 3 PD 1.
76 (1888) 13 App Cas 88.
77 [1946] P 122.
78 See the text at notes 7-10 as to why these cases are discussed, although they do not concern commercial contracts.
79 (1879) 5 PD 94 the remittance of *Sottomayor v De Barros (1)* (1877) 3 PD 1 from the Court of Appeal.
80 (1800) 3 ESP 163.
81 [1927] 1 KB 669 (CA).
82 [1972] 1 WLR 680.
83 Briggs (2014: 583 and 596). *Cf* Briggs (2008: 165) and Briggs (2014: 615-616 and 948-949). According to the author (Briggs: 2014 583 note 215), the law governing the contract was previously the law of the place where the contract was made.

respect of immovable property.[84] The law of domicile governs the capacity to conclude a matrimonial contract.[85]

The author is in favour of the application of the law governing the contract[86] rather than the law of domicile. There may be no "reason or opportunity to know that the other may be domiciled in a state according to the law of which he has an unsuspected incapacity".[87] In addition, someone's domicile cannot always readily be determined as "the detailed rules of the common law of domicile are far from being transparent in their application".[88] However, the law of domicile should govern the capacity to conclude a matrimonial contract[89] as "the personal law is obviously more appropriate" in this context.[90] The proper law of the contract should today be determined in accordance with the Rome I Regulation.[91]

The author argues that the proper law should in this regard include a choice of law by the parties,[92] as the chosen law could just as easily invalidate a contract or could even have, for instance, a higher age of majority.[93] However, a chosen law could be excluded on the basis of public policy.[94]

3.2.1.1.2.2 Carter

According to Carter, contractual capacity in an English context should in principle be governed by the proper law of the contract, objectively ascertained.[95] The proper law, in this regard, should not be determined subjectively as this would enable a contractant to choose a more favourable legal system.[96] The author rejects the application of the *lex loci contractus* to determine contractual capacity because the *locus contractus* may be fortuitous, contrived or unknown. Although the *locus contractus* is usually the place in which the last event necessary for the formation of the contract occurred,

84 Briggs (2014: 583): "Where, however, the contract is for the disposition of land, the capacity rules of the *lex situs* may not be easily avoided."
85 Briggs (2014: 584, 616, 778 and 948).
86 Briggs (2014: 583, 615-616 and 948-949; cf 596).
87 Briggs (2014: 948).
88 *ibid*.
89 Briggs (2014: 584, 616, 778 and 948.
90 Briggs (2014: 616).
91 note 2. Briggs (2014: 596; *cf* 948).
92 Briggs (2014: 583, 596, 615-616 and 948-949).
93 Briggs (2014: 949).
94 Briggs (2014: 583, 615-616 and 949). *Cf* Briggs (2014: 596): "In some cases the proposition that a would-be contracting party has found a path to the conclusion that he has contractual capacity is unobjectionable; in others, the allegation that he has 'conferred capacity upon himself' betrays a respectable objection. A uniform solution to the problem may never be found, but it is certainly not to hand at the moment."
95 Carter (1986: 24).
96 *ibid*.

this cannot justify why the *lex loci contractus* should receive preference to govern an individual's capacity.[97]

The author clearly doubts the applicability of the *lex domicilii* on its own. In fact, in respect of the latter, he submits: "Sweeping *dicta* to the effect that the law of a party's domicil *per se* governs contractual capacity are unsupportable."[98] A foreign contractant should not be allowed to rely on incapacity according to the *lex domicilii* to avoid liability. It does not follow, however, that a contractant who is capable in terms of the *lex domicilii* should be able to avoid liability because of incapacity according to the proper law of the contract. Therefore, any contractant may for enabling purposes be allowed to rely on the capacity of the other party in terms of the *lex domicilii*.[99] This legal system is accepted to be the governing law in England in terms of Rule 182 of Dicey and Morris[100] (the predecessor of Rule 228(1) of Dicey, Morris and Collins),[101] at least if domicile is coupled with residence.[102] In effect, Carter's view comes down to support for the alternative application of the proper law of the contract and the *lex domicilii*.

3.2.1.1.2.3 Clarence Smith

According to Clarence Smith, the *lex domicilii* (in principle) applies to contractual capacity.[103] The *lex loci contractus* applies if the capable contractant could not reasonably be expected to know that the counterpart was incapable according to his or her *lex domicilii*.[104] This means that the author regards the *lex domicilii* as the default legal system; the *lex loci contractus* will, however, apply in addition where no fault was present on the part of the contract assertor. The author's approach closely resembles that found in most jurisdictions with codified rules in respect of contractual capacity, where the personal law applies in principle but in conjunction with the *lex loci contractus* if certain conditions are satisfied.[105] The only condition to be complied with, according to the author's approach, is the absence of fault on the part of the contract assertor. The absence of fault thus plays the role of a requirement

97 Carter (1986: 25).

98 Carter (1986: 24 note 98). The *dicta* referred to here relate to *Sottomayor v De Barros (1)* (1877) 3 PD 1 and *Cooper v Cooper* (1888) 13 App Cass 88. Also see Cheng (1916: 62-63 and 68).

99 Carter (1986: 24).

100 Collins *et al* (eds) (1987: 1202).

101 Collins *et al* (eds) (2012b: 1865).

102 Carter (1986: 24).

103 Clarence Smith (1952: 470).

104 The author states at 470: "What is reasonable varies with the transaction, but extreme examples are that a tradesman supplying without extravagance a foreigner resident in the tradesman's country need not even inquire, while a banker accepting a guarantee from a young person or married woman must inquire carefully and will be excused only if his enquiries are met with plausible lies. Where the parties are acquainted, and the contract purely personal, nothing at all will excuse ignorance."

105 There are four different conditions which may be set in this regard. See the discussion in Chapter 4.

to be satisfied for the *lex loci contractus* to be applied, a structure referred to elsewhere in this study as the two-step model.[106] The first step in terms of this model is the default employment of the primary applicable legal system, *in casu*, the *lex domicilii*. Step two: the *lex loci contractus* applies in addition to the default system where fault is absent on the part of the contract assertor. It may be noted that Clarens Smith's approach is specifically comparable to Article 17 of the Romanian Private International Law Code in that, in this jurisdiction, the absence of fault on the part of the contract assertor is the only requirement to be fulfilled for the *lex loci contractus* to apply in addition to the default legal system.[107] Contractual capacity in respect of immovable property, according to the author, is governed by the *lex situs*.[108]

3.2.1.1.2.4 Clarkson and Hill

The authors support Rule 209 of Dicey, Morris and Collins[109] to the effect that a contractant to an international contract should be regarded as having capacity if he has such by either the personal law or the objective proper law. In their opinion, therefore, a contractant incapable in terms of the proper law of the contract should nevertheless be liable if he or she has capacity according to (for instance)[110] the *lex domicilii*.[111] The rule, so they aver, is based on the protection of the incapable party and the law of the country of which this individual is a domiciliary[112] is most suited to establish whether he or she requires such protection. It follows that an individual who possesses capacity in terms of the *lex domicilii* should not be able to avoid liability by referring to another legal system.[113] If a contractant were to be allowed to rely on incapacity in terms of the *lex domicilii*, it would be unfair to the counterpart who may have no reason to assume that the former has a foreign domicile, let alone possess knowledge of that country's capacity rules. In the same way, where contractants have capacity according to the proper law, it would be unreasonable for one of them to escape liability by relying on incapacity in terms of the personal law.[114]

106 This model is discussed in detail in Chapter 4, paragraph 4.8.

107 Romanian Private International Law Code (1992: Chapter II Article 17). Regard may also be had to the Estonian Private International Law Act (2002: § 12(3)); the Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(1)); the Civil Code of the Russian Federation (2001: Chapter 67, Article 1197(2)); and the Private International Law Code (Tunisia) (1998: Article 40), but in these jurisdictions, the formulation of the rule veers towards the three-step model. See the discussion in Chapter 4.

108 Clarence Smith (1952: 471).

109 Collins *et al* (eds) (2006b: 1621). Rule 228 is of course the most recent in this regard (Collins *et al* (eds) (2012b: 1865)).

110 Dicey, Morris and Collins also refer to the law of residence as personal law (Collins *et al* (eds) (2006b: 1621 and 1624).

111 Collins *et al* (eds) (2006b: 1624).

112 The authors use the word "national" in this context but, as they support Dicey, Morris and Collin's rule, this should be read as "domiciliary".

113 Clarkson and Hill (2011: 250).

114 *ibid*.

The proper law referred to here is objectively ascertained, namely, the law of the country with which the contract is most closely connected. The proper law should not be subjectively determined, as this would enable a contractant to confer capacity upon him or her by merely agreeing to a contractual clause which selects a legal system under which he or she possesses capacity.[115]

Lastly, the authors confirm that the capacity to transfer immovable property (or to take such a transfer) is (in general) governed by the *lex situs*.[116] English courts will usually not have jurisdiction in cases where questions concerning the law governing the transfer of foreign immovables arise. In this regard, a distinction should be drawn between the transfer of title and a contract in pursuance of which title has been transferred. An English court may indeed assume jurisdiction over disputes arising out of such a contract. Issues concerning the contract (including capacity) should be governed by the proper law of the contract which may or may not be the *lex situs*. This is the correct approach, according to the authors, because there is no apparent reason why the private international law rules for capacity to conclude a contract involving immovables should be different from those concerning any other contract.[117] The law governing the question should be the law of the country with which the contract is most closely connected – the proper law of the contract.[118]

3.2.1.1.2.5 Collier

Collier submits that problems relating to contractual capacity in an English context hardly occur, since the only categories of individuals having limited capacity would be mental patients, intoxicated persons and minors.[119] The author does not seem to take the possibility into account that foreign law may apply to contractual capacity. He also does not take incapacity due to the absence of spousal consent into consideration.

When problems do occur, however, the governing law may be the *lex domicilii*, the *lex loci contractus* or the proper law of the contract. Neither the *lex domicilii* nor the *lex loci contractus* are preferred because an application of the former may work unjustly toward the counterpart and the *locus contractus* may be fortuitous.[120] The most appropriate governing law, according to

115 *ibid*.
116 Clarkson and Hill (2011: 474).
117 with specific reference to *Bank of Africa, Limited v Cohen* [1909] 2 Ch 129.
118 Clarkson and Hill (2011: 475-476).
119 Collier (2001: 208-209). The author explains that fewer minors will be incapable especially since the age of majority in terms of Section 1 of the Family Law Reform Act of 1969 has been reduced from twenty-one to eighteen.
120 Collier (2001: 209).

the author, is the proper law of the contract.[121] In this context, reference is made to the putative proper law which refers to "the proper law ascertained by looking for the system of law with which the transaction has its closest and most real connection, ignoring any express choice of law, at any rate if that law was chosen in order to confer capacity which otherwise would not exist".[122] It therefore perhaps remains possible to take the subjective proper law into account if it were not chosen in order to confer capacity. The author only refers to an express choice of law; the result then is that a tacit choice of law may indeed confer capacity which would not otherwise exist.

The author also refers to Rule 179(1) of Dicey and Morris,[123] (now Rule 228(1) of Dicey, Morris and Collins)[124] that a contractant should be considered to have capacity if he or she has such in terms of the proper law of the contract or the personal law, but does not offer any commentary.

Finally, with reference to *Bank of Africa, Limited v Cohen*,[125] the author states that it appears that the *lex situs* governs not only the capacity to convey or to create an interest in land, but also the capacity to conclude a contract in this regard.[126]

3.2.1.1.2.6 Dicey, Morris and Collins

Contractual capacity is governed by Rule 228 enunciated by the authors.[127] The rule reads as follows:

> "(1) The capacity of an individual to enter into a contract is governed by the law of the country with which the contract is most closely connected or by the law of his domicile and residence:
>
> (a) If he has capacity to contract by the law of the country with which the contract is most closely connected, the contract will (*semble*) be valid so far as capacity is concerned.
>
> (b) If he has capacity to contract by the law of his domicile and residence, the contract will (*semble*) be valid so far as capacity is concerned.
>
> (2) If the contract is concluded between persons who are in the same country, an individual may not rely on his incapacity under the law of some other country with which the contract is most closely connected or in which he is domiciled and resident, unless the other party was aware of the incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence."

121 Collier (2001: 210). The author refers to the Canadian decision *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario) in support of this submission and states further that cases previously referred to are consistent with this governing law because the law of the place of contracting and the proper law were the same.

122 Collier (2001: 209-210).

123 Collins *et al* (eds) (2000: 1271-1272).

124 Collins *et al* (eds) (2012b: 1865).

125 [1909] 2 Ch 129.

126 Collier (2001: 267).

127 Collins *et al* (eds) (2012b: 1865).

Clause (1) of the rule thus states that the contractual capacity of an individual shall be governed by both the proper law of the contract and his or her personal law (domicile and residence). Clause (a) further explains that if a contractant who is incapable in terms of the personal law possesses capacity according to the proper law of the contract, then the contract will nevertheless be valid. Clause (b) covers the inverse situation as it provides that the contract will be valid where the contractant in question lacked capacity in terms of the proper law of the contract but possessed such according to the personal law.[128]

The authors refer to the law of domicile *and* residence.[129] It is not clear whether either of these will suffice or whether capacity under both the law of domicile and the law of residence is required. The authors do not discuss this issue. The use of the word "and" seems to suggest that the latter possibly was intended. However, the authors also refer to the "personal law" as an applicable legal system.[130] Here it seems that the authors had in mind that one can have capacity in terms of either the law of domicile or the law of residence. If the *lex domicilii* and the law of residence were meant to apply in the alternative, the word "or" should have been used.

Clause (2) is intended to give effect to Article 13 of the Rome I Regulation (Article 11 of the Rome Convention) on the assumption that clause (1) correctly sets out the position in English law.[131] This clause therefore means that a contractant incapable in terms of the proper law of the contract or the personal law shall not be able to rely on this incapacity if the contract was concluded between the contractants in the same country, unless the counterpart knew or should have known about the incapacity. Clause (2) implies that the *lex loci contractus* applies as an additional legal system if the parties were in the same country at the conclusion of the contract. Article 11 of the Rome Convention and Article 13 of the Rome I Regulation are discussed in detail in Chapter 5 below.[132] Here it must be indicated that the authors follow the system which will be named the three-step model in respect of fault in Chapter 4.[133] Step 1: the *prima facie* applicable legal systems are the objective proper law and the personal law. Step 2: the *lex loci contractus* is added to these legal systems if the parties were present in the same country at the time of the conclusion of the contract. Step 3: the *lex loci contractus* is not applicable

128 The main consideration with this rule is the protection of the incapable contractant under his or her personal law (Collins *et al* (eds) (2012b: 1869).

129 in terms of Rule 228(1).

130 Collins *et al* (eds) (2012b: 1870).

131 The authors expressly refer to Article 13 of the Rome I Regulation but continue to discuss the contents of Article 11 of the Rome Convention. This, according to the current author, is an error as the authors intended to discuss Article 13 (Rome I Regulation). This seems to be an editorial oversight.

132 Paragraph 5.3.1.

133 Paragraph 4.8.

if fault was present on the part of the contract-assertor in that he or she was aware of the incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence.

The authors clearly reject the possibility of the exclusive application of the *lex domicilii* to capacity. They correctly indicate that this legal system was adhered to in case law that did not concern contractual capacity in the usual sense.[134] The *lex domicilii* cannot universally apply to contractual capacity in respect of commercial contracts, to the capacity to marry and to contractual capacity in respect of antenuptial contracts. Great inconvenience and injustice would arise if the *lex domicilii* were applied in international transactions. A contractant would be entitled to escape liability simply because of incapacity by the law of domicile which may be unknown to the counterpart.[135]

The *lex loci contractus*, the authors continue, plays a prominent role in civil law countries (in addition to the personal law) in respect of contractual capacity.[136] While this legal system has gained some support in England,[137] Scotland,[138] South Africa[139] and Canada (Saskatchewan),[140] objections may be raised against it. The place where the contract is made could be entirely fortuitous, especially in matters involving letters, telex, fax or telephone (one could add: electronic communications).[141] The law under which, and not the place at which, the contract was made[142] should be decisive. The proper law is therefore included in the list of alternatively applicable legal systems but the *lex loci contractus* only for the scenario that the parties are in the same country at the moment of conclusion of the contract – and then only by implication.

The authors believe that a contractant should not be able to confer capacity upon him-or herself by simply agreeing to the choice of a system of law as the law of the contract. They are therefore in favour of the application of the legal system with which the contract is most closely connected, that is, the proper law objectively determined.[143]

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134 Cases such as *Sottomayor v De Barros (1)* (1877) 3 PD 1 and *Cooper v Cooper* (1888) 13 App Cass 88 concerned the capacity to marry and to conclude an antenuptial agreement. Also see the discussion of these cases at par 3.2.1.1.1.2 and 3.2.1.1.1.3. See further Cheng (1916: 62-63).

135 Collins *et al* (eds) (2012b: 1867). Also see Cheng (1916: 68).

136 The authors refer to the position in France and Germany in this regard. See, in particular, Collins *et al* (eds) (2012b: 1868 note 553 and 554).

137 *Male v Roberts* (1800) 3 ESP 163.

138 *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773.

139 *Kent v Salmon* 1910 TPD 637.

140 *Bondholders Securities Corporation v Manville* [1933] 4 DLR 699; [1933] 3 WWR 1.

141 Collins *et al* (eds) (2012b: 1868).

142 *ibid*.

143 Collins *et al* (eds) (2012b: 1869).

Capacity in respect of immovable property is governed by Rule 132(1) enunciated by the authors.[144] The rule states: "A person's capacity to alienate an immovable by sale or mortgage *inter vivos* is governed by the *lex situs*."[145] The *lex situs* also governs the capacity to acquire immovable property.[146]

The authors are therefore in favour of the alternative application of the objective proper law of the contract, the law of domicile and residence and, in particular circumstances, the *lex loci contractus*.[147] With regard to immovable property, capacity is governed by the *lex situs*.

3.2.1.1.2.7 Fawcett and Carruthers

The authors submit that the *lex domicilii* is an unsatisfactory test regarding contractual capacity, considering the unfairness that it may yield in commercial interaction.[148] The exclusive application of the *lex loci contractus*, according to the authors, is also untenable as it would enable a contractant to avoid incapacity in terms of the law that governs the contract by contracting in a country where the law is more favourable. Further, the *lex loci contractus* would be inadequate when parties contract in a country where they are only momentarily present.[149]

Modern authority, according to the authors, indicates that contractual capacity should be governed by the proper law of the contract objectively ascertained. This was indeed the position in the Canadian decision *Charron v Montreal Trust Co*[150] and the English case *The Bodley Head Ltd v Flegon*.[151] "The proper law" should be taken to mean the law of the country with which the contract is most closely connected. Intention does not play a role here. A contractant should not be able to confer capacity upon himself by submitting to a law factually unrelated to the contract.[152]

The authors therefore do not support the application of the *lex domicilii* or the exclusive application of the *lex loci contractus* to contractual capacity. In as far as the proper law of the contract should play a role, this should be the proper law objectively determined.

144 Collins *et al* (eds) (2012b: 1332).
145 *ibid.*
146 Collins *et al* (eds) (2012b: 1333).
147 See Stone (2010: 329) who supports this proposal by implication.
148 Fawcett and Carruthers (2008: 750). The authors believe that in civil-law systems a contractant may not rely on incapacity in terms of his personal law if he or she has such according to the *lex loci contractus*. The discussion in Chapter 4 explains why this statement is inaccurate on various levels.
149 Fawcett and Carruthers (2008: 751).
150 (1958) 15 DLR (2d) 240 (Ontario).
151 [1927] 1 KB 669 (CA).
152 Fawcett and Carruthers (2008: 751).

3.2.1.1.2.8 Fawcett, Harris and Bridge

The authors reject the exclusive application of the *lex domicilii* to commercial contracts because of the impractical results that would arise.[153] The authors probably have the protection of local creditors in mind. The advantages of the proper law approach are that it may limit the evasion of capacity rules and that it ensures a strong connection between capacity and the contract itself.[154]

The current author agrees that the proper law approach is indeed more effective in preventing the evasion of capacity rules when compared to the application of the *lex loci contractus*. The parties could intentionally select a country of conclusion with the aim of evading another legal system (for instance, the incapable contractant's country of domicile). On the other hand, if the personal law (for instance the *lex domicilii*) were to be applied, evasion of capacity rules would even be more difficult.

However, the law of the closest connection may again, according to the authors, be difficult to determine and may lead to excessive uncertainty because the common law rules will have to be utilised to ascertain the applicable law rather than the provisions of Article 4 of the Rome Convention[155] (today Article 4 of the Rome I Regulation).[156]

The current author submits, however, that the provisions of the Rome Convention / Rome I Regulation should be utilised in determining the proper law applicable to contractual capacity.[157] The authors seem to confuse the exclusion of capacity under the Rome Convention / Rome I Regulation[158] with the non-applicability thereof in determining the proper law for the purposes of capacity. There seems to be no reason in logic or authority for the discontinued common-law rules on the determination of the proper law of contract to now suddenly be revived to determine the proper law in the context of capacity.

The authors are of the opinion that Rule 179(1) of Dicey and Morris[159] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[160] is commendable as it is inclined to uphold the contract; an individual need only have capacity by either the proper law or the personal law. However, the connecting factors (proper law, domicile, residence) are unfortunately, inherently uncertain and

153 Fawcett, Harris and Bridge (2005: 657).
154 Fawcett, Harris and Bridge (2005: 658).
155 note 1.
156 note 2.
157 Also see Briggs (2014: 595; *cf* 948).
158 Article 1(2)(a) of the Rome Convention (note 1); Article 1(2)(a) of the Rome I Regulation (note 2).
159 Collins *et al* (eds) (2000: 1271-1272).
160 Collins *et al* (eds) (2012b: 1865).

this will again undermine commercial certainty, especially since the court may now have to consider not one but two (or three) connecting factors.[161]

The authors therefore do not indicate clear support for any of the legal systems that are commonly utilised to determine contractual capacity.

3.2.1.1.2.9 Hill and Chong

Hill and Chong support Rule 209(1) of Dicey, Morris and Collins.[162] In terms of this rule, a contractant should not be able to rely on incapacity in terms of any other law if he or she possesses capacity according to the proper law of the contract and does not require protection.[163] The authors emphasise that the *lex loci contractus* is irrelevant in this context.[164]

The authors agree that the *lex domicilii* should not apply exclusively. The legitimacy of the argument against the exclusive application of the *lex domicilii* is illustrated in the following example: "[I]f … an English resident, aged seventeen, contracts to buy a motor-car from a foreign seller, the contract would not be valid if contractual capacity were regarded as being a matter solely for the personal law."[165]

The authors submit that an individual should be taken to have capacity if he or she has such according to the putative proper law.[166] The proper law in this context, the authors continue, is the law with which the contract has its closest and most real connection and not the proper law chosen by the parties, whether expressly or impliedly.[167] If the proper law was to be determined subjectively as opposed to objectively, an incapable individual would be able to confer capacity upon himself by merely electing a favourable legal system. This would frustrate the protective effect of the personal law.[168]

3.2.1.1.2.10 McClean and Beevers

McClean and Beevers admit that it is rather difficult to state which legal system an English court would apply in cases involving contractual capacity. Generally, the authors submit, two approaches exist in this regard: the *lex*

161 Fawcett, Harris and Bridge (2005: 658).
162 Collins *et al* (eds) (2006b: 1621).
163 Hill and Chong (2010: 550).
164 Hill and Chong (2010: 550). Of course, the *lex loci contractus* will play a role in terms of Article 11 of the Rome Convention (note 1) and Article 13 of the Rome I Regulation (note 2).
165 Hill and Chong (2010: 550).
166 Hill and Chong (2010: 550), with particular reference to *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67.
167 Also see the discussion of *The Bodley Head Ltd v Flagon* [1972] 1 WLR 6680 in par 3.2.1.1.1.8 where, according to the authors, the court accepted that the putative proper law should be determined by reference to the law which the parties expressly or tacitly chose.
168 Hill and Chong (2010: 551).

domicilii applies or the objective proper law governs. Application of the objective proper law (and not the subjective proper law or the *lex loci contractus*) is promoted as the latter approaches would enable an incapable individual to confer capacity upon him- or herself by a mere choice of law or the conclusion of the contract in a specific country.[169] Although application of the *lex domicilii* is "old-fashioned",[170] deciding between this legal system and the objective proper law of contract is rather complicated. The following scenario (and explanation) illustrates this: "A domiciled Ruritanian aged 20 buys goods on credit from a London shop. Could he refuse to pay for them on the ground that by Ruritanian law minority ends at 21 and contracts made by minors cannot be enforced against them?"[171]

If we assume that the contract was concluded *inter praesentes* in the London shop and the latter is English-owned and -managed, then, according to the author, English law would logically be the putative proper law of the contract. English law would therefore be applied as it would be unfair and inconvenient if the validity of this contract was dependant on the foreign domicile of the incapable party with which the counterpart could not be expected to be familiar. But if the contract was concluded *via* correspondence, the letter of acceptance was posted from Ruritania and the shop was owned and managed by Ruritanians, then, according to the authors, it would seem that Ruritanian law as the putative proper law should apply.[172] The current author, however, suggests that English law would be the proper law also in the second scenario, as English law is the law of the country of the seller (the default proper law in terms of the Rome Convention and the Rome I Regulation).[173]

Turning to case law, the authors submit that, while there have been *dicta* favouring the *lex domicilii*,[174] the *lex loci contractus*[175] and the proper law of the contract,[176] it is uncertain which route English courts will follow. The authors in final instance suggest that the best solution would be to regard a

169 McClean and Beevers (2009: 386).
170 *ibid*.
171 *ibid*.
172 *ibid*.
173 See Article 4(2) of the Rome Convention (note 1) and Article 4(1)(a) of the Rome I Regulation (note 2).
174 *Sottomayor v De Barros (1)* (1877) 3 PD 1 and *Cooper v Cooper* (1888) 13 App Cass 88. The authors imply that these cases concerned the capacity to marry and not contractual capacity and are therefore not genuine authority (McClean and Beevers (2009: 387 note 177)).
175 *Male v Roberts* (1800) 3 ESP 163 and *Baindail v Baindail* [1946] P 122. But this legal system, the authors concede, may be fortuitous and is therefore of little importance (McClean and Beevers (2009: 387)).
176 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680. See McClean and Beevers (2009: 387). Also see the discussion of the *dicta* in *The Bodley Head Ltd v Flegon* (*supra*: 689) in par 3.2.1.1.1.8.

contractant as capable if he is such in terms of either the proper law of the contract or the personal law (domicile and residence).[177]

3.2.1.1.2.11 O'Brien

O'Brien is of the opinion that, while the personal law may be referred to for the capacity to marry or to make a will, it is not preferable as applicable law for the purposes of contractual capacity, especially not where the contract is concluded outside the domiciliary country. Although the *lex loci contractus* has been referred to previously in case law,[178] it cannot be supported because it has no necessary connection with the parties or the substance of the contract.[179] It could also be exploited by the stronger contractant who may intentionally have the parties conclude a contract in a country where the protection of the counterpart, whose capacity is in doubt, is the weakest.[180]

The putative proper law may also find application. The author describes this legal system as "that which would be the applicable law of the contract if the capacity issue is determined affirmatively"[181] or "that which would be the applicable law if the contract was not affected by the incapacity".[182] The proper law can, however, be chosen by the parties. This would enable the stronger contractant to specify a law which may remove the protection which the vulnerable counterpart might have enjoyed. The most viable option, the author continues, is the putative proper law in the objective sense, notwithstanding its shortcoming,[183] as it avoids both accident[184] and machination.[185]

The author confirms that, in general, the capacity to conclude contracts in respect of immovable property in the forum state is governed by the *lex situs*.[186] This is not the position with regard to the capacity to conclude a contract involving foreign immovables. Based on the critique levelled against the decision in *Bank of Africa, Limited v Cohen*,[187] it is deduced that the author supports the application of the objective putative proper law in this regard.[188]

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177 McClean and Beevers (2009: 388). This view is similar to Dicey, Morris and Collins' Rule 209 (Collins *et al* (eds) (2006b)), but the authors do not refer to this source.
178 as in *Male v Roberts* (1800) 3 ESP 163, according to the author.
179 O'Brien (1999: 318).
180 O'Brien (1999: 319).
181 O'Brien (1999: 318).
182 O'Brien (1999: 319).
183 Namely, that it does not ensure the protection of the vulnerable contractant as a reference to his or her personal law might have.
184 Here the author probably refers to the application of the *lex loci contractus*.
185 O'Brien (1999: 319). Here the author probably refers to the application of the *lex domicilii*.
186 O'Brien (1999: 551).
187 [1909] 2 Ch 129. See the text at notes 70-73.
188 O'Brien (1999: 551-552).

3.2.1.1.2.12 Summary

In summary, some English authors expressly reject the general application of the *lex domicilii* to contractual capacity[189] while others reject its exclusive application.[190] Authors such as Carter,[191] Collier,[192] Dicey, Morris and Collins,[193] Hill and Chong,[194] McClean and Beevers[195] and O'Brien[196] reject the application of the *lex loci contractus* in general. Fawcett and Carruthers,[197] on the other hand, only reject the exclusive application of this legal system. Dicey, Morris and Collins[198] add the *lex loci contractus* to the objective proper law and the personal law (law of domicile and habitual residence), for the scenario that the parties were present in the same country at the time of the conclusion of the contract. However, the *lex loci contractus* is not applicable if fault was present on the part of the contract assertor in that he or she was aware of the incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence.[199] Clarence Smith[200] is of the opinion that the *lex loci contractus* should only be applicable (that is: in addition to the *lex domicilii*) if no fault was present on the part of the contract assertor in that he or she did not know and could not reasonably be expected to know that the counterpart was incapable according to his or her *lex domicilii*.[201]

In as far as the proper law of contract plays a role in contractual capacity, a number of authors reject the application of this legal system subjectively ascertained.[202] Collier[203] would consider the subjective proper law,[204] provided that it is not chosen in order to confer capacity. There is some support

189 Briggs (2014: 948) (the *lex domicilii*, according to the author (2014: 616), is however, more appropriate in respect of matrimonial contracts); Carter (1987: 24) (the author, however, asserts that the *lex domicilii* can be relied upon for enabling purposes); Collier (2001: 209); McClean and Beevers (2009: 386); and O'Brien (1999: 318).

190 Briggs (2008: 165); Clarkson and Hill (2011: 250); Collins *et al* (eds) (2012b: 1867); Fawcett and Carruthers (2008: 750); Fawcett, Harris and Bridge (2005: 657); and Hill and Chong (2010: 550). Also see Cheng (1916: 62-63 and 72).

191 Carter (1987: 25).

192 Collier (2001: 209).

193 Collins *et al* (eds) (2012b: 1868).

194 Hill and Chong (2010: 550).

195 McClean and Beevers (2009: 386).

196 O'Brien (1999: 318-319).

197 Fawcett and Carruthers (2008: 751).

198 Collins *et al* (eds) (2012b: 1865).

199 *ibid.*

200 Clarence Smith (1952: 470).

201 Also see Cheng (1916: 71 and 128) in this regard who submits that the capacity to conclude a contract of a business nature (not relating to immovables) should, in addition to the *lex domicilii*, be governed by the *lex loci contractus*.

202 Carter (1987: 24); Clarkson and Hill (2011: 250); Collins *et al* (eds) (2012b: 1869); Fawcett and Carruthers (2008: 751); and Hill and Chong (2010: 551).

203 Collier (2001: 209-210).

204 Also see Briggs (2014: 583, 596, 615-616 and 948-949). The proper law subjectively ascertained could, according to the author, be excluded on the basis of public policy.

for the proper law of contract objectively ascertained.[205] Most of the authors, however, refer to the more technically correct putative objective proper law of the contract.[206] Fawcett, Harris and Bridge[207] expressly reject the exclusive application of the proper law in general while O'Brien[208] rejects the application of the putative proper law subjectively determined.

In respect of these English authors that indeed support a specific proposal with regard to contractual capacity in private international law,[209] the majority seems in favour of the alternative reference rule advocated by Dicey, Morris and Collins. According to the authors, contractual capacity should be governed by the objective proper law of the contract or the *lex domicilii* and the law of residence.[210] Authors such as Clarkson and Hill,[211] Hill and Chong[212] and McClean and Beevers[213] clearly support this proposal while Carter,[214] Collier[215] and Fawcett, Harris and Bridge[216] acknowledge its tenability but refrain from expressing support.

In respect of contractual capacity in as far as immovable property is concerned, Briggs,[217] Clarence Smith,[218] Collier,[219] and Dicey, Morris and Collins[220] express support for the application of the *lex situs*.[221] Clarkson and Hill[222] and O'Brien[223] agree with this view only in respect of local immovable

205 Carter (1987: 24); Clarkson and Hill (2011: 250); and Collins *et al* (eds) (2012b: 1869).
206 Collier (2001: 209-210); Hill and Chong (2010: 551); McClean and Beevers (2009: 386); and O'Brien (1999: 319).
207 Fawcett, Harris and Bridge (2005: 658).
208 O'Brien (1999: 318-319).
209 Fawcett and Carruthers (2008), as well as Fawcett, Harris and Bridge (2005), do not express clear support for any of the legal systems to govern capacity.
210 Collins *et al* (eds) (2012b: 1865 (Rule 228)).
211 Clarkson and Hill (2011: 250).
212 Hill and Chong (2010: 550).
213 McClean and Beevers (2009: 388).
214 Carter (1987: 24).
215 Collier (2001: 210).
216 Fawcett, Harris and Bridge (2005: 658). Also see their critique against this rule (at 658).
217 Briggs (2014: 583).
218 Clarence Smith (1952: 471).
219 Collier (2001: 267).
220 Collins *et al* (eds) (2012b: 1332-1333).
221 But see Cheng who maintains that, while popular opinion favours the application of the *lex situs* to contractual capacity in respect of immovable property, this issue should be governed by the *lex domicilii* (1916: 75-82 and 128).
222 Clarkson and Hill (2011: 474).
223 O'Brien (1999: 551).

property; the capacity to conclude contracts involving foreign immovables should be governed by the objective (putative) proper law.[224]

3.2.1.2 Scotland

Some uncertainty exists in respect of the law applicable to contractual capacity in Scottish private international law. The choice, however, lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. Some support also exists for the application of the *lex situs* in contracts involving immovable property.

3.2.1.2.1 The courts

3.2.1.2.1.1 Introduction

According to Anton and Beaumont, the courts in Scotland draw a distinction between ordinary commercial (mercantile) contracts and other (non-mercantile) contracts. In respect of mercantile contracts, although the cases are sparse and the conflicts rules regarding capacity inadequately addressed, they tend to indicate that the *lex loci contractus* must be applied. It seems likely, according to the authors, that the courts have accepted that an individual incapable in terms of his or her personal law may validly conclude mercantile contracts in a country where this incapacity was not applicable.[225] The most prominent Scottish decision in this regard is *McFeetridge v Stewarts & Lloyds Ltd*.[226]

3.2.1.2.1.2 McFeetridge v Stewarts & Lloyds Ltd[227]

In casu, the appellant, McFeetridge, a minor with an Irish domicile, concluded a contract of employment with a Scottish company. He was injured in the course of his employment and agreed to accept compensation under the Workmen's Compensation Act, 1906, but this, it was averred, was done in ignorance of his common-law rights. After receiving compensation for some time, McFeetridge instituted a common-law action arguing that, since he lacked capacity under the *lex domicilii*, the agreement pertaining to his election of compensation was void.

The court rejected the incapacity argument and concluded that the *lex loci contractus* was applicable to the matter. Lord Salvesen decided: "In the case of a minor, the reasonable view seems to be that he should have such protec-

224 Clarkson and Hill (2011: 475-476); and O'Brien (1999: 551-553). The only reason submitted for adopting such an approach is that there should be no difference between the choice of law rules for capacity to conclude contracts involving immovables and the rules for capacity to enter into any other type of contract. Of course, this does not justify a distinction between local and foreign immovable property. Also see Cheng (1916: 75, 78-79 and 128).

225 Anton and Beaumont (1990: 276).

226 1913 SC 773.

227 *ibid*.

tion in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different right."[228]

The court thus clearly stated that the protection of a minor should be determined with reference to the *lex loci contractus* and not the *lex domicilii*. The court continued:

> "The considerations which support this view are mainly those of good sense and expediency. A foreigner who contracts in Scotland with a native of that country must *prima facie* be held to intend that the law of Scotland shall be held to apply to the transaction. The Scottish contracting party cannot be presumed to know the law which regulates the capacity of the foreigner with whom he contracts. Indeed he has no reason to know that the foreigner has not become domiciled in Scotland; for if he is resident there this is a matter which may be known only to himself."[229]

From this *dictum* it is clear that, according to Lord Salvesen, contracts concluded in Scotland between foreign and local domiciliaries are to be governed by the *lex loci contractus*. The Scottish contractant need neither take cognisance of where the other party is domiciled nor of the personal law of the counterpart.

Anton and Beaumont point to the fact that, although the court explicitly proceeded from the view that the *lex loci contractus* governed the matter, this legal system was also the proper law of the contract and no choice had to be made between them. It should also be remembered that in 1913, when the case was decided, the *lex loci actus* was indeed often the proper law of the contract.[230] Nevertheless, the case does contain clear support for the application of the *lex loci contractus* to contractual capacity.

3.2.1.2.1.3 Obers v Paton's Trustees[231]

In a non-commercial context, the Scottish courts may apply the *lex domicilii* to capacity.[232] In this regard, Anton and Beaumont[233] discuss the decision in *Obers v Paton's Trustees*.[234]

Mr Paton Jr, domiciled in Scotland, relocated to France and acquired a "trading domicile" there. Subsequent to his bankruptcy and sequestration according to French law, he returned to Scotland where he executed and registered

228 *McFeetridge v Stewarts & Lloyds Ltd* (*supra*: 789).
229 *ibid*.
230 Anton and Beaumont (1990: 277-278).
231 (1897) 24 R 719. Also see *De Virte v MacLeod* (1869) 6 SLR 236, where the *lex domicilii* was applied.
232 Anton and Beaumont (1990: 278-279).
233 Anton and Beaumont (1990: 278).
234 *Obers v Paton's Trustees* (*supra*).

a discharge of his legitim.[235] His justification for this was that, during his father's lifetime, he (Mr Paton Sr) had made various cash advances to Mr Paton Jr. He therefore believed that it was proper, in respect of these advances, to execute the discharge.[236] Shortly afterwards, Mr Paton Sr died, leaving a will from which Mr Paton Jr accepted an alimentary provision only. A French official, representing the general body of creditors, instituted an action against Mr Paton Jr for the reversing of the discharge and the payment (to the creditors) of the legitim.

The Lord President held that, in terms of Scots law, an insolvent was incapable of waiving (discharging) his right to the legitimate portion of his father's estate.[237] The insolvent was incapable because such a waiver would prejudice the creditors and amount to fraud. Therefore, although not expressly stated, the court applied Scots law, the *lex domicilii* (the domicile of the insolvent), to the issue of capacity, as the Lord President approached the matter from a Scots perspective.

3.2.1.2.1.4 Summary

In summary, as illustrated in the prominent Scottish decisions, the courts seem inclined to apply the *lex loci contractus* to capacity in mercantile (commercial) contracts[238] and the *lex domicilii* in respect of non-mercantile (non-commercial) contracts.[239]

3.2.1.2.2 The authors

3.2.1.2.2.1 Anton and Beaumont

Anton and Beaumont support the distinction in Scots case law between ordinary commercial contracts and non-mercantile contracts, the *lex loci actus* being applicable to the first and the *lex domicilii* to the second type of contract.[240] The authors have reservations about applying the objective proper law, as advocated by some of the English authors.[241] According to the latter authors, the proper law has to be ascertained objectively, otherwise a minor may confer on him- or herself capacity which he or she otherwise would not have had by merely agreeing to the application of another legal system. Anton and Beaumont submit that the risk thereof is real, considering the pace at which international commerce is developing. The problem could, however, be addressed legislatively. In any event, the risk mentioned must be weighed against the uncertainty which such a rule would introduce in

235 In Scots law this related to a child's legal share of his or her parents' moveable property on their death. See note 21 for an explanation. See http://www.scan.org.uk/index.html.
236 *Obers v Paton's Trustees* (*supra*: 350).
237 *Obers v Paton's Trustees* (*supra*: 352).
238 *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773.
239 See *De Virte v MacLeod* (1869) 6 SLR 236; and *Obers v Paton's Trustees* (1897) 24 R 719.
240 Anton and Beaumont (1990: 276). Also see Beaumont and McEleavy (2011: 491).
241 They refer to Collins *et al* (eds) (1987: 1203); and North and Fawcett (1987: 481).

respect of ordinary business contracts, more particularly, ordinary contracts of sale, where the seller may also require protection.[242]

Finally, Anton and Beaumont submit that the capacity to hold immovable property or to alienate an immovable by way of sale, mortgage or donation, whether *inter vivos* or *mortis causa*, must be governed by the *lex situs*.[243]

3.2.1.2.2.2 Crawford and Carruthers

These authors do not expressly support any of the available legal systems but seem to endorse Cheshire's suggestions during his David Murray lecture in 1948.[244] These suggestions were two-fold: first, a contract is not void due to incapacity if the contractants are capable in terms of the putative proper law; and, secondly, a contractant incapable according to the putative proper law should not be allowed to rely on his or her incapacity if he or she possesses capacity in terms of the *lex domicilii.* The putative proper law referred to here should be objectively ascertained because parties cannot confer capacity on themselves by merely selecting an unconnected law.[245]

3.2.1.2.2.3 Summary

The Scottish authors hold dissimilar views on the law applicable to contractual capacity. Anton and Beaumont draw a clear distinction between mercantile and non-mercantile contracts. In the case of the former, the *lex loci contractus* should apply and, in respect of the latter, the *lex domicilii*.[246] They reject the application of the proper law of contract to capacity in general.[247] The authors support the application of the *lex situs* to capacity in respect of contracts relating to immovable property.[248] Crawford and Carruthers, on the other hand, do not express clear support for any of the legal systems to govern capacity. However, by referring to Cheshire's suggestion in 1948, they seem to endorse the alternative application of the putative objective

242 Anton and Beaumont (1990: 278). Beumont and McEleavy (2011: 491) refer the reader to Anton and Beaumont's second edition (Anton and Beaumont (1990)) for further detail. Beaumont and McEleavy further tentatively suggest that capacity, in contracts concluded between parties in different countries (when the Rome I Regulation does not apply), should be governed by the personal law or the putative proper law of the contract.

243 Anton and Beaumont (1990: 604); also Beaumont and McEleavy (2011: 940). The authors refer to Story (1841: 618): "It may be laid down as a general principle of the common law that a party must have a capacity to take according to the law of the *situs*, otherwise he will be excluded from all ownership."

244 Cheshire (1948), referred to by Crawford and Carruthers (2006: 437).

245 Crawford and Carruthers (2006: 437).

246 Anton and Beaumont (1990: 276). Also see Beaumont and McEleavy (2011: 491).

247 Anton and Beaumont (1990: 278).

248 Anton and Beaumont (1990: 604); also Beaumont and McEleavy (2011: 940).

proper law and the *lex domicilii*.[249] The proper law subjectively ascertained is clearly not accepted in Scott's private international law.[250]

3.3 Australasia

3.3.1 Australia

3.3.1.1 Introduction

As is the position in the United Kingdom, in Australia the position regarding the law governing contractual capacity is not settled.[251] There is further a dearth of case law on the issue and the legal systems that are utilised in the English-law context are referred to by the authors, namely the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.

3.3.1.2 The courts

3.3.1.2.1 Introduction

There are two prominent Australian cases concerning contractual capacity: *Gregg v Perpetual Trustee Company*,[252] which concerned the transfer of rights in respect of immovable property in terms of an antenuptial contract, and *Homestake Gold of Australia v Peninsula Gold Pty Ltd*,[253] which involved the transfer of shares.

3.3.1.2.2 Gregg v Perpetual Trustee Company[254]

Bertha Major entered into an antenuptial agreement with Francis Gould Smith. The parties were both domiciled in New South Wales (Australia). At the time of the conclusion of the antenuptial agreement (and entering into marriage), Bertha was a minor. In terms of the antenuptial agreement, Bertha transferred her interests in immovable property situated in Queensland (Australia) to her husband, Mr Smith. Upon attaining majority, she executed a document ratifying the agreement, but this was not attested to in the presence of a commissioner. In terms of her domiciliary law (the law of New South Wales), she lacked the capacity to conclude a transaction for the transfer of interests of this nature but, in terms of the *lex situs* (the law of Queensland), she was capable. The court was thus approached to pronounce on whether the mentioned interests were in fact transferred under the circumstances.

249 Crawford and Carruthers (2006: 437), as per Cheshire's view (Cheshire (1948)).
250 Anton and Beaumont (1990: 437). Also see Beaumont and McEleavy (2011: 491) and Crawford and Carruthers (2006: 437).
251 Davies, Bell and Brereton (2010: 406-407); Nygh (1991: 279); Sykes and Pryles (1991: 614); Tilbury, Davis and Opeskin (2002: 768); and the Australian Law Reform Commission (1992: 100).
252 (1918) 18 SR (NSW) 252.
253 (1996) 20 ACSR 67.
254 (1918) 18 SR (NSW) 252.

The Married Woman's Property Act of Queensland of 1891 came into force before the Smiths were married.[255] Harvey J, relying on the Act, *Re Piercey*[256] and *Murray v Champernowne*,[257] therefore held that "this property became on her marriage her separate estate, and could be dealt with by Mrs Smith accordingly".[258] Harvey J also stated that the confirmation of the ratification by a commissioner *in casu* was irrelevant: "No acknowledgement of the deed of confirmation of her marriage settlement was therefore necessary on her part to pass so much of the property as at the date of her marriage was in fact real estate situated in Queensland."[259] Harvey J arrived at the conclusion that the relevant interests were transferred *in casu* because the "real estate … may be effectively conveyed according to the law of the land where the real estate is situated, and capacity to deal with such an interest is determined by the *lex loci*".[260] From the context it is clear that the "lex loci" here must be read to refer to the *lex situs*.

3.3.1.2.3 Homestake Gold of Australia v Peninsula Gold Pty Ltd[261]

This rather complicated decision involved a novel scheme to defeat compulsory acquisition in a takeover by transferring shares to minors. Young J referred to it as the "ham scam case".[262] The minors (or their guardians) would benefit as they would be awarded a small amount of money or (strangely enough) a free ham. The promoters of the scheme, on the other hand, would benefit from having their shares registered in a large number of individual holdings by minors. On 14 August 1995, the Homestake Mining Company ("Homestake Mining") announced that it would make takeover offers to acquire the outstanding shares in the gold mining company Homestake Gold (the plaintiff), as it already owned 81.5% of the ordinary shares in the latter company. On 16 October 1995, the plaintiff's share registry received 918 transfers executed by the defendant, Peninsula, each transferring 100 shares in the capital of the plaintiff. The transferees were all minors. The effect of the registration was that the number of members in Homestake Mining increased from 918 to 4357. Homestake Mining's takeover offer closed on 9 February 1996 and had then become entitled to 99.5% of the paid-up ordinary shares of the plaintiff. As such, Homestake Mining asserted that it had satisfied the requirements for compulsory acquisition, which is allowed in terms of Section 701 of the Australian Corporations Law. In the meantime, further share transfers were lodged with the plaintiff's share registry but these were not registered because the transferors were

255 The Act entered into force on 1 January 1891 and the Smiths were married on 31 January 1895.
256 [1895] 1 Ch 83.
257 [1901] 2 IR 232.
258 *Gregg v Perpetual Trust Company* (*supra*: 256).
259 *ibid*.
260 *ibid*.
261 (1996) 20 ACSR 67.
262 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*: 1).

minors and the plaintiff feared that the transfers were not binding on these minors. The issue before the court was precisely the validity of the transfer to the minors in October 1995 and the transfer from them in February 1996; more particularly, whether the minors had the contractual capacity to ratify or affirm the contracts.

Young J approached the matter from a private international law perspective as the minors were domiciled in Australia, New Zealand and the United Kingdom. He held that the issue of capacity pertains to the domain of the substantive validity of a contract because it determines whether enforceable rights and obligations are to flow from an agreement between contractants. In rejecting the application of the *lex domicilii*, the judge cited the Canadian author McLeod, who submits that the application of the *lex domicilii* is unsatisfactory in modern commerce and should thus be abandoned.[263] The *lex loci contractus*, according to Young J, should also be disregarded because this legal system was only applied in cases involving negotiable instruments[264] or marriage contracts.[265] Although he mentioned Dicey and Morris' Rule 181[266] (the predecessor of Rule 228(1) of Dicey, Morris and Collins),[267] that an individual's contractual capacity is governed by either the proper law or the law of domicile and residence, the court found the most compelling approach to be that advocated by Cheshire and North[268] – that contractual capacity in a commercial context should be regulated by the proper law of the contract objectively ascertained. Indeed, this legal system was applied by the Ontario Court of Appeal in *Charron v Montreal Trust Co*[269] and later by Brightman J in *The Bodley Head Limited v Flegon*.[270] The objective putative proper law, Young J added, is also favoured by modern Australian authors such as Nygh[271] and Sykes and Pryles,[272] as well as by the Canadian conflicts author, McLeod.[273] As a result, he arrived at the conclusion that contractual capacity is to be governed by the objectively ascertained proper law of the contract. He stated: "I believe I should follow the *Charron* case and apply the proper law of contract."[274]

263 McLeod (1983: 491).
264 as in *Bondholders Securities Corporation v Manville* (*supra*).
265 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (*supra*: 8).
266 Collins *et al* (eds) (1993: 1271).
267 Collins *et al* (eds) (2012b: 1865).
268 North and Fawcett (1992: 511).
269 (1958) 15 DLR (2d) 240 (Ontario) at 240.
270 [1927] 1 KB 669 (CA) at 680.
271 Nygh (1995: 303).
272 Sykes and Pryles (1991: 614). However, these authors, of course, support the objective and subjective proper law – see paragraph 3.3.1.3.4.
273 McLeod (1983: 490-492).
274 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (*supra*: 8).

Sychold,[275] however, is of the opinion that *Charron v Montreal Trust Co*,[276] on which Young J heavily relies, is not strong authority, as the court simply assumed that the problem (namely, that separation agreements between spouses were invalid in Quebec at the time) was one of capacity rather than invalidity due to public policy. In addition, the proper law *in casu* was also the *lex fori* and the Ontarian Court of Appeal was clearly reluctant to apply the civil-law rules of Quebec (the law of Quebec was the *lex domicilii*). According to the author, the court in the *Charron* case[277] arbitrarily decided to apply the proper law to capacity as a matter of policy, as advocated by English commentators, instead of following English case law on marital property settlements (where the *lex domicilii* was always applied). Sychold submits that there remains considerable scope for the application of the *lex domicilii* to contractual capacity, particularly in non-commercial contracts in Australian private international law.[278]

3.3.1.2.4 Summary

From these two decisions it can be deduced that the Australian courts would be inclined to apply the objective proper law to capacity in respect of commercial contracts in general and the *lex situs* in cases involving immovable property.

3.3.1.3 The authors including the Australian Law Reform Commission

3.3.1.3.1 Davies, Bell and Brereton

According to these authors, contractual capacity should be governed by the proper law of the contract. This approach was, according to them, correctly adopted in a Canadian,[279] an English[280] and an Australian[281] case.[282] One question remains, however: could an incapable contractant acquire capacity by selecting an appropriate law? In other words, is the proper law referred to objectively determined or could it also be subjectively ascertained? The authors are undecided on this issue. They refer to Dicey, Morris and Collins' Rule 209(1)[283] (the predecessor of Rule 228(1) of Dicey, Morris and Collins),[284] who suggest that capacity should be governed by the proper law of the contract objectively ascertained,[285] in contrast to Sykes and Pryles' approach that a choice by the contractants should be given effect to – the

275 Sychold (2007: par 184).
276 *Charron v Montreal Trust Co* (*supra*).
277 *ibid.*
278 Sychold (2007: par 184).
279 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario).
280 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680.
281 *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67.
282 Davies, Bell and Brereton (2010: 406-407).
283 Collins *et al* (eds) (2006b: 1621).
284 Collins *et al* (eds) (2012b: 1865).
285 Davies, Bell and Brereton (2010: 407).

proper law of the contract subjectively ascertained.[286] The authors also refer to the view of the Australian Law Reform Commission, who accept Sykes and Pryles' view and recommend that capacity should be governed by the law of habitual residence and the proper law of the contract (either subjectively or objectively determined).[287]

According to Davies, Bell and Brereton, the capacity to conclude a contract involving immovable property is generally governed by the *lex situs*.[288] This is not the position where the contract is merely one to execute a conveyance or mortgage in the future. The capacity to conclude such contracts can only be governed by its proper law. With reference to *Bank of Africa, Limited v Cohen*,[289] the authors submit that the Australian courts would not enforce a contract for the transfer of an interest in immovables situated abroad if the transferor lacked capacity in terms of the *lex situs*.[290]

3.3.1.3.2 Mortensen

Mortensen acknowledges that there is common-law authority for the application of the *lex loci contractus* as well as the *lex domicilii* to contractual capacity. However, it is apparent to the author that these legal systems have now been replaced by a rule requiring the application of the putative proper law of the contract to the issue.[291] In an Australian context, the author adds, this would be the putative proper law objectively ascertained.[292] The author further supports the application of the *lex situs* to contractual capacity in the context of immovable property.[293]

3.3.1.3.3 Sychold

Sychold is of the opinion that capacity should be governed by either the proper law of the contract or the habitual residence of the incapable party.[294] He rejects the argument that the proper law must be objectively ascertained, independently of any party autonomy. The position should be similar to the situation in respect of the substantive validity of the contract, where party autonomy prevails.[295]

286 Sykes and Pryles (1991: 614), referred to by Davies, Bell and Brereton (2010: 407).
287 The Australian Law Reform Commission (1992: 101), referred to by Davies, Bell and Brereton (2010: 407).
288 Davies, Bell and Brereton (2010: 669).
289 [1909] 2 Ch 129.
290 Davies, Bell and Brereton (2010: 407).
291 Mortensen (2006: 403).
292 Mortensen (2006: 404).
293 Mortensen (2006: 460).
294 Sychold (2007: par 185).
295 *ibid*.

3.3.1.3.4 Sykes and Pryles

Sykes and Pryles concede that, in the common law, the *lex domicilii* may be the governing law in the context of marriage contracts. This legal system should, however, not apply exclusively as this would mean that a contractant would carry the incapacity in terms of the law of domicile with him or her and escape liability in other jurisdictions. Capacity is not status but merely an accompaniment or result of status and it should therefore be governed by the law that governs the transaction.[296]

In respect of non-matrimonial contracts, the proper law of the contract should apply, although there is common-law authority favouring the *lex loci contractus*, namely *Male v Roberts*.[297] At the time of this decision, the authors submit, there was a strong presumption that the *lex loci contractus* was indeed the proper law of the contract. The case is therefore consistent with the view that the proper law of the contract governs capacity.[298] The authors also commend Dicey and Morris' Rule 182[299] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[300] that capacity should be governed by either the proper law of the contract or the personal law, which would mean that an individual shall possess capacity if he or she has such under either law.

The proper law in this context, according to many English authors,[301] must be determined objectively, independent of any express (or tacit) choice of law, so that a contractant may not confer capacity on him- or herself by merely selecting the law of a favourable country. Sykes and Pryles do not support this view. They submit that there is no justification for differentiating between capacity to contract and, for example, the essential validity of a contract. In the latter case, contractants may deliberately select the law of a country which upholds the validity of the transaction, as opposed to the law of a country that does not. There seems to be no explanation why the selection of a legal system may be effective for essential validity but not for capacity. They state:

> "[I]f it is not a true private international law case the choice may not be effective in either instance but in a multistate situation where the law of one of the 'connected' states is chosen it is hard to see why the stipulation should be effective as far as essential validity is concerned but denied effect in regard to capacity."[302]

296 Sykes and Pryles (1991: 344).
297 (1800) 3 ESP 163.
298 as decided in *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680 and *Charron v Montrael Trust Co* (1958) 15 DLR (2d) 240 (Ontario).
299 Collins *et al* (eds) (1987: 1161-1162).
300 Collins *et al* (eds) (2012b: 1865).
301 Collins *et al* (eds) (1987: 1161-1162); and North and Fawcett (1987: 480).
302 Sykes and Pryles (1991: 614).

Further, they submit that the problems that may occur in respect of party autonomy in cases of essential validity and capacity are similar; therefore, analogous rules should be employed.[303] It seems that the authors are therefore supportive of the application of the proper law as such. The proper law is determined by a choice of law by the parties (although it is required that a legal system is chosen with a (close) link to the parties or the contract)[304] or, otherwise, in an objective manner.

Sykes and Pryles submit that the Anglo-Australian rule in respect of contracts relating to immovable property is dissimilar to that advocated by some European and American authors, namely that all issues in this regard are governed by the *lex situs*. Sykes and Pryles assert that contracts involving immovables should in addition be governed by the *lex situs* and the proper law of the contract, subjectively or objectively ascertained (the alternative application of the proper law and the *lex situs*).[305]

3.3.1.3.5 Tilbury, Davis and Opeskin

Tilbury, Davis and Opeskin expressly support the view that, in the context of a commercial contract, contractual capacity should be governed by the proper law of the contract.[306] The other main alternatives, namely the *lex domicilii* and the *lex loci contractus*, cannot be justified as comprehensively as the proper law. The cases in which the *lex domicilii* was applied clearly show the influence of choice of law rules in matrimonial matters, where domicile is an important connecting factor. Cases in which the *lex loci contractus* was applied, on the other hand, show the influence, in a former period, of the *locus contractus* as the determinant of the applicable law in contractual matters.[307] The reason for applying the proper law of the contract,[308] according to the authors, is the impracticality of supposing that the capable contractant has knowledge of his counterpart's incapacity arising under the *lex domicilii*. The proper law referred to here is objectively ascertained, as this will prevent contractants from conferring capacity upon themselves by expressly selecting a foreign legal system.[309]

303 *ibid*.
304 Sykes and Pryles (1991: 614).
305 *ibid*.
306 Tilbury, Davis and Opeskin (2002: 768).
307 Tilbury, Davis and Opeskin (2002: 770).
308 as in *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680, which is discussed in paragraph 3.2.1.1.1.8.
309 Tilbury, Davis and Opeskin (2002: 771).

3.3.1.3.6 The Australian Law Reform Commission

The commission partially supports Dicey and Morris' Rule 182,[310] the predecessor of Dicey, Morris and Collins' current Rule 228.[311] In terms of the commission's interpretation of Rule 182, capacity according to the *lex domicilii*, the law of habitual residence or the proper law of the contract is sufficient to validate a contract. However, according to the commission, domicile is an inappropriate connecting factor in a commercial context. The place of residence of the incapable contractant is preferable.[312] The commission is in favour of the application of the proper law of the contract, which may be subjectively or objectively determined. This view is based on Sykes and Pryles' contention[313] that there is no justification for differentiating between capacity and, for example, essential validity. Contractants may intentionally select the law of a country which upholds the validity of the contract, as opposed to the law of a country that does not. There seems to be no explanation as to why the selection of a legal system may be effective for the purposes of essential validity but not for the purposes of contractual capacity. The commission therefore recommends that capacity in terms of either the alleged incapable contractant's residence or the proper law of the contract should suffice for the validity of a contract.[314]

3.3.1.3.7 Summary

All the Australian authors,[315] as well as the Australian Law Reform Commission,[316] are in favour of the application of the proper law of the contract to contractual capacity. Mortenson[317] employs the technically correct term of "putative proper law" in this regard. The authors have different opinions on how the proper law must be determined. Mortensen[318] and Tilbury, Davis and Opeskin[319] are of the opinion that the proper law must be objectively determined, but Sychold,[320] Sykes and Pryles[321] and the Australian Law Reform Commission[322] would apply the legal system chosen by the parties (the proper law established subjectively) and, only in the absence of such a choice, the proper law objectively ascertained. Sykes and Pryles,[323] however,

310 Collins *et al* (eds) (1987: Rule 182).
311 Collins *et al* (eds) (2012b: 1865).
312 hence, partially supporting Dicey and Morris.
313 Sykes and Pryles (1991: 614) referring to North and Fawcett (1987: 480).
314 The Australian Law Reform Commission (1992: 101). Also see Tetley (1994: 237).
315 Davies, Bell and Brereton (2010: 407); Mortensen (2006: 404); Sychold (2007: par 185); Sykes and Pryles (1991: 614); and Tilbury, Davis and Opeskin (2002: 771).
316 The Australian Law Reform Commission (1992: 101).
317 Mortensen (2006: 404).
318 Mortensen (2006: 404).
319 Tilbury, Davis and Opeskin (2002: 771).
320 Sychold (2007: par 185).
321 Sykes and Pryles (1991: 614).
322 The Australian Law Reform Commission (1992: 101).
323 Sykes and Pryles (1991: 614).

require that a connected legal system be chosen. Davies, Bell and Brereton[324] do not express an opinion on whether the proper law must be objectively or may also be subjectively determined. Sychold[325] and the Australian Law Reform Commission[326] would pair the proper law with the law of habitual residence in the context of an alternative reference rule. Sykes and Pryles,[327] in commending the views of Dicey and Morris[328] would possibly add both the law of habitual residence and the *lex domicilii* to the application of the proper law. None of the Australian authors are in favour of the application of the *lex loci contractus*.

Davies, Bell and Brereton[329] and Mortensen[330] favour the application of the *lex situs* in respect of immovable property. Sykes and Pryles,[331] on the other hand, reject the application of the *lex situs* in respect of immovables in favour of the subjective or objective proper law of the contract, possibly in addition to the *lex domicilii* and the law of habitual residence. As the other authors[332] and the Australian Law Reform Commission[333] do not distinguish between contracts in respect of immovable property and other contracts, they probably also favour the application of the proper law in this regard (whether objectively or also subjectively determined, and whether or not linked to the other alternatively applicable legal systems).

3.3.2 New Zealand

There is no case law from New Zealand dealing specifically with contractual capacity. According to Angelo,[334] capacity will be governed by the law of domicile. The content of domicile is, of course, determined in accordance with the *lex fori*. The author partially cites Rule 209 of Dicey, Morris and Collins[335] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[336] to the effect that capacity according to the proper law may also be sufficient for the existence of a contract. This implies that there may be scope for the application of the proper law to capacity in the New Zealand context.

324 Davies, Bell and Brereton (2010: 407).
325 Sychold (2007: par 185).
326 The Australian Law Reform Commission (1992: 101).
327 Sykes and Pryles (1991).
328 Collins *et al* (eds) (1987: 1161-1162).
329 Davies, Bell and Brereton (2010: 669).
330 Mortensen (2006: 460).
331 Sykes and Pryles (1991: 618).
332 Sychold (2007); and Tilbury, Davis and Opeskin (2002).
333 The Australian Law Reform Commission (1992).
334 Angelo (2012: par 75).
335 Collins *et al* (eds) (2006b: 1621).
336 Collins *et al* (eds) (2012b: 1865).

3.4 North America

3.4.1 Canada (the common-law provinces)

3.4.1.1 The courts

3.4.1.1.1 Charron v Montreal Trust Co[337]

The only common-law Canadian decision concerning contractual capacity is *Charron v Montreal Trust Co*[338] and *in casu* the Ontario Court of Appeal applied the objectively determined proper law of the contract. Peter Charron was originally domiciled in the province of Quebec (Canada) but relocated to Ottawa (Ontario, Canada) in 1906 when he took up employment there. In 1908 he married the plaintiff in Ottawa, where they cohabited until their divorce in 1920. On 21 May 1920, the couple entered into a separation agreement in terms of which Mr Charron was to effect certain payments to the plaintiff. On 1 March 1953 he died in Montreal (Quebec) leaving his entire estate to his five children. It was apparent, however, that for many years prior to Mr Charron's death, no payments were effected in terms of the separation agreement. The plaintiff thus claimed $15 600 against his estate, being the arrears of payments due under the agreement. In defence to this action, it was argued on behalf of Mr Charron's estate, that he lacked the contractual capacity to enter into the separation agreement under the law of his domicile – Quebec.

In the court *a quo*, McRuer CJHC held that the separation agreement was valid and enforceable under Ontarian law and that he did not have to expressly address the issue of capacity.[339] *Charron v Montreal Trust Co* is an appeal by the defendant against the judgment of the Chief Justice that the estate had to effect payment of $15 600 to the plaintiff and carry the costs of the suit.

On appeal, Morden J held that, in respect of marriage and marriage settlements, the *lex domicilii* generally governed capacity. In a Canadian context, however, he continued, there is no clear decision on whether capacity is to be governed by the *lex loci contractus* or *the lex domicilii*.[340] Applying the *lex loci contractus* exclusively is not preferred. If the facts of the case were that the parties were domiciled in Quebec and concluded the contract in Ontario while present there only temporarily, application of the *lex loci contractus* would be incorrect as this would be completely fortuitous.[341] The exclusive application of the *lex domicilii* is also not preferred. In the present case,

337 (1958) 15 DLR (2d) 240 (Ontario).
338 *ibid*.
339 The court also held that the law of Quebec was not applicable to the separation agreement.
340 *Charron v Montreal Trust Co* (*supra*: 244).
341 *ibid*.

the parties concluded their marriage in Ontario and resided there until the date of the agreement in question. It would be inappropriate to apply the *lex domicilii* to determine capacity in this instance.[342] The solution to the problem, the court resolved, was to apply the objective proper law of the contract to capacity.[343] The judge stated:

> "[A] party's capacity to enter into a contract is to be governed by the proper law of the particular contract, that is the law of the country with which the contract is most substantially connected. In this case there is no doubt that the proper law of the agreement was the law of [Ontario],[344] and by that law, neither party to the agreement lacked the necessary capacity."[345]

Morden J agreed with the Chief Justice's decision that the agreement was valid and enforceable in terms of Ontarian law. The defendant therefore had to effect payment to the plaintiff for the mentioned amount.[346]

According to Rafferty *et al*, the proper law referred to in the *Charron* case was the objectively determined proper law, not one chosen by the parties.[347] The reason for this is that contractants may not bestow capacity on themselves by agreeing on a different proper law (different from the law with which the contract is most closely connected) with a more favourable rule regarding capacity.

3.4.1.2 The authors

3.4.1.2.1 Pitel and Rafferty

Pitel and Rafferty emphasise that the rules on contractual capacity remain unclear in Canadian private international law.[348] There are, according to the authors, three possibilities in this regard, namely: the *lex loci contractus*, the law of the country of habitual residence and the putative proper law of the contract. It would appear that the authors regard the latter legal system as the most tenable. One question remains: if a contract contains an express choice of law, would a court apply the chosen law to the issue of capacity? The obvious concern is that contractants could elect an applicable law by which they are capable and in this way avoid the restrictions in another country's law. Applying the putative proper law objectively determined may address this concern, but the alternative approach of utilising the putative proper law including any express choice "is probably more adaptable

342 *ibid.*
343 The court referred to: Cheshire (1957: 221-224); Falconbridge (1954: 383-385); and Morris *et al* (eds) (1958: 769-774).
344 There is a spelling error in the original text; it reads: Ontaario.
345 *Charron v Montreal Trust Co* (*supra*: 244-245).
346 *Charron v Montreal Trust Co* (*supra*: 245).
347 Rafferty *et al* (2010: 756).
348 Pitel and Rafferty (2010: 281).

to the various circumstances".[349] This choice would still have to be *bona fide*, legal and consistent with public policy. The authors add that there is still a possibility of a Canadian court applying the law on capacity from another country as a mandatory rule.[350]

It is generally accepted, the authors add, that the *lex situs* governs the capacity to transfer immovable property, as well as the formal and essential validity of such transfers.[351] In this context, the courts would be inclined to utilise the doctrine of *renvoi* so as to apply the law of the country which the courts of the *situs* would apply and not necessarily the domestic law of the *situs*.[352] It would, after all, be senseless to apply another law, since the courts of the *situs* have ultimate control over the immovable property. A court will usually lack jurisdiction to ascertain title in respect of foreign immovables, so there are few decisions concerning choice of law in this context. Therefore, many of the decisions concerning foreign immovables relate to contracts to transfer the property rather than the transfer itself. There is a distinction between the contract to transfer the property and the transfer itself, the conveyance. The authors submit that in the case of a contract concerning foreign immovable property, the proper law should govern instead of the *lex situs*.[353]

3.4.1.2.2 Walker

Walker indicates that, as in England, the possible legal systems to govern contractual capacity in Canadian private international law are the *lex domicilii*, the *lex loci contractus* and the objective proper law of the contract.[354] She does not support the application of the *lex loci contractus* because this legal system may be fortuitous. She apparently does not favour the *lex domicilii* as a general rule, as she remarks that support for this legal system is drawn from cases that did not concern commercial contracts.[355] Application of the *lex domicilii* would also be contrary to the expectations of the parties.[356] However, the author has no objection against the application of the objectively determined proper law.[357] Perhaps the *lex domicilii* may apply in respect of contracts relating to marriage and the *lex situs* with regard to immovable property.[358]

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349 *ibid*.

350 One could imagine a court applying the *lex domicilii*, the *lex patriae* or even the *lex fori* in this regard.

351 Pitel and Rafferty (2010: 326).

352 as suggested by Dicey, Morris and Collins (Collins *et al* (eds) (2006a: 83)).

353 Pitel and Rafferty (2010: 327), *contra Bank of Africa, Limited v Cohen* [1909] 2 Ch 129.

354 Walker (2005: § 31.4d); and Walker (2006*:* 517). In the most recent update issue, she no longer refers to the *lex loci contractus* as a possible governing legal system (Walker 2005/2014: § 31.5b).

355 Walker (2005: § 31.4d).

356 Walker (2005/2014: § 31.5b).

357 Walker (2005/2014: 31.5b).

358 Walker (2011: 618); Walker (2005: § 31.4d); and see Walker (2006: 517).

3.4.1.2.3 Summary

To summarise, the Canadian authors hold divergent views on contractual capacity. Pitel and Rafferty[359] favour the putative proper law of contract, including an express choice of law if such choice was made *bona fide*, was legal and not inconsistent with public policy. They support the application of the *lex situs* to capacity with regard to contracts involving immovables in general, but in respect of foreign immovable property, the proper law shall govern.[360] Walker[361] seems to reject the application of the *lex domicilii* and the *lex loci contractus* in a commercial context but has no objection against the application of the objectively determined proper law. She possibly, however, favours the *lex situs* in respect of contractual capacity concerning immovable property.[362]

3.4.2 United States of America

3.4.2.1 The courts

3.4.2.1.1 Introduction

In American common law, there is support for both the *lex domicilii* and the *lex loci contractus* governing contractual capacity.[363] As an illustration, reference will be made to the conflicting decisions in *Milliken v Pratt*[364] and *Union Trust Company v Grosman et al*.[365] In as far as immovable property is concerned, reference is made to *Polson v Stewart*.[366]

3.4.2.1.2 Milliken v Pratt[367]

The Pratts were permanent residents of the state of Massachusetts in the United States of America (USA). Mr Pratt, who conducted business in Massachusetts, applied for credit from a partnership established in Maine (USA) to facilitate the purchase of goods from the partnership. The partners would only grant the credit request if Mrs Pratt guaranteed payment. Mr Pratt obtained this guarantee in writing from his wife and mailed it from Massachusetts to the partnership in Maine. After having thus successfully obtained credit, Mr Pratt purchased goods which the partners shipped from Maine to

359 Pitel and Rafferty (2010: 281).
360 Pitel and Rafferty (2010: 326-327).
361 Walker (2005: § 31.4d).
362 Walker (2011: 618); Walker (2005: § 31.4d) and see Walker (2006: 517).
363 Clarence Smith (1952: 446-471); Symeonides (2008b: 227-228); and Van Rooyen (1972: 119).
364 125 Mass 374 (1878).
365 245 US 412 (1918).
366 45 NE 737 (1897).
367 125 Mass 374 (1878). See the discussion by Cramton, Currie, Kay and Kramer (1993: 17-20); Hay, Weintraub and Borchers (2009: 493-496); Lowenfeld (2002: 14-17); Simson (2005: 24-27); Symeonides, Collins Perdue and Von Mehren (1998: 29-32); and Vernon, Weinberg, Reynolds and Richman (2003: 255-258).

Massachusetts. However, Mr Pratt failed to pay for the goods and the partnership accordingly instituted an action in Massachusetts for the enforcement of Mrs Pratt's guarantee. At the time of the purchase of the goods, Mrs Pratt lacked the capacity under Massachusetts law to conclude a contract of suretyship but was capable in terms of the law of Maine.

In deciding which legal system to apply to the issue, the court held that the law of the state where the contract was "made"[368] should govern. The court continued that the contract was concluded in Maine as it "was complete when the guarantee had been received and acted on by the plaintiffs at Portland (Maine), and not before".[369] The court therefore ruled in favour of the plaintiffs as the contract of suretyship was valid (and thus binding) according to the law of Maine. In delivering judgment, Gray CJ expressly rejected the application of the *lex domicilii* to contractual capacity:

> "[I]t is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases would not be done without such delay as would greatly cripple the power of contracting abroad at all."[370]

3.4.2.1.3 Union Trust Company v Grosman et al[371]

While the Grosmans, domiciled in Texas (USA), were temporarily in Illinois (USA), Mr Grosman executed two promissory notes in favour of the plaintiff. At the same time, Mrs Grosman concluded a contract of suretyship for payment as part of the same transaction. In terms of the law of Texas, the contract of suretyship would have been void but in terms of the law of Illinois, the contract was valid. The Federal High Court, through Holmes J, thus had to pronounce on which law was applicable.

In addressing the issue, Holmes J upheld Mrs Grosman's reliance on incapacity. He stated: "It is extravagant to suppose that the [domiciliary] courts … will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a state line long enough to contract."[372] The *lex domicilii* was thus applied (the law of Texas) and the contract was declared void.[373]

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368 *Milliken v Pratt* (*supra*: 375).
369 *Milliken v Pratt* (*supra*: 376). See the commentary by Hay (1994: 196); Hay, Weintraub and Borchers (2009: 496); and Weintraub (2001: 441).
370 *Milliken v Pratt* (*supra*: 382). Also see McDougal, Felix and Whitten (2001: 495); and Scoles, Hay, Borchers and Symeonides (2000: 882).
371 245 US 412 (1918).
372 *Union Trust Company v Grosman et al* (*supra*: 416).
373 See McDougal, Felix and Whitten (2001: 495).

3.4.2.1.4 Polson v Stewart[374]

This early American decision concerned the capacity to conclude a contract for the transfer of immovable property. The finding of the High Court of Massachusetts, through Holmes J, was dissimilar to the decisions of the other cases concerning immovable property discussed in Chapter 3. *In casu*, a woman concluded a contract in her residential state, North Carolina (USA), for the transfer of immovable property situated in Massachusetts (USA). In terms of the *lex domicilii*, she was capable of contracting but in terms of the *lex situs* she lacked capacity. Holmes J nevertheless decided that the contract was valid and therefore applied the *lex domicilii* in preference to the *lex situs*.

3.4.2.1.5 Summary

Milliken v Pratt[375] and *Union Trust Company v Grosman et al*[376] both concern contractual capacity in respect of contracts of suretyship, yet the courts have taken dissimilar views in their judgments. In the former case, the *lex loci contractus* was applied but in the latter, the *lex domicilii*. Further, American courts, as illustrated in *Polson v Stewart*,[377] may be inclined to apply the *lex domicilii* and not the *lex situs* to capacity in cases involving immovable property.

3.4.2.2 Restatement (Second)

The most important contemporary approach to private international law of contract in the United States is the Restatement (Second), as 23 states follow this approach.[378] Five further states[379] could be added to this total as these adhere to the "significant contacts approach", which is highly comparable to that employed in the Restatement in that it also entails taking a variety of connecting factors into consideration. The discussion on choice-of-law methodology in the United States will therefore be limited to the Restatement. There is uncertainty on how precisely the states adhering to these approaches will resolve a particular contract conflict issue. In fact, the Restatement itself, and the courts that follow it, have been described as "equivocal" in designating the applicable law.[380] Nevertheless, the Restatement remains a

374 45 NE 737 (1897).
375 125 Mass 374 (1878).
376 245 US 412 (1918).
377 45 NE 737 (1897).
378 Alaska; Arizona; Colorado; Connecticut; Delaware; Idaho; Illinois; Iowa; Kentucky; Maine; Michigan; Mississippi; Missouri; Montana; Nebraska; New Hampshire; Ohio; South Dakota; Texas; Utah; Vermont; Washington; and West Virginia. See Symeonides (2011: 331). See also Symeonides (2008b: 225). As far as the present author could determine, no distinction is drawn between international and interstate conflicts cases.
379 Arkansas; Indiana; Nevada; North Carolina; and Puerto Rico (the Puerto Rican *Projet* is discussed in Chapter 4). See Symeonides (2011: 32).
380 Symeonides (2008b: 225).

prominent point of departure for choice-of-law analysis.[381] The Restatement operates as follows: the rule intended to apply to a particular issue appears as the first statement. This is generally followed by a secondary statement which sets out the rule that the courts will "usually" apply in given situations.[382]

Paragraph 198 of the Restatement contains the rules applicable to contractual capacity. The primarily applicable rule, § 198(1), states the following: "The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187-188." [383] The secondary rule, in § 198(2), reads as follows: "The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil."[384]

Paragraph 198(1), the primarily applicable rule, in effect states that contractual capacity shall be governed by the law chosen by the parties, as recognised in § 187,[385] if they have in fact done so. § 187 relates to an express choice of law by the parties. In terms of § 187(1), the primarily applicable rule of this provision, if the parties elected the law of a certain state to govern a particular issue, which they were entitled to address in their contract, it shall be applied. In terms of the secondary statement of this provision, § 187(2), where such an issue could not have been addressed in their contract, such as capacity, formalities and substantial validity,[386] the chosen law shall nevertheless apply, unless it holds no substantial relationship to the parties or the contract and no other grounds exist for its election.[387] This law would not apply where it would be contrary to the policy of the state having materially greater interests regarding the particular issue and which would otherwise be the proper law.[388] Paragraph 198(1) therefore, in the first place, provides for the application of the subjectively ascertained proper law.[389]

According to the commentary of the American Law Institute, permitting contractants to elect the law to govern the validity of their contract promotes the primary objectives of contract law, namely, the protection of the justified expectations of the parties and the possibility of predicting their contractual

381 *ibid*. The American authors generally refer to the discussed case law and the Restatement. See, for example, Cramton, Currie, Kay and Kramer (1993); Felix and Whittem (2011); Hay, Weintraub and Borchers (2009); Lowenfeld (2002); McDougal, Felix and Whitten (2001); Scoles, Hay, Borchers and Symeonides (2000); Simson (2005); Symeonides, Collins Perdue and Von Mehren (1998); Vernon, Weinberg, Reynolds and Richman (2003); and Weintraub (2001).

382 The American Law Institute (1971: VIII).

383 The American Law Institute (1971: 632).

384 *ibid*.

385 See the American Law Institute (1971: 561).

386 The American Law Institute (1971: 564).

387 § 187(2)(a).

388 § 187(2)(b).

389 See Symeonides (2008b: 228).

rights and duties accurately.[390] Therefore, the applicable law subjectively ascertained secures certainty and predictability. Granting contractants this power of choice is also consistent with the fact that individuals are at liberty to determine the nature of their contractual obligations. This does not make legislators of them. The forum selects the law applicable by applying its own choice-of-law rules. It may utilise a choice-of-law rule which provides that the law of the state elected by the parties shall be applied to determine the validity of the contract. The law of the state chosen by the parties is applied because this is the outcome demanded by the forum's choice-of-law rule and not on account of the contractants being legislators.[391] The power of choice would obviously enable contractants to evade prohibitions that exist in the state that would otherwise be the proper law of the contract. In American private international law, according to the Restatement, however, the demands of certainty, predictability and convenience enjoy priority in this regard;[392] therefore parties to a contract should have the power to choose the applicable law.

In the absence of such a choice, the proper law, in terms of paragraph 198(1), shall be determined with reference to § 188.[393] According to § 188(1), the primarily applicable rule in this regard, the proper law of a contract shall be the law of the state that has the most significant relationship to the parties and the contract, having particular regard to the relevant factors enunciated in § 6.[394] The connecting factors ("contacts"), in terms of the secondary statement, § 188(2), to be considered in applying the principles of § 6 to ascertain the proper law (which would be the same or similar in terms of the "significant contacts approach") include: the *locus contractus*; the place of negotiating the contract; the *locus solutionis*; the location of the subject matter of the contract; and the domicile, habitual residence, nationality, the place of incorporation and place of business of the contractants. The contacts will have to be evaluated according to their comparative importance with regard to the particular issue.[395] Paragraph 198(1) therefore also provides for the application of the objectively determined proper law in the absence of a permissible subjectively determined *lex causae*.

390 The American Law Institute (1971: 565).
391 *ibid.*
392 *ibid*.
393 See the American Law Institute (1971: 575). Also see Symeonides (2008b: 228).
394 These factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied" (the American Law Institute (1971: 10)).
395 The American Law Institute (1971: 575).

These rules focus on the protection of the justified expectations of the contractants,[396] a factor which is of considerable importance in respect of issues relating to the validity of a contract, such as capacity.[397] Parties to a contract will generally expect the contractual obligations to be binding upon them. The application of the law of a state which would invalidate the contract is undesirable as this would frustrate their expectations. Of course, the law of such a state may nevertheless be applied where the interests of this state, in applying the invalidating rule, substantially outweigh the value of protecting the justified interests of the parties.[398]

Each connecting factor or contact in § 188(2) carries a specific weight in determining the proper law of the contract.[399] According to the American Law Institute, the *locus contractus* on its own is rather insignificant. Where issues involving the validity of the contract are governed by this legal system, it will apply by virtue of the fact that it coincides with other contacts.[400] This suggests that the *lex loci contractus* will generally not apply independently, but that the *locus contractus* is one of the connecting factors to be taken into consideration. In other words, the law of the state where the contract is concluded will govern, for example, where it is also the law of the place of negotiation and the *lex loci solutionis* or the *lex situs* and the law of domicile of the parties. Of course, the *locus contractus* will not be taken into consideration where it is purely fortuitous and holds no relation to the parties or the contract.[401]

According to the American Law Institute, the place of negotiating the contract is a significant connecting factor. This is because the state where the negotiations were held and agreement was reached has an obvious interest in the matter. This connecting factor plays a lesser role where the contractants do not meet personally but enter into negotiations from different states by mail or telephone.[402]

The state where the performance is to be effected has an obvious interest in the nature of the performance and the party who must perform. Where the contractants are to perform in the same state, this state will be so closely related to the contract and the parties that it will normally be the proper law, even in respect of issues not strictly associated with performance. The *locus solutionis* will, however, not be taken into consideration where it is uncertain or unknown at the moment of contracting or when the performance is to be

396 The values of certainty, predictability and uniformity of result underlie the need for protecting the justified expectations of the parties. See the American Law Institute (1971: 576).
397 The American Law Institute (1971: 577).
398 *ibid*.
399 The American Law Institute (1971: 579).
400 The American Law Institute (1971: 580).
401 *ibid*.
402 The American Law Institute (1971: 580).

divided approximately equally between two or more states with different rules on the particular issue.[403] Paragraph 188(3) states that "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied".[404]

Where the contract involves movable and immovable property, the location of this property is significant. The state where the property is situated will have a natural interest in transactions concerning it. The parties themselves will also regard the location of the property as important. Where the property is the principle subject matter of the contract, it can be assumed that the parties reasonably expected the law of the state where the property is situated to govern numerous issues arising from the contract.[405]

The place of domicile, habitual residence or nationality and the place of incorporation and the place of business of the parties are all factors indicating an enduring relationship to the parties. It may be deduced from the discussion of paragraph 198(2) below that an individual at all times maintains a close relationship with his or her personal law.[406]

The proper law of the contract must be determined with reference to certain presumptions in § 189-197.[407] For instance, contracts of sale of movable property (chattels) will usually be governed by the *lex loci solutionis* in respect of delivery.[408]

Paragraph 198(2), the secondary statement, in other words, the rule customarily followed by the courts, merely states that where a contractant is capable in terms of his or her domiciliary law, he or she shall be regarded as possessing contractual capacity.[409] Protection of the incapable contractant is the focal point of the rules concerning incapacity.[410] The rationale behind paragraph 198(2) is thus that, in these circumstances, a contractant's law of domicile has determined that he or she is not in need of the protection which a rule of incapacity would provide. He or she should therefore be regarded as capable of commercial interaction.[411] Where a contractant's domiciliary law regards him or her as capable, there can be little reason why the law of another state should apply that would afford him or her protection and would lead to the invalidation of the contract. This would in any event be

403 *ibid.*
404 except as otherwise stipulated in §§ 189-199 and 203. See the American Law Institute (1971: 575).
405 The American Law Institute (1971: 581).
406 The American Law Institute (1971: 581).
407 The American Law Institute (1971: 586-632).
408 § 191, discussed by the American Law Institute (1971: 594-600).
409 See Born (1996: 673). Also see Symeonides (2008b: 228).
410 The American Law Institute (1971: 632).
411 *ibid.*

contrary to the parties' expectations. The rule should only be deviated from in exceptional circumstances, for example, where a contractant is habitually resident in a state where he is incapable but his relationship to the state of his or her domicile is rather insignificant.[412]

Paragraph 198 also applies to contracts involving immovable property. The official commentary in respect of this paragraph states that the "capacity to make a contract for the transfer of an interest ... in land ... is determined by the law selected by application of the rule of this Section and of the rules of § 189".[413] As such, the contractual capacity of parties to conclude contracts involving immovable property shall in principle be governed by the provisions in paragraph 198(1) and (2). This rule should be applied in conjunction with § 189, which concerns contracts for the transfer of interests in land. According to paragraph 189, which contains no secondary statement, the validity of a contract to transfer interests in immovables, in the absence of an effective choice of law by the parties, shall be governed by the *lex situs*.[414] This is interpreted to mean that the provision in § 198(1), read with paragraphs 187 and 198(2), is applicable to the capacity to conclude contracts relating to immovable property. Where the applicable law has been elected by the parties, as described in § 187, this law shall govern capacity in respect of immovables. Where the parties have not chosen a legal system to govern the contract, the *lex situs* shall apply and not the objectively determined proper law. The objective proper law may, however, be applicable in the alternative. For instance, when the contract would be invalid in terms of the *lex situs* but valid according the objectively determined proper law, then the latter law shall apply.[415] The objective proper law shall, however, not apply where the value of protecting the parties' expectations is outweighed by the interest of the *situs* state in applying its invalidating rule. Also, if a state, other than that indicated by the objective proper law or the *lex situs*, has a substantial interest in having its law applied, then the law of this state shall be applicable.[416] Therefore, according to the Restatement (Second), the contractual capacity to conclude contracts in respect of immovable property may be governed by the subjectively or objectively ascertained proper law, the *lex domicilii* and the *lex situs*.

Numerous factors justify the rule in favour of the law of the location of the immovable property. These factors closely resemble those discussed under the importance of the *situs* of the subject matter above,[417] except that here

412 *ibid.*
413 The American Law Institute (1971: 634).
414 See McDougal, Felix and Whitten (2001: 579). Although the rule concerns "validity", its scope is broad as it applies to such issues "as whether a married woman has capacity to sell or lease her interests in land" (the American law Institute (1971: 587)).
415 The American Law Institute (1971: 588).
416 *ibid.*
417 See the text at note 405.

the emphasis is on the nature of the property. The state where the property is situated has a natural interest in contracts concerning it, especially since it is immovable in nature.[418] It is also assumed that, because the immovable property is the subject matter of the contract, the parties would expect the *lex situs* to govern several issues arising from the contract. The rule promotes the choice-of-law values of certainty, predictability, uniformity of decision and simplicity in determining the proper law.[419]

The Restatement (Second), the majority approach in American private international law of contract, therefore applies the proper law of the contract (subjectively and objectively ascertained) and the *lex domicilii* to capacity in respect of movable and immovable property (the alternative application of the proper law and the *lex domicilii*). In respect of immovable property, the *lex situs* must be added to the list.

The legal position in Louisiana and Oregon and the proposal in the Puerto Rico *Projet* will be discussed in Chapter 4.

3.5 The Far East

3.5.1 India

3.5.1.1 Introduction

As is the position in the other common-law countries discussed above, in India the issue of which law applies to contractual capacity is not clear.[420] It is certain, however, that the choice lies between the *lex domicilii*, the *lex loci contractus*, the proper law of the contract and the *lex situs*.[421]

3.5.1.2 The courts

3.5.1.2.1 Early case law

There are two early Indian cases (*Kashibadin v Schripat*[422] and *Lachmi v Fateh*)[423] where the *lex domicilii* was applied by virtue of Section 11 of the Indian Contract Act of 1872.

418 The American Law Institute (1971: 588).
419 *ibid.*
420 Diwan and Diwan (1998: 523); and Agrawal and Gupta (2003: par 202).
421 Diwan and Diwan (1998: 523) assert that the *lex loci contractus* may also be seen as a possible governing legal system but they discard it because of being "least justified on principle."
422 ILR (1891) 19 Bom 697, as referred to by Agrawal and Gupta (2003: par 202) and Diwan and Diwan (1998: 523).
423 ILR (1902) 25 All 195, as referred to by Agrawal and Gupta (2003: par 202).

3.5.1.2.2 TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors[424]

VPS Mohammed Hussain, the first defendant, a merchant conducting business in Colombo (Ceylon; today Sri Lanka), became a client of TNS Firm, the plaintiff, a company in Ceylon, in January 1923. Besides purchasing rice from TNS Firm, the first defendant also entered into loan agreements with the firm. By 1 May 1923, the balance due to the plaintiff exceeded Rs 15000. The debt was never settled and the plaintiff sued the first defendant for this outstanding amount. The second defendant was included in the proceedings on the grounds that he was the previous endorsee of certain bills of exchange handed to the plaintiff by the first defendant's agents as security. The court *a quo* granted an order against the first defendant but dismissed the suit against the second. The court was convinced that the second defendant was a minor and lacked the capacity to contract at the time of the transaction. On appeal, the High Court of Madras, per Ramesam J, had to pronounce on *inter alia*, the issue of the second defendant's capacity, more particularly, whether he was exempt from liability as a result of incapacity.

It was apparent to the court that the second defendant lacked capacity in terms of the law of Ceylon, the *lex loci contractus*, but was capable according to Indian law, the *lex domicilii*. Ramesam J thus had to decide which legal system was applicable to contractual capacity in this context. He held that exception 1 to Dicey's Rule 158 was relevant in this matter.[425] Also, although previously authority predominantly favoured the application of the *lex domicilii* to capacity, [426] "as to ordinary mercantile contracts the preponderance now seems to be the other way".[427] Ramesam J was obviously referring to the application of the *lex loci contractus*. With further reference to *Sottomayer v De Barros (2)*, in which the *lex loci contractus* was applied,[428] he arrived at the conclusion that the second defendant was exempted from liability due to the incapacity under the law of Ceylon.[429] Ramesam J thus applied the *lex loci contractus* to contractual capacity, confirming the decision of the court *a quo*.

3.5.1.2.3 Nachiappa Chettiar v Muthu Karuppan Chettiar[430]

In casu a dispute arose between the Chettiar brothers, Nachiappa and Muthu Karruppan, regarding the alienation of immovable property situated in Ceylon as per a bequest in their father's will. The issue particularly was whether

424 AIR 1933 Mad 756.
425 Berriedale Keith (ed) (1927: 599).
426 with reference to *Cooper v Cooper* (1888) 13 App Cass 88.
427 *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* (*supra*: par 24).
428 Although the incorrect reference is provided (namely: 1897), the court was clearly referring to *Sottomayer v De Barros (2)* (1879) 5 PD 94.
429 *ibid.*
430 AIR 1946 Mad 398.

their father, Annamalai Chettiar, had the capacity to dispose of property that belonged to the joint family in favour of one of his sons, the respondent, Muthu Karruppan. In an *obiter dictum*, the High Court of Madras pronounced on the capacity to contract in respect of immovables.

The court, through Rajamannar J, held that it is a well-established rule that "all rights over and in relation to an immovable (land) are, subject to certain exceptions, governed by the law of the country where the immovable is situate (*lex situs*)".[431] Consequently, he added that "a person's capacity to alienate an immovable by sale or mortgage, *inter vivos*, or to devise an immovable, or to acquire, or to succeed to an immovable is governed by the *lex situs*".[432]

3.5.1.2.4 Technip Sa v Sms Holding (Pvt) Ltd & Ors[433]

In casu, Pal J had to pronounce on whether Technip, a company incorporated in France, had acquired control of South East Asia Marine Engineering and Construction Ltd (SEAMEC), a company incorporated in India, in April 2000 or in July 2001. The date of the acquisition was important as this concerned the price of the shares payable to the respondents, the shareholders of SEAMEC. The Supreme Court stated in passing that issues of capacity are in principle governed by the *lex domicilii*, except where the application of this legal system would be contrary to public policy.[434] This is, of course, not binding on lower courts since it is merely *obiter dictum* and may at most serve as persuasive authority. Although this is the most recent case on the issue of contractual capacity, it is unclear how the *dictum* may influence future decisions.

3.5.1.2.5 Summary

Judicial opinion in India regarding the question of which legal system should govern contractual capacity is not uniform. There is support for the application of the *lex domicilii*[435] and the *lex loci contractus*[436] and, for the purposes of immovable property, the *lex situs*.[437] It remains to be seen what influence the Supreme Court's *obiter dictum* in *Technip Sa v Sms Holding (Pvt) Ltd & Ors*[438] in favour of the *lex domicilii* will have on the lower courts.

431 *Nachiappa Chettiar v Muthu Karuppan Chettiar* (*supra*: par 32).
432 *Nachiappa Chettiar v Muthu Karuppan Chettiar* (*supra*: par 33).
433 [2005] 60 SCL 249 SC.
434 *Technip Sa v Sms Holding (Pvt) Ltd & Ors* (*supra*: 4).
435 *Kashibadin v Shripat* ILR (1891) 19 Bom 697; and *Lachmi v Fateh* ILR (1902) 25 All 195.
436 *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756.
437 *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.
438 [2005] 60 SCL 249 SC.

3.5.1.3 The authors

3.5.1.3.1 Agrawal and Singh

Capacity in respect of non-commercial contracts, according to the authors and rather different from other common law authority, should be governed by the putative proper law of the contract. Where such a contract relates to immovable property, the *lex situs* should be applied.[439]

In the case of commercial contracts, capacity may be governed by the *lex loci contractus*, the *lex domicilii*, the proper law of the contract or the *lex situs*.[440] The authors emphasise that there is Indian case law applying the *lex domicilii*[441] and the *lex loci contractus*[442] to capacity (also the *lex situs* in respect of immovables),[443] but not in favour of the application of the proper law doctrine.[444] Indian private international law, the authors add, should be taken as settled on the issue in favour of the *lex loci contractus*. The authors seem to maintain this view despite the substantial criticism the application of this legal system is subjected to by the Indian authors.[445] For instance, a contractant may evade the incapacity by simply concluding the contract in a country where he or she would possess contractual capacity. Also, where the *locus contractus* is temporary, there is no justification on principle for applying the *lex loci contractus*.[446]

3.5.1.3.2 Diwan and Diwan

Diwan and Diwan submit that all the common-law cases (including Indian decisions) that favoured the *lex domicilii* indeed involved status, particularly matrimonial status. The *lex domicilii* was then applied to commercial contracts by way of analogy. However, according to the authors, it is generally accepted that the *lex domicilii* governing capacity in commercial contracts is entirely unacceptable.[447]

The same can be said regarding the *lex loci contractus*, especially when considering the objections to the exclusive application of this legal system. First, a contractant may avoid incapacity by simply selecting a place of contracting

439 Agrawal and Singh (2010: par 201).
440 Agrawal and Singh (2010: par 201A). Also see Agrawal and Gupta (2003: par 201).
441 with reference to *Kashibadin v Shripat* ILR (1891) 19 Bom 697.
442 with reference to *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756.
443 with reference to *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.
444 Agrawal and Singh (2010: par 202). Also see Agrawal and Gupta (2003: par 202).
445 Agrawal and Singh (2010: par 203). Also see Agrawal and Gupta (2003: par 203).
446 Agrawal and Singh (2010: par 203). Also see Diwan and Diwan (1998: 524); and Agrawal and Gupta (2003: par 203).
447 Diwan and Diwan (1998: 523), referring to Dicey and Morris (undated) 745. The authors are probably referring to Morris *et al* (eds) (1967).

where he or she is capable. Secondly, the *lex loci contractus* would be inadequate where the *locus contractus* is temporary or fortuitous.[448]

The authors find the application of the proper law of the contract, objectively ascertained, the most appropriate approach. The proper law should not be subjectively determined as this would allow a contractant to confer capacity upon himself by merely choosing a favourable legal system.[449] The authors concur with Dicey and Morris[450] in this regard that the objective proper law would provide for situations where a contractant is incapable in terms of the *lex loci contractus* but capable according to the *lex loci solutionis*. The authors here refer to the common-law position, where the *lex loci solutionis* (the law of the country of the performance) was usually chosen as the proper law of the contract.[451] The objective proper law approach, of course, involves the application of the legal system which has the most substantial connection with the contract and application thereof would be "correct on principle and … in accordance with justice and convenience".[452]

The authors submit that the Indian private international law rule on capacity in respect of immovable property is clear: the capacity to buy and sell immovable property is governed by the *lex situs* of the property.[453]

3.5.1.3.3 Summary

The views held by the Indian authors are rather dissimilar. Diwan and Diwan[454] expressly reject the (exclusive) application of both the *lex domicilii* and the *lex loci contractus* to contractual capacity but support the objective proper law of the contract.[455] According to these authors, it is settled Indian law that the *lex situs* shall govern capacity in respect of contracts relating to immovable property.[456] Agrawal and Singh,[457] on the other hand, distinguish between non-commercial and commercial contracts. Capacity in respect of non-commercial contracts should be governed by the putative proper law. When this contract relates to immovable property, the *lex situs*

448 Diwan and Diwan (1998: 524), referring to Morris (1967: 744).
449 Diwan and Diwan (1998: 524).
450 Morris *et al* (eds) (1967: 745).
451 For the position in South African law today, see Chapter 2, paragraph 2.2.
452 Diwan and Diwan (1998: 524).
453 Diwan and Diwan (1998: 407). The authors add that, therefore, if an individual is incapable in terms of the law of the country where the property is situated then any *conveyance* of such property anywhere in the world would be invalid. But conveyance will of course never be done in a country other than the *situs*. The statement may, however, be applicable to a foreign court order in this regard.
454 Diwan and Diwan (1998: 523-524).
455 Diwan and Diwan (1998: 524).
456 Diwan and Diwan (1998: 407).
457 Agrawal and Singh (2010: par 201).

applies.[458] In the case of commercial contracts, capacity will be governed by the *lex loci contractus*, despite authoritative criticism in this regard.[459]

3.5.2 Malaysia

3.5.2.1 Introduction

As in India and other common-law systems, there is a lack of clarity on the question of which law governs contractual capacity. Nevertheless, according to the authors, the choice of a governing law lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.[460] It is uncertain what the position is in respect of immovable property.

No reported Malaysian decisions could be found dealing specifically with contractual capacity.[461] Malaysian conflicts authors have, however, expressed some views in this regard.

3.5.2.2 The authors

3.5.2.2.1 Hickling and Wu

Hickling and Wu believe that, in a Malaysian context, the *lex domicilii* should be disregarded as a possible governing law, but that this is not true in respect of the *lex loci contractus*.[462] According to the authors, the latter legal system remains a compelling choice in addressing capacity.[463]

It does seem, however, that the authors in final instance support the approach enunciated in Dicey and Morris' Rule 147[464] (the predecessor of Rule 228 by Dicey, Morris and Collins)[465] that a contractant should be regarded as having capacity if he is capable in terms of the proper law of the contract, the *lex domicilii* or the law of residence. This view is "liberal and realistic".[466] The authors also refer to Canadian case law, [467] where the proper law of the contract was applied to capacity.[468]

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458 *ibid*.
459 Agrawal and Singh (2010: par 203).
460 Hickling and Wu (1995: 170-171).
461 Hickling and Wu (1995) do not refer to any cases decided by the Malaysian courts.
462 Hickling and Wu (1995: 170-171).
463 Hickling and Wu (1995: 170-171) with reference to the early English cases *Male v Roberts* (1800) 3 ESP 163 and *Schmidt & Ors v Spahn* (1863) Leic 229.
464 Collins *et al* (eds) (1980: 778).
465 Collins *et al* (eds) (2012b: 1865).
466 Hickling and Wu (1995: 171).
467 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario).
468 They also refer to the American decision in *Milliken v Pratt* 125 Mass 374 (1878). However, in the discussion above (see par 3.4.2.1.2), it was illustrated that the court applied the *lex loci contractus* to the issue of capacity.

3.5.3 Singapore

3.5.3.1 Introduction

No reported Singaporean decisions could be found specifically addressing contractual capacity.[469] Being a common-law system, the choice in the private international law of Singapore nevertheless lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. It is uncertain what the position is in respect of immovable property.[470]

3.5.3.2 The authors

3.5.3.2.1 Tan

In addressing the issue of which legal system should be applied to contractual capacity, the conflicting considerations are the following: as a matter of protection, the *lex domicilii* should govern, but to facilitate contracting, the proper law should be decisive. According to Tan, this conflict is difficult to resolve.[471]

In respect of the proper law as an applicable legal system, the author explains that if an individual may be incapable of concluding a contract by reason of, for instance, minority, it would be arguing in a circle to apply "the proper law of the contract" to determine whether it is void. The circularity may be avoided by applying the putative proper law, as objectively determined.[472]

In the final instance, the author supports the approach advocated by Dicey and Morris in Rule 182[473] (now Rule 228 of Dicey, Morris and Collins),[474] which he refers to as "the alternative reference test", namely that an individual shall have capacity if he is capable in terms of the (putative) proper law (as objectively determined), the *lex domicilii* or the law of habitual residence.[475]

469 Tan (1993: 471) does not refer to any decisions of the courts of Singapore.
470 Tan (1993: 471).
471 *ibid*.
472 *ibid*.
473 Collins *et al* (eds) (1987: 1202-1207).
474 Collins *et al* (eds) (2012b: 1865).
475 Tan (1993: 472).

3.6 Africa[476]

3.6.1 Ghana

Oppong[477] argues that the proper law should govern contractual capacity in Ghanaian private international law.[478] The application of the *lex domicilii*, the *lex loci solutionis* or the *lex loci actus* may lead to arbitrary results. He states: "The most closely connected test takes account of all connecting factors. It is more likely to lead to an outcome consistent with the expectations of the parties."[479] He argues that, although the courts should take account of the choice of law clause in the contract, "it should not be allowed to prevail or exclusively govern the issue of capacity to contract. Allowing choice of law agreements to supersede other connecting factors would enable parties to evade limitations imposed on them by national laws."[480] It seems that the objectively determined proper law usually has priority over the subjectively determined proper law if they do not coincide, but it remains unclear when account must nevertheless be taken of a choice of law clause in these circumstances.

3.6.2 Nigeria

No reported Nigerian decisions could be found specifically addressing the law applicable to contractual capacity. The Nigerian conflicts author, Agbede, has expressed some views on the issue.[481] He draws a distinction between non-commercial and commercial contracts. He submits that in the case of the former the *lex domicilii* should apply[482] but in the case of the latter, the proper law of the contract.[483] It is settled law in Nigeria, he continues, that the contractual capacity for the disposition of interests in immovable property, either *inter vivos* or *mortis causae*, is governed by the *lex rei sitae*.[484]

476 The legal position in South Africa is discussed in Chapter 2.

477 Oppong (2012: pars 92-94); and Oppong (2013: 142).

478 According to a decision of the courts in Ghana, the proper law of the contract governs the question whether a natural person has the capacity to bind a company that is not yet incorporated: see *Jadbranska Slobodna Plovidba v Oysa Ltd* [1979] GLR 129; 1978 (2) ALR Comm 108, as discussed by Oppong (2012: pars 92-93).

479 Oppong (2012: par 94).

480 *ibid*.

481 Agbede (2004: par 73).

482 According to the author, while this legal system "governs most aspects of capacity to enter into legal relations its application on [the] issue of capacity is not exclusive" (Agbede (2004: par 75)).

483 He also makes the sweeping statement that in civil-law systems "most problems of capacity are governed by a single law – the *lex patriae*" (Agbede (2004: par 74)). This statement is, however, clearly incorrect, as illustrated in Chapter 4.

484 Agbede (2004: par 75), with particular reference to Rule 115 of Dicey and Morris (Collins *et al* (eds) (2000: 958).

3.7 Summary

In the case law from the common-law countries, as discussed, support may be found for the *lex domicilii*,[485] the *lex loci contractus*[486] and the objective proper law of the contract[487] to govern contractual capacity. In respect of immovable property, the *lex situs*[488] and the *lex domicilii*[489] are applied. It is apparent that the courts do not draw a clear distinction between commercial and non-commercial matters. For instance, although the *lex domicilii* was applied predominantly in non-commercial matters,[490] there are also two decisions concerning commercial issues where the *lex domicilii* was held to govern capacity,[491] as well as an *obiter dictum* of the Indian Supreme Court in this regard.[492] Also, although the *lex loci contractus* predominantly featured in cases concerning commercial contracts,[493] it was applied in one decision of the English Probate Division which concerned a non-commercial matter.[494] The proper law of the contract (objectively ascertained) was applied in commercial[495] and non-commercial contexts.[496] There is one English decision where the court refrained from indicating the law applicable to capacity in a commercial context.[497]

485 *Baindail v Baindail* [1946] P 122; *Cooper v Cooper* (1888) 13 App Cass 88; *De Virte v MacLeod* (1869) 6 SLR 236; *Kashibadin v Schripat* ILR (1891) 19 Bom 697; *Lachmi v Fateh* ILR (1902) 25 All 195; *Obers v Paton's Trustees* (1897) 24 R 719; *Polson v Stewart* 45 NE 737 (1897); *Sottomayor v De Barros (1)* (1877) 3 PD 1; and *Union Trust Company v Grosman et al* 245 US 412 (1918). Regard must also be had to the *obiter* remark by Pal J in *Technip Sa v Sms Holding (Pvt) Ltd & Ors* [2005] 60 SCL 249 SC at 4.

486 *Male v Roberts* (1800) 3 ESP 163; *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773; *Milliken v Pratt* 125 Mass 374 (1878); *Sottomayer v De Barros (2)* (1879) 5 PD 94; and *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756. Also see the comments by Lord Greene MR in *Baindail v Baindail* (*supra*: 128).

487 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario); *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67; *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680.

488 *Bank of Africa, Limited v Cohen* [1909] 2 Ch 129; *Gregg v Perpetual Trustee Company* (1918) 18 SR (NSW) 252; and *Nachiappa Chettiar v Muthu Karrupan Chettiar* AIR 1946 Mad 398.

489 *Polson v Stewart* (*supra*).

490 *Baindail v Baindail* (*supra*); *Cooper v Cooper* (*supra*); *De Virte v MacLeod* (*supra*); *Obers v Paton's Trustees* (*supra*); and *Sottomayor v De Barros (1)* (*supra*).

491 *Union Trust Company v Grosman et al* (*supra*); and *Polson v Stewart* (*supra*).

492 *Technip Sa v Sms Holding (Pvt) Ltd & Ors* (*supra*: 4) per Pal J.

493 *Male v Roberts* (*supra*); *McFeetridge v Stewarts & Lloyds* (*supra*); *Milliken v Pratt* (*supra*); and *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* (*supra*).

494 *Sottomayer v De Barros (2)* (*supra*).

495 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (*supra*); and *The Bodley Head Ltd v Flegon* (*supra*).

496 *Charron v Montreal Trust Co* (*supra*).

497 *Republica De Guatemala v Nunez* [1927] 1 KB 669 (CA).

The proper law of the contract is by far the most popular legal system to be proposed by the authors in jurisdictions without codified rules in respect of contractual capacity, either as the sole legal system or as part of an alternative reference rule in this regard. The term "proper law" in the context of contractual capacity should be understood to refer to the putative proper law. If one of the parties did not have the capacity to conclude a contract, no contract will come into existence. The proper law as applicable to contractual capacity must therefore be the legal system that would have been the proper law of the contract if it actually came into existence. The putative proper law will then determine whether the contract was in fact concluded.[498] A minority of authors, such as Agrawal and Singh,[499] Collier,[500] Crawford and Carruthers,[501] Hill and Chong,[502] Mortensen,[503] O'Brien,[504] Pitel and Rafferty,[505] and Tan,[506] indeed employ the technically correct term "putative proper law".

There is a difference of opinion amongst the authors as to whether the proper law of the contract must be determined objectively or whether a choice of law should be taken into account. Authors as Carter,[507] Clarkson and Hill,[508] Crawford and Carruthers,[509] Dicey, Morris and Collins,[510] Diwan and Diwan,[511] Hill and Chong,[512] McClean and Beavers,[513] Tilbury, Davis and Opeskin,[514] and Walker[515] are of the opinion that the proper law must be determined objectively. Sychold[516] and the Australian Law Reform Commission[517] would apply the proper law either subjectively or objectively determined. This is also the position under the Restatement (Second).[518] According to Collier,[519] a choice of law may be taken into account if it was not made

498 See for example Collier (2001: 209-210).
499 Agrawal and Singh (2010: par 201) in respect of non-commercial contracts.
500 Collier (2001: 209-210).
501 Crawford and Carruthers (2006: 437)
502 Hill and Chong (2010: 551).
503 Mortensen (2006: 404).
504 O'Brien (1999: 319).
505 Pitel and Rafferty (2010: 281).
506 Tan (1993: 472).
507 Carter (1987: 24).
508 Clarkson and Hill (2011: 250).
509 Crawford and Carruthers (2006: 437).
510 Collins *et al* (eds) (2012b: 1869).
511 Diwan and Diwan (1998: 524).
512 Hill and Chong (2010: 551).
513 McClean and Beevers (2009: 386).
514 Tilbury, Davis and Opeskin (2002: 771).
515 Walker (2005/2014: § 31.5b).
516 Sychold (2007: par 185).
517 The Australian Law Reform Commission (1992: 101).
518 The American Law Institute (1971: § 187 and § 188).
519 Collier (2001: 209-210).

in order to confer capacity. Pitel and Rafferty[520] are of the opinion that only an express choice of law may be taken into account; the choice of law must also be *bona fide*, legal and not in contravention of public policy.[521] According to Sykes and Pryles,[522] the parties are only allowed to choose the law of a connected state. Oppong[523] states that a choice of law must be taken into consideration but should not prevail or apply to the matter exclusively.

Various authors favour the sole application of the proper law to contractual capacity (at least as far as commercial contracts are concerned); they include Agbede,[524] Davies, Bell and Brereton,[525] Diwan and Diwan,[526] Mortensen,[527] O'Brien,[528] Oppong,[529] Pitel and Rafferty,[530] and Tilbury, Davis and Opeskin.[531] However, more writers would apply the proper law as part of an alternative reference rule. A combination of the proper law and the law of domicile is advocated by Carter,[532] Clarkson and Hill[533] and Crawford and Carruthers.[534] This is also the position in the Restatement (Second).[535] Sychold[536] and the Australian Law Reform Commission[537] favour the application of the proper law together with the law of habitual residence. Dicey, Morris and Collins[538] are of the opinion that the proper law should be applied together with "the law of domicile and residence" ("the personal law"). It is not clear whether a person has to be domiciled and resident in the same country for the personal law to apply or whether the law of domicile and the law of residence are both applicable legal systems. The proposal by the authors is nevertheless subscribed to by authors as Hill and Chong,[539]

520 Pitel and Rafferty (2010: 281).
521 Briggs, who supports the subjective proper law of the contract, similarly asserts that it could be excluded on the basis of public policy (Briggs (2014: 583, 596, 615-616 and 948-949)).
522 Sykes and Pryles (1991: 614).
523 Oppong (2012: par 94).
524 Agbede (2004: par 74).
525 Davies, Bell and Brereton (2010: 407).
526 Diwan and Diwan (1998: 524).
527 Mortensen (2006: 404).
528 O'Brien (1999: 319).
529 Oppong (2012: par 94).
530 Pitel and Rafferty (2010: 281).
531 Tilbury, Davis and Opeskin (2002: 771).
532 Carter (1987: 24).
533 Clarkson and Hill (2011: 250).
534 Crawford and Carruthers (2006: 437). *Cf* Angelo (2012: par 75); and Collier (2001: 209-210).
535 The American Law Institute (1971: § 198(2), § 187 and § 188).
536 Sychold (2007: par 185).
537 The Australian Law Reform Commission (1992: 101).
538 Collins *et al* (eds) (2012b: 1865).
539 Hill and Chong (2010: 551).

and McClean and Beevers.[540] Hickling and Wu[541] and Tan[542] are in favour of the simultaneous application of the proper law, the law of domicile and the law of habitual residence.

Anton and Beaumont[543] and Agrawal and Singh[544] would apply the *lex loci contractus* as the sole applicable legal system in respect of ordinary commercial contracts.[545] Dicey, Morris and Collins[546] and Clarence Smith[547] add the *lex loci contractus* as an applicable legal system in specific circumstances. According to Dicey, Morris and Collins, this legal system must apply in the alternative (together with the proper law and the law of domicile and residence) if both parties were in the same country at the time of conclusion of the contract, unless fault was present on the part of the contract-assertor in that he or she was aware of the incapacity in terms of the proper law or the law of domicile and residence, or was not aware thereof as a result of negligence. Clarence Smith is of the opinion that the *lex loci contractus* should only be applied in the alternative (that is: in addition to the *lex domicilii*) if no fault was present on the part of the contract-assertor in that he or she did not know and could not reasonably be expected to know that the counterpart was incapable according to his or her *lex domicilii*.[548]

In respect of contractual capacity relating to immovable property, considerable support exists for the application of the *lex situs*.[549] Clarkson and Hill,[550] O'Brien[551] and Pitel and Rafferty[552] draw a distinction between local and foreign immovable property. In the first mentioned scenario, the *lex situs*

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540 McClean and Beevers (2000: 386). *Cf* Fawcett, Harris and Bridge (2005: 658). Authors such as Angelo (2012: par 75); Carter (1987: 24); Collier (2001: 209-210); and Sykes and Pryles (1991: 614) merely refer to the proposal but do not express any preference.

541 Hickling and Wu (1995: 171).

542 Tan (1993: 472).

543 Anton and Beaumont (1990: 276). Also see Beaumont and McEleavy (2011: 491).

544 Agrawal and Singh (2010: par 203).

545 *Cf* Hickling and Wu (1995: 170-171); and Cheng (1916: 71 and 128).

546 Collins *et al* (eds) (2012b: 1865).

547 Clarence Smith (1952: 470).

548 Clarence Smith (1952: 470).

549 Agbede (2004: par 75); Agrawal and Singh (2010: par 201) (but only in respect of non-commercial contracts); Anton and Beaumont (1990: 604); Beaumont and McEleavy (2011: 940); Briggs (2014: 583); Clarence Smith (1952: 471); Clarkson and Hill (2011: 474); Collier (2001: 267); Collins *et al* (eds) (2012b: 1332-1333); Davies, Bell and Brereton (2010: 669); Diwan and Diwan (1998: 407); Mortensen (2006: 460); O'Brien (1999: 551); Pitel and Rafferty (2010: 326); Walker (2011: 618); and Walker (2005: § 31.4d). Also see Walker (2006: 517). The courts also applied this legal system in *Bank of Africa, Limited v Cohen* (*supra*); *Nachiappa Chettiar v Muthu Karuppan Chettiar* (*supra*); and *Gregg v Perpetual Company* (*supra*).

550 Clarkson and Hill (2011: 474-476).

551 O'Brien (1999: 551-552).

552 Pitel and Rafferty (2010: 327).

must apply but the proper law of the contract[553] should govern capacity in respect of foreign immovables. Sykes and Pryles[554] reject the *lex situs*, as they prefer the application of the proper law (subjectively or objectively determined) to govern capacity in this context. The American Law Institute follows a dissimilar approach. In terms of the Restatement (Second), capacity in respect of contracts involving immovables is governed by the subjectively and objectively determined proper law,[555] the *lex domicilii*[556] as well as the *lex situs*, unless it is clear that the contract should rather be governed by another law, for instance, on the basis of public policy.[557] Many of the authors,[558] as well as the Australian Law Reform Commission,[559] do not make a distinction between contracts in respect of immovables and other contracts. They are therefore presumably of the opinion that the general arrangement with regard to contractual capacity should also apply in respect of immovable property.

553 which may or may not also be the *lex situs*: see Clarkson and Hill (2011: 474-476).
554 Sykes and Pryles (1991: 618).
555 The American Law Institute (1971: § 198(1)).
556 The American Law Institute (1971: § 198(2)).
557 The American Law Institute (1971: § 189).
558 Angelo (2012); Carter (1987); Crawford and Carruthers (2006); Hickling and Wu (1995); Hill and Chong (2010); McClean and Beevers (2009); Oppong (2012); Sychold (2007); and Tan (1993).
559 The Australian Law Reform Commission (1992).

4 Jurisdictions with Codified Rules in Respect of Contractual Capacity in Private International Law

4.1 Introduction

In this chapter, a comprehensive study is conducted of the private international law rules in respect of contractual capacity applicable in legal systems with codified conflicts rules in this regard. These are primarily civil-law jurisdictions, but not necessarily. Israel and the state of Oregon belong to the common-law family, while Louisiana, Puerto Rico and Quebec enjoy mixed legal systems. Although Puerto Rico is an unincorporated self-governing external territory of the United States of America, it is discussed under the heading "South America" due to its proximity to that continent. The discussion includes a variety of codes from Europe, the Middle East, the Far East, North America and Africa.

The European jurisdictions covered include Austria, Belarus, Belgium, Bulgaria, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Switzerland and the Ukraine. Azerbaijan, Iran, Israel, Qatar, Syria, Turkey, the United Arab Emirates and Uzbekistan are the Middle Eastern countries discussed. Legal systems canvassed in the Far East include China, Japan, South Korea, Macau, Mongolia, the Philippines, Taiwan, Thailand and Vietnam. The North American jurisdictions discussed include Louisiana, Oregon and Quebec, while the South American legal systems considered are these of Argentina, Brazil, Mexico, Puerto Rico, Uruguay and Venezuela. Finally, the African legal systems covered include Algeria, Angola, Burkina Faso, Egypt, Mozambique and Tunisia.

As has been explained in Chapter 1, a reference in a form as "*lex loci contractus / lex fori*" denotes that the *lex loci contractus* applies but that, due to the particular formulation of the rule, this legal system will always be the *lex fori*. The same composite concept ("*lex loci contractus / lex fori*") is utilised to indicate that the *lex fori* applies if the contract is concluded in the forum country. If the *lex fori* applies on condition that the contract was concluded and that performance had to be effected in the forum state, the reference "*lex fori / lex loci contractus / lex loci solutionis*" is used.

It will be illustrated that the overwhelming majority of the jurisdictions discussed apply the personal law (*lex patriae*, *lex domicilii* or the law of the country of habitual residence) of an individual as the primarily applicable (default) legal system. In most of these jurisdictions, other legal systems apply in addition, namely, on an alternative basis. "Alternative" in this context indicates

that other legal systems (often the *lex loci contractus*) would apply in addition to the default legal system when certain requirements are complied with (for instance, that the contract was concluded in the forum state).[1] The additional legal systems do not replace those applied primarily but they apply alongside one another. No jurisdictions were found where the additional legal systems applied cumulatively (namely that an individual could only have contractual capacity if he or she is capable in terms of all the relevant legal systems).[2] The method of adding legal systems to the primarily applicable one(s), has its origin in the decision of the French Court of Cassation in *Lizardi v Chaize*.[3] Some jurisdictions will only apply an extra legal system when conditions identical to these articulated in *Lizardi* are satisfied. Other jurisdictions adhere partially to the original conditions; some legal systems require supplementary ones. The *Lizardi* decision is discussed under French private international law.[4] In paragraph 4.8, the summary section, a comparison of the applicable rules in this regard will be undertaken, in particular noting the conditions (if any) for the additional application of the *lex loci contractus* or other systems.

Excluded from the discussion are the rules employed to determine the personal law of natural persons in the case of dual citizenship, refugees and stateless persons. Rules of a regional, international or supranational character will be discussed in chapter 5, for instance Article 13 of the Rome I Regulation.[5]

4.2 Europe

4.2.1 Austria

One of the provisions in the Austrian Private International Law Act[6] deals specifically with contractual capacity. Paragraph 12 in Chapter 2 of the code[7] states the following: "A person's legal capacity and his capacity to act shall be judged according to his personal status law." The "personal status law" of a natural person is the "law of the state to which the person belongs".[8]

1 See paragraph 4.8.
2 See Neels (2001: 707) on cumulative reference rules and the view of Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
3 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
4 Paragraph 4.2.7.
5 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) ("the Rome I Regulation"). This provision was preceded by Article 11 of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention).
6 Austrian Private International Law Act (1978). See the translation by Palmer (1980: 197-221).
7 Chapter 2 concerns the law of persons and § 12 deals with legal capacity and the capacity to act.
8 § 9 of the code.

Contractual capacity is therefore governed by the *lex patriae*.[9] More specifically, capacity is governed by the personal law at the time of the conclusion of the contract.[10] The personal law applies to, for instance, the determination of minority or majority and to emancipation.[11] Once an individual has obtained the status of majority in terms of the *lex patriae*, subsequent changes in the personal law shall not affect this status.[12] The personal law also applies to any requirements for contractual capacity[13] and the consequences of the absence thereof.[14] In short: in Austrian private international law, contractual capacity is governed by the *lex patriae*.

4.2.2 Belarus

The contractual capacity (and, in general, the legal capacity) of natural persons is governed by Article 1104 sub-articles 1, 3 and 4 of the Civil Code of the Republic of Belarus:[15]

> "1. Legal capacity and active legal capacity of [a] person shall be determined by the personal law of the person.
>
> 3. The active civil legal capacity of the natural person concerning the transactions, effectuated in the Republic of Belarus, … shall be determined by the legislation of the Republic of Belarus.
>
> 4. The capacity of a natural person, carrying out entrepreneurial activity, to be an individual entrepreneur and to have rights and duties, connected with this, shall be determined by the law of the country, where the natural person is registered as an individual entrepreneur. If there is no country of registration, the law of the country of the main place of effectuation of the individual entrepreneurial activity shall be applied."

In terms of sub-article 1, the contractual capacity of an individual shall be determined by the *lex patriae*, as "[t]he law of the country, the citizenship of which this person has, shall be considered to be the personal law of the natural person".[16] According to sub-article 3, capacity relating to contracts concluded in Belarus shall be governed by the *lex loci contractus / lex fori*. In terms of sub-article 4, the capacity of an individual in the context of entre-

9 See, in general, Posch (2002: 48-49); Schwimann (2001: 53-54); and Verschraegen (2012: 2-3). However, the *lex fori* applies to contractual capacity within the ambit of the Federal Act Concerning the Granting of Asylum (2005): see Verschraegen (2012: 2).

10 Schwimann (2001: 53-54).

11 Schwimann (2001: 53-54); and Verschraegen (2012: 2).

12 See § 7 of the code and Posch (2002: 49); Schwimann (2001: 53-54); and Verschraegen (2012: 2). *Cf* Verschraegen (2012: 240).

13 for instance, consent of guardians.

14 Verschraegen (2012: 3).

15 Civil Code of the Republic of Belarus (1999). English translation available at http://www.law.by/work/englportal.nsf. See, in general, Danilevich (2009: 57). Article 1104 is titled "Legal Capacity and Active Legal Capacity of Person".

16 Article 1103 of the code.

preneurial activity shall be determined by the law of the country where he or she is registered as an entrepreneur. In the absence of a country of registration, the law of the state where the core entrepreneurial activity is effected.

In Belarusian private international law, contractual capacity is therefore determined by the *lex patriae*; it is also governed by the *lex loci contractus / lex fori* but only if the contract is concluded in the forum state.[17] Special rules apply to contracts concluded by an individual entrepreneur: the law of the country of registration as individual entrepreneur shall apply or, in the absence of such registration, the law of the state of central entrepreneurial activity.

4.2.3 Belgium

The relevant stipulations of the Belgian private international law code[18] are contained in Chapter II (Section 1), specifically Article 34, § 1 and § 2.[19] Article 34 reads as follows:

> "§ 1. Except in matters where the present statute provides otherwise, the law of the State whose nationality that person has governs the status and capacity of a natural person.
>
> Belgian law governs the capacity if the foreign law leads to the application of Belgian law.
>
> The capacity acquired according to the law that is applicable by virtue of part 1 and 2 will not be lost as a result of a change in nationality.
>
> § 2. Incapacities concerning a specific legal relationship are governed by the law applicable to that legal relationship."

In terms of the first section of Article 34, § 1 of the code ("part 1"), capacity of a natural person in general is governed by the *lex patriae*. The second paragraph ("part 2"), determines that where the private international law of the *lex patriae* refers back to Belgian law, Belgian law will apply. *Renvoi* is therefore accepted in the particular scenario. Paragraph 1 part 3 provides that, once capacity is obtained in accordance with the provisions of § 1, it shall continue to exist irrespective of a change in nationality. Paragraph 2 provides an exception to the general rule in respect of specific legal relationships. These include contractual relationships and in that context the excep-

17 The requirements for applying the *lex loci contractus* are not listed in the summary which follows the discussion of a particular legal system. They will, however, be discussed in the summary section, paragraph 4.8.

18 the Belgian Private International Law Code (2004), as translated by Clijmans (2004: 333). See, in general, Fiorini (2005: 499-519).

19 The title of Chapter II is "Natural Persons," and the title of Section 1 is "Status, Capacity, Parental Authority and Protection of the Incapable". Article 34 concerns the law applicable to status and capacity in particular.

tion provides for the application of the law applicable to the contract (the proper law of the contract).[20] This legal system will have to be determined in accordance with the Rome I Regulation,[21] the applicable instrument in European private international law today.[22] The proper law must be determined subjectively (in the case of a choice of law by the parties),[23] or objectively, as stipulated in Article 4 of the Regulation in the absence of a choice.

Belgian private international law therefore provides for the application of the proper law of the contract (either subjectively or objectively determined) to ascertain the existence of contractual capacity. Therefore, the primarily applicable legal system is not the *lex patriae*, but the subjectively and objectively determined proper law.

4.2.4 Bulgaria

The provisions relating to contractual capacity in the Bulgarian Private International Law Code[24] are to be found in Articles 50-52.[25] Article 50(1) simply states that capacity is governed by the *lex patriae*. Article 50(2) introduces an exception to the general rule as it states that a contractant lacking capacity in another legal system[26] may not rely on this fact if the contract was concluded between parties present in the same country, where this contractant had such capacity in terms of the law of the country of presence. The exception thus implies an application of the *lex loci contractus* in specific instances. The incapable contractant may, however, raise the incapacity where the counterpart was aware of it at the time of contracting or was ignorant thereof as a result of negligence.[27] According to Article 50(3), the provision in sub-article (2) shall neither apply in the context of family and succession law nor to real rights in respect of immovable property. In terms of Article 51, once contractual capacity is attained, it shall not be influenced by a change in nationality.

In terms of Article 52, the contractual capacity of an individual purporting to be a businessperson or trader (entrepreneur) in his own capacity (and not as a representative or agent of a juristic person) shall be governed by the law of

20 See, in general, Erauw (2002: 145-161).
21 note 5.
22 unless the contract was concluded before 17 December 2009, when the Rome Convention (note 5) would apply.
23 Article 3 of the Rome I Regulation (note 5).
24 Bulgarian Private International Law Code (2005). German translation in *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* (2007: 457-493). See, in general, Jessel-Holst (2007: 375-385).
25 Article 50 is titled "Geschäftsfähigkeit" in the German translation, Article 51 "Erworbene Rechts- und Geschäftsfähigkeit" and Article 52 "Kaufmännische Geschäftsfähigkeit".
26 for instance, the *lex patriae*.
27 Article 50(2).

the country in which he or she is registered as such. Where registration is not required, the law of the country in which the person has his core establishment shall apply.

In Bulgarian private international law contractual capacity is therefore governed by the *lex patriae* and, in particular circumstances, by the *lex loci contractus*. There are also specific rules relating to entrepreneurship for the application of the law of the country of registration as entrepreneur or the location of the core establishment.

4.2.5 Czech Republic

The conflicts rules pertaining to the contractual capacity of natural persons in the Czech Republic are contained in Part Four, Title I, § 29 (1) and (2)[28] of the Act on Private International Law.[29] The provision reads:[30]

> "(1) Unless otherwise stipulated by this Act,[31] legal personality and legal capacity shall be governed by the law of the state in which a person is habitually resident.
>
> (2) Unless otherwise stipulated by this Act,[32] it shall be sufficient when a natural person undertaking a legal act has legal capacity under the law applicable at the place where the legal act is undertaken."

The primarily applicable legal system according to sub-paragraph (1) is therefore the law of the country of habitual residence as this legal system governs as a point of departure. Sub-paragraph (2) then provides for the additional application of the *lex loci contractus*. The inference here is made that a party, incapable in terms of the primarily applicable law, may nevertheless be contractually bound if he has capacity in terms of the *lex loci contractus*.

Further, § 31 of the Act contains specific conflicts provisions concerning bills of exchange and cheques.[33] The provision stipulates:

> "(1) The capacity of a person to obligations (to be legally bound) under bills of exchange or cheques shall be governed by the law of the state of which he or she is a citizen. Should that law claim another state's law is applicable, the law of the other state shall apply.

28 Part Four is titled: "Provisions Concerning Individual Types of Private-Law Relations" and Title I refers to "Legal Capacity". Paragraph 29 is titled: "Natural Persons".
29 Act on Private International Law (2012).
30 English translation at http://www.brizatrubac.cz/files/scany-clanku/Translation-Czech-PIL.pdf.
31 as in § 31 of the Act which is discussed below.
32 *ibid.*
33 Paragraph 31 is titled: "Bill of Exchange and Cheque Capacity".

(2) A person without a capacity to obligations under bills of exchange or cheques under the law referred to in the paragraph 1 shall nevertheless be validly bound should he or she sign the bill of exchange or cheque in the state under the law of which he or she would have the capacity to obligations under bills of exchange or cheques. This shall not apply should a citizen of the Czech Republic or a person habitually resident in the Czech Republic be concerned."

In contrast to the rules stipulated in § 29, the contractual capacity of an individual to assume liability in respect of bills of exchange and cheques in terms of § 31(1) is governed by the *lex patriae*. Where the private international law of the *lex patriae* indicates the applicability of another legal system, *renvoi* must be applied. According to § 31(2), a contractant, incapable in terms of the *lex patriae* (or the law that is indicated through the application of *renvoi)*, shall nevertheless be liable if he or she is capable in terms of the *lex loci contractus*. If this contractant is a Czech national or resident, the *lex patriae* shall apply and not the *lex loci contractus*.

Therefore, in Czech private international law, contractual capacity is governed by the law of the country of habitual residence and the *lex loci contractus* on an equal level. Capacity in as far as bills of exchange and cheques are concerned, is governed by the *lex patriae* and, in certain circumstances, the *lex loci contractus*. A rule relating to *renvoi* is also provided for in the context of bills of exchange and cheques in terms of which the law referred to by the *lex causae*'s private international law must apply.

4.2.6 Estonia

The provisions of the Estonian Private International Law Act relating to contractual capacity[34] are to be found in § 12.[35] § 12 reads as follows:

"(1) The law of the state of residence of a natural person applies to his or her passive and active legal capacity.

(2) A change of residence shall not restrict the active legal capacity already acquired.

(3) If a person entered into a transaction although pursuant to the law of the state of his or her residence the person does not have active legal capacity or his or her active legal capacity has been restricted, such person shall not rely on his or her incapacity if the person would have had active capacity pursuant to the law of the state where he or she entered into the transaction. Such provision does not apply if the other party was or should have been aware of the lack of active capacity of the person.

34 Estonian Private International Law Act (2002). English translation available at http://www.legaltext.ee/text/en/x30075.htm (on the website of the Estonian *Justiits Ministeerium*). See, in general, Sein (2008: 459-472).

35 § 12 is titled "Passive and active legal capacity of natural persons".

(4) The provisions of subsection (3) of this section do not apply to transactions arising from family law or the law of succession or to transactions concerning immovable situated in other states."

The general rule articulated in § 12(1) is that the contractual capacity of a natural person is governed by the law of the country of his or her habitual residence. According to § 12(2), once capacity is acquired, it shall not be affected by a subsequent change of residence. Paragraph 12(3) contains an exception to the general rule: if a contractant lacking (or possessing limited) capacity according to the law of his or her habitual residence, concludes a contract in a country where he or she would have such capacity – then (so it is implied) the *lex loci contractus* will apply. The exception does, however, not apply if the counterpart was or should have been aware of the incapable contractant's incapacity. Lastly, § 12(4) states that the exception in (3) shall neither apply to contracts concerning family or succession law, nor to transactions involving immovables situated abroad.

From the discussion it is clear that in Estonian private international law, the law of the country of habitual residence and, in particular circumstances, the *lex loci contractus* are applied to contractual capacity.

4.2.7 France

Article 3 of the French Civil Code contains the rule relevant to contractual capacity.[36] This article states that "[s]tatutes relating to the status and capacity of persons govern French persons, even though residing in foreign countries". In other words, the capacity of French nationals is governed by the *lex patriae*.[37] The courts have interpreted this rule to also be applicable in the reverse case: the *lex patriae* applies to the contractual capacity of foreigners as well.[38]

There is, however, an important exception to these rules. The exception emanates from the decision of the *Cour de cassation* in *Lizardi v Chaize*,[39] where a Mexican minor purchased jewellery from a jeweller in Paris (France). According to French law, however, he was already a major. The *Cour de cassation* did not take his minority in terms of Mexican law into consideration. The court held:

36 French Civil Code (1804–2004). See http://www.lexadin.nl; www.legifrance.gouv.fr. for the translated text of the French Civil Code.

37 Also see Delaume (1961: 118).

38 Van Rooyen (1972: 113).

39 Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193. Also see the discussion in Chapter 2, paragraph 2.4.4 and Dickson (1994: 245).

> "Que, dans ce cas, le Français ne peut être tenu de connaître les lois des diverses nations de leurs dispositions concernant notamment la minorité, la majorité et l'étendue des engagements qui peuvent être pris par les étrangers dans la mesure de leur capacité civile; qu'il suffit alors, pour la validité du contrat, que le Français ait traité sans légèreté, sans imprudence et avec bonne foi; Attendu en fait, qu'il n'est pas établi que les défenseurs éventuels aient connu la qualité d'étranger du demandeur quand ils ont traité avec lui; qu'il résulte des déclarations de l'arrêt attaqué qu'en lui faisant diverses ventes d'objets mobiliers de leur commerce, ils ont agi avec une entière bonne foi; que le prix de ces ventes, quoique assez élevé, n'était pourtant point hors de proportion avec la fortune de Lizardi; que ces fournitures lui ont été faites en présence de sa famille et sans aucune opposition de la part de celle-ci; que les objets vendus ont même profité en partie au demandeur, et que rien n'a pu faire pressentir aux défendeurs éventuels que Lizardi, quoique âgé alors de plus 22 ans, était cependant encore mineur d'après les lois de son pays."[40]

It was thus decided that, in the particular circumstances, French law had to be applied to the contractual capacity of a person of foreign nationality where the contract was concluded with a French citizen in France. The reasoning behind the *Lizardi* decision, in its creation of an exception to the application of the *lex patriae* as exclusively applicable legal system, is clearly based on the national interest in the protection of businesses located in France: at least in respect of regular commercial contracts, it cannot be expected that an enquiry must be made into the content of the personal legal system (the *lex patriae*) of the foreigner.[41] The decision may therefore be interpreted (and is indeed understood as such in French doctrine)[42] as authority for the application of the *lex loci contractus* in the particular circumstances.[43]

Having regard to the *ratio* underlying the decision, it is in the opinion of the current author unlikely that the outcome would have differed had the jeweller not been a French citizen. Business located in France was to be protected.

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40 Clarence Smith (1952: 457) translates this passage as follows: "It cannot be a Frenchman's duty to know the laws of the various nations and in particular their provisions concerning minority, majority and the extent of the obligations which foreigners are civilly capable of assuming: it is enough for the validity of the contract that the Frenchman has dealt without carelessness, without imprudence, and in good faith. Here it is not established that the defendants knew that the plaintiff was a foreigner when they dealt with him; in selling him the goods in which they traded they acted in complete good faith; the price of these sales, though considerable, was yet not disproportionate to Lizardi's wealth; these goods were supplied to him in the presence of his family and with no objection taken on their part; the sales were even to some extent on terms profitable to him; and there was nothing to suggest to the defendants that Lizardi, though over 22, was yet a minor by his own country's laws." The German translation of the phrase "sans légèreté, sans imprudence et avec bonne foi" by Kegel and Schurig (2000: 491-495) reads: "ohne Leichtsinn, ohne Unvorsichtigkeit und in gutem Glauben".

41 Delaume (1961: 118); Lando (1976: 95); Lipp (1999: 107); Mayer and Heuzé (2010: 395-396). But see Batiffol and Lagarde (1983: par 491).

42 Ferry (1989: 30-31); Gaudemet-Tallon (2009: Fasc 552-15); Mayer and Heuzé (2010: 395-396); Santa-Croce (2008: Fasc 552-60); Vignal (2008: Fasc 545).

43 In exceptional cases the law of the physical presence of the parties and the *lex loci contractus* will not coincide. See Chapter 5, paragraph 5.3.1; *cf* Santa-Croce (2008: Fasc 552-60).

French authors still refer to French nationality in this context[44] but it is also indicated that nationality no longer plays a role in the comparable provisions in the Rome Convention[45] and the Rome I Regulation,[46] which are both inspired by the *Lizardi* decision.[47] None of the later formulations of the *Lizardi* rule in the legislative instruments of a wide range of countries require that the capable party must be a citizen of the forum country.[48]

If the capable party knew about the incapacity of the counterpart or was not aware thereof due to negligence, the *lex loci contractus* does not apply. If fault is absent on the part of the capable party, his or her ignorance of the foreign law is excusable.[49] The onus to prove that the capable party was aware of the incapacity or was negligent in this regard rests on the incapable contractant.[50] The authors accept that, if a contract involves luxury goods, immovables, or a substantial amount, there is a more stringent test for the capable party to comply with; if the object of the contract concerns daily essentials, the criterion for negligence is more lenient.[51]

Businesses outside of France are not protected by the *Lizardi* rule.[52] Some authors are of the opinion that the rule should be extended to contracts concluded abroad[53] but this view does not have unanimous support.[54]

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44 Batiffol and Lagarde (1983: pars 490-491); Gaudemet-Tallon (2009: Fasc 552-15); Mayer and Heuzé (2010: 395-396); Santa-Croce (2008: 552-60); and Vignal (2008: Fasc 545).

45 note 5.

46 note 5. Gaudemet-Tallon (2009: Fasc 552-15); Santa-Croce (2008: Fasc 552-60). See the discussion of Article 11 of the Rome Convention and Article 13 of the Rome I Regulation in Chapter 5, paragraph 5.3.1.

47 Gaudemet-Tallon (2009: Fasc 552-15); Mayer and Heuzé (2010: 395-396); Niboyet and de Geouffre de la Pradelle (2009: 179-180); and Santa-Croce (2008: Fasc 552-60).

48 See the discussion on the law of several countries in the present chapter.

49 Batiffol and Lagarde (1983: pars 490-491); Santa-Croce (2008: Fasc 552-60); and Vignal (2008: Fasc 545). The doctrine of the excuse of ignorance of the law could find its foundation in the theory of "apparence" in private international law: Santa-Croce (2008: 552-60). For the common law in this regard, see Barnett (2001) and Yeo (2004).

50 Santa-Croce (2008: Fasc 552-60).

51 Batiffol and Lagarde (1983: par 491); Mayer and Heuzé (2010: 393-396); and Vignal (2008). In circumstances similar to these in *Lizardi* and the *Prince Farouk* case (*Soc Jean Dessès c prince Farouk et dame Sadek* T civ Seine (1_{re} Ch) – 12 juin 1963 *Rev crit DIP* 1964), where contracts of sale for expensive jewelry and clothing respectively were concluded, a strict application of the negligence test would therefore be appropriate.

52 Ferry (1989: 30-31); Lando (1976: 95); and Mayer and Heuzé (2010: 395-396). *Cf* Symeonides (2014: 317-318).

53 Batiffol and Lagarde (1983: par 491); and Lipp (1999: 115-116).

54 Ferry (1989: 30-31); Mayer and Heuzé (2010: 395-396). In this context the terms unilateral (the *Lizardi* rule is applicable to contracts concluded in France only) and bilateral (the *Lizardi* rule to be applicable to contracts concluded abroad as well) are sometimes used: Mayer and Heuzé (2010: 395-396); Santa-Croce (2008: Fasc 552-60); and Symeonides (2014: 313). See Neels (2010: 122-123) on the distinction between unilateral, bilateral and multilateral conflicts rules.

Of course, the *Lizardi*-inspired rule in the Rome Convention and the Rome I Regulation apply to contracts wherever concluded.[55]

Authors such as Batiffol and Lagarde submit that the consequences of incapacity, for example, the invalidity of the contract, are governed by the *lex patriae*.[56] They are also of the opinion that foreign law can only be excluded from application on the basis of *ordre public* when the content of such is incompatible with French civilization or legislative policy. However, a different age of majority in the foreign law is, in itself, no reason to apply the doctrine of public policy.[57]

Later case law is very rare;[58] together with the entering into force of the Rome Convention[59] and later the Rome I Regulation, this may explain the absence of further development in doctrine.[60] The sources refer to one 20th century case, *Soc Jean Dessès c prince Farouk et dame Sadek*, a decision of the *Tribunal civile Seine*[61] dated 12 June 1963. At the very end of King Farouk's reign over Egypt, just before being overthrown in the revolution of 1952, his second wife, Queen Narriman Sadek, bought ladies' clothing for almost two and a half million francs at the fashion house of Jean Dessès in Paris.[62] The parties divorced in 1954. Due to the forced abdication, at the time of the decision the defendants were known as prince Farouk and lady Sadek. As Farouk did not authorise the transaction, he would not have been bound by it in terms of Egyptian law, the *lex patriae* of both parties. However, French law adhered to the doctrine of the tacit mandate of a wife to buy household goods that are reasonably necessary, taking into consideration the social standing of the parties. The tribunal decided that French law applied as the contract was concluded in Paris and the local French company was not bound to know the law of Egypt (the plaintiff in fact also was not aware of the content of Egyptian law). The merchant therefore acted "sans légèreté,

55 See Chapter 5, paragraph 5.3.1; Mayer and Heuzé (2010: 395-396); and Niboyet and de Geouffre de la Pradelle (2009: 179-180).

56 Batiffol and Lagarde (1983: par 490).

57 Batiffol and Lagarde (1983: par 491).

58 Mayer and Heuzé (2010: 395-396); and Staudinger/Hausmann (2013: 602). Vignal (2008: Fasc 545) refers to three cases, two from the 19th century and the decision of the *Tribunal civile Seine*, discussed below (at note 61).

59 Staudinger/Hausmann (2013: 602) submit that no French case law on the *Lizardi* rule emerged since the Rome Convention entered into force.

60 See, however, Ferry (1989: 30-31). According to the author's interpretation, French courts take all the facts of the individual case into account: nationality and the place of contracting play an important role but they are not the only factors to be considered (also see the list of factors in the quote from the *Lizardi* case). Ferry suggests that this approach balances the conflicting goals of the protection of the incapable party and the simplification of international commerce.

61 *Soc Jean Dessès c prince Farouk et dame Sadek* (supra: 689).

62 The transaction took place between 17 May and 1 July 1952. The king was forced to abdicate on 26 July 1952.

sans imprudence et avec bonne foi". The tribunal takes particular notice of the fact that previous transactions by the queen had been honoured by the king. Accordingly, both Farouk and lady Sadek were liable *in solidum* for the outstanding purchase price plus interest.[63] The decision simply echoes the *Lizardi* case from 1861.

For the purposes of this study, it will be accepted that in French private international law the *lex patriae* and, in particular circumstances, the *lex loci contractus / lex fori* are applicable to contractual capacity.

4.2.8 Germany

The provisions relevant to contractual capacity are found in § 7 and § 12 of the *Einführungsgesetz* to the German civil code.[64] These rules also apply to limited capacity.[65] Relevant issues in this context are minority and mental illness.[66] However, in German law, whether or not the consent of a spouse is necessary for the valid conclusion of a contract depends on the applicable matrimonial property regime. This question consequently forms part of matrimonial property law and is regulated by the legal system that governs the proprietary consequences of marriage.[67] The consent requirement therefore does not refer to capacity as it does in, for example, the Dutch legal system.[68]

In terms of the first sentence of § 7(1), contractual capacity is in general governed by the *lex patriae*: "Die Rechtsfähigkeit und die Geschäftsfähigkeit einer Person unterliegen dem Recht des Staates, dem die Person angehört."[69] The second sentence provides that the same rule applies where capacity is

63 The king could not invoke immunity from the jurisdiction of the French courts even though the contract was concluded before the abdication.

64 Introductory Act to the Civil Code (1994) (EGBGB). For the German text, see http://bundesrecht.juris.de/bgbeg/BJNR006049896.html and Jayme and Hausmann (2012). For a translation in English, see www.gesetze-im-internet.de/englisch_bgbeg/index.html. The German term for contractual capacity in § 7 is *Geschäftsfähigkeit*. Par 12, in addition, utilises the concept of *Handlungsfähigkeit*. Staudinger/Hausmann (2013: 612-613) suggest that the latter notion is otherwise unknown and of no particular use in German law and should therefore be ignored.

65 MünchKommBGB/Spellenberg (2010: 1058 and 1750); Staudinger/Hausmann (2013: 27 and 612).

66 See, for example, Kropholler (2006: 317-321).

67 See MünchKommBGB/Spellenberg (2010: 1046); Reinhartz (1997: 397 and 529); and Staudinger/Hausmann (2013: 26, 38-39, 602-603 and 618-620). See §§ 14-15 of the EGBGB for the applicable legal system.

68 See paragraph 4.2.13.

69 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "The legal capacity and capacity to contract of a person are governed by the law of the country of which the person is a national." *Cf* § 5(1). The title of § 7 is "Rechtsfähigkeit und Geschäftsfähigkeit" ("Legal capacity and capacity to contract").

expanded through the conclusion of marriage: "Dies gilt auch, soweit die Geschäftsfähigkeit durch Eheschließung erweitert wird."[70]

A leading text book provides a number of examples of the application of § 7(1) in respect of minority from which the following statements may be deduced: A minor of 17 years old who is a citizen of country A (which maintains the majority age of 21) and who acquires the nationality of country B (where the majority age is 18) will become a major at age 18. A minor of 19 years old who is a citizen of country A (majority age of 21) and who acquires the nationality of country B (majority age 18) will become a major immediately at the moment of naturalisation. A minor of 17 years old who is a citizen of country A (majority age 18) and who acquires the nationality of country B (majority age 21) will become a major only at age 21.[71]

Paragraph 7(2) states that, once capacity is acquired, it shall not lapse as a result of a subsequent acquisition or loss of German citizenship: "Eine einmal erlangte Rechtsfähigkeit oder Geschäftsfähigkeit wird durch Erwerb oder Verlust der Rechtsstellung als Deutscher nicht beeinträchtigt."[72] The Latin adagium referred to in this regard is "semel maior, semper maior".[73] Therefore a German citizen aged 19 who acquires the nationality of a country where 21 is the age of majority, will remain a major for the purposes of German private international law.[74]

Paragraph 7(2) is an incomplete conflicts rule as it only refers to German citizenship. The German authors are of the opinion that the rule should also be applied in the context of other nationalities. Once a contractant has acquired capacity, it should not lapse as a result of a subsequent acquisition or loss of any nationality.[75] Therefore, a South African citizen of 19 years old, who acquires the nationality of a country where 21 is the age of majority, should remain a major for the purposes of German private international law.[76]

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70 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "This is also applicable where the capacity to contract is extended by marriage." See, for instance, MünchKommBGB/Birk (2010: 1565 and 1572).

71 Staudinger/Hausmann (2013: 50). However, the authors incorrectly utilise South African law as an example of a legal system where the age of majority is 21. In terms of the Children's Act 38 of 2005, the age of majority in South Africa is 18. On double citizenship in this context, see Staudinger/Hausmann (2013: 50-51).

72 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "The once acquired legal capacity or capacity to contract shall not be lost or restricted by the acquisition or loss of legal status as a German national."

73 MünchKommBGB/Birk (2010: 1572); Reithmann/Martiny/Hausmann (2010: 1877); Staudinger/Hausmann (2013: 51-52).

74 Staudinger/Hausmann (2013: 52). The majority age in Germany is 18 years (see, for example, Staudinger/Hausmann (2013: 75)).

75 Kegel and Schurig (2000: 493); Kropholler (2006 318); Reithmann/Martiny/Hausmann (2010: 1877); Staudinger/Hausmann (2013: 49 and 52-53).

76 The majority age in South Africa is 18 years: see note 71.

The application of the *lex patriae* is limited by the provision in the first sentence of § 12 of the EGBGB:

> "Wird ein Vertrag zwischen Personen geschlossen, die sich in demselben Staat befinden, so kann sich eine natürliche Person, die nach den Sachvorschriften des Rechts dieses Staates rechts-, geschäfts- und handlungsfähig wäre, nur dann auf ihre aus den Sachvorschriften des Rechts eines anderen Staates abgeleitete Rechts-, Geschäfts- und Handlungsunfähigkeit berufen, wenn der andere Vertragsteil bei Vertragsabschluß diese Rechts-, Geschäfts- und Handlungsunfähigkeit kannte oder kennen musste."[77]

The provision in § 12 is substantially based on Article 11 of the Rome Convention[78] (which is again inspired by French case law and doctrine). Paragraph 12 must therefore be interpreted in the light of European law. In any event, the provision has practically been usurped by the relevant provisions in Article 11 of the Rome Convention and Article 13 of the Rome I Regulation.[79] Paragraph 12 will still apply when the contract is not governed by the European rules.[80]

Paragraph 12 in effect provides that when a contractant, lacking capacity in terms of his or her *lex patriae*, concludes a contract in a country where he or she would have possessed capacity, and the counterpart is also physically present in the same country at the conclusion of the contract, the *lex loci contractus* shall apply to determine the capacity of the first-mentioned contractant. This exception to the application of the *lex patriae* by virtue of § 7 shall not apply if the counterpart was aware of the incapacity in terms of the *lex patriae* at the moment of concluding the contract, or was unaware thereof as a result of negligence. Although § 12 neither directly refers to the law of the country where the contract was concluded nor the law of the presence of the parties, the German authors are unanimous that application of the *lex loci contractus* is implied.[81]

Application of the *lex patriae* is limited by § 12 as the indiscriminate use of this legal system would be very onerous for the local legal traffic: creditors would have to inform themselves of the content of the law of the national-

77 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the substantive provisions of the law of that country may invoke his incapacity resulting from the substantive provisions of another law only if the other party to the contract was aware or should have been aware of this incapacity at the time of the conclusion of the contract."

78 note 5.

79 note 5. See Chapter 5, paragraph 5.3.1.

80 MünchKommBGB/Spellenberg (2010: 1040, 1742 and 1744); Staudinger/Hausmann (2013: 1, 20 and 601-604).

81 MünchKommBGB/Spellenberg (2010: 1746-1747); Reithmann/Martiny/Hausmann (2010: 1913); Staudinger/Hausmann (2013: 604-605, 626 and 630-631). See, however, section 22(2) and Section 23(c) of the South African Electronic Communications and Transactions Act 25 of 2002 (discussed in Chapter 2, paragraph 2.2.4): the law of presence will not necessarily coincide with the law of conclusion of the contract.

ity of every possible contractant. The protection of normal legal interaction, specifically daily commercial activities, and the aim of legal certainty both indicate the need for an exception to the application of the *lex patriae*.[82] The application of the *lex loci contractus* is preferred on the following basis: the *locus contractus* is *ab initio* known; the application of the *lex loci contractus* is foreseeable; the *lex loci contractus* is geographically the best system to govern; both contractants intentionally participated in legal interaction in the *locus contractus*; and application of the *lex loci contractus* protects trust in the law of the country of contracting.[83] The intention of § 12 is clearly the protection of the *bona fide* counterpart[84] who is also not negligent. This is already clear from the title of the provision: "Schutz des anderen Vertragsteils".[85]

For § 12 to be applicable, the incapable person must be a natural person. The capable party may either be a natural or a juristic person.[86] However, the *Bundesgerichtshof*, in a decision in 1998, refers to the possibility of the analogous application of § 12 to incapable juristic persons.[87] The court did not find it necessary to decide this point as the requirements for § 12 were in any event not complied with.

Paragraph 12 is an "allseitige Kollisionsregel"[88] in that it applies irrespective in which country the contract was concluded.[89] As such, the German rule differs from the position in French private international law.[90] The parties must be present in the same country at the conclusion of the contract. Their nationality, domicile and habitual residence are irrelevant.[91] Short-term presence, including presence on "verkehrstechnische Gründen" (for instance, meeting at an airport) and even coincidental presence will be sufficient.[92] The parties must be present in the same country, not necessarily in the same town or in each other's presence.[93] The relevant moment in time is the conclusion of the contract.[94]

82 Staudinger/Hausmann (2013: 20, 601, 603, 605 and 612).
83 Staudinger/Hausmann (2013: 605).
84 MünchKommBGB/Spellenberg (2010: 1745); Reithmann/Martiny/Hausmann (2010: 1913); Staudinger/Hausmann (2013: 603-604).
85 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "Protection of the other party".
86 Staudinger/Hausmann (2013: 607-609).
87 BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; www.unalex.eu.
88 Also see paragraph 4.2.7 on bilateral and unilateral conflicts rules.
89 Kegel and Schurig (2000: 493); Staudinger/Hausmann (2013: 601, 602 and 625).
90 See paragraph 4.2.7.
91 Kegel and Schurig (2000: 480); Staudinger/Hausmann (2013: 626 and 633).
92 Staudinger/Hausmann (2013: 626).
93 Staudinger/Hausmann (2013: 625-626). Error in respect of the presence of the parties at the time of conclusion is irrelevant: Staudinger/Hausmann (2013: 629-630). See Reithmann/Martiny/Hausmann (2010: 1913-1914) and Staudinger/Hausmann (2013: 626-629) on distance contracts and the position where the parties make use of agents.
94 Staudinger/Hausmann (2013: 31, 50 and 629).

Paragraph 12 is an alternative reference rule in the sense that, in the circumstances as described, the party invoking incapacity will nevertheless be held to possess capacity if he or she has such in terms of either the *lex patriae* or the *lex loci contractus*.[95] The relevant party cannot at will invoke either the *lex patriae* or the *lex loci contractus* as the governing legal system.[96] Paragraph 12 does not play a role when the incapable party has no capacity in terms of both the *lex patriae* and the *lex loci contractus* (the relevant party will then not be bound to the contract). Paragraph 12 is also not applicable when the relevant party has capacity in terms of the *lex patriae*, whether or not capacity exists in terms of the *lex loci contractus* (the party invoking incapacity will be bound to the contract). However, § 12 will be relevant if the party invoking incapacity has no capacity in terms of the *lex patriae* but would have such in terms of the *lex loci contractus*, provided that the requirements of this paragraph are satisfied.[97] It follows that § 12 is irrelevant when the *lex patriae* and the *lex loci contractus* are the same law. This indeed happened in a case which came before the *Bundesgerichtshof* in 2004, resulting in two related decisions,[98] both dealing with the one factual scenario of a mentally incapable German director of a Swiss company. The court did not even refer to § 12 EGBGB as German law was both the *lex patriae* and the *lex loci contractus*.[99] The issue was held to be governed by the *lex patriae* in terms of the first sentence of § 7(1).

The *lex loci contractus* does not apply (and therefore only the *lex patriae* will govern) when the capable party was aware of the incapacity in terms of the *lex patriae* or should have been aware thereof. The onus to prove that the capable party had knowledge of the incapacity or was negligent in not being aware of the incapacity rests on the incapable party.[100] The *Oberlandesgericht* of Hamm[101] decided in 1995 that the capable party would clearly not be able to invoke § 12 as the minor's date of birth was included in the contract. In the circumstances, the capable party was deemed to have been aware of the incapacity in terms of the *lex patriae*.[102]

95 Staudinger/Hausmann (2013: 606 and 635-636).
96 Staudinger/Hausmann (2013: 636).
97 *Cf* Staudinger/Hausmann (2013: 635-637).
98 BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; www.openjur.de/u/344496.html.
99 *Cf* MünchKommBGB/Spellenberg (2010: 1043 n 35). German law was also the law applicable to the contract.
100 Staudinger/Hausmann (2013: 635).
101 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu. See Staudinger/Hausmann (2013: 631).
102 However, it seems that the minor would have lacked capacity in terms of both relevant legal systems as Germany and Spain adhere to the majority age of 18. See Staudinger/Hausmann (2013: 75 and 81).

Some commentators are of the opinion that the content of negligence in this regard should be determined by German law[103] but others argue that § 12 should be interpreted along the lines of Article 13 of the Rome I Regulation.[104] In any event, negligence will be readily found to be present in respect of important transactions and when valuable goods are involved (for instance, buying and selling immovable property versus goods for daily living) and also when a merchant, rather than a private person, concludes a contract.[105] The *Bundesgerichtshof* found in 1998 that even slight negligence[106] would be sufficient to exclude the protection of the capable party in § 12.[107] This case concerned a German company which neglected to obtain legal advice on whether a Yugoslavian company[108] would have capacity to conclude a transnational contract;[109] the German company could therefore not invoke § 12.[110]

The alternative application of the *lex loci contractus* does not apply to contracts concerning family and succession law, nor to these involving immovable property situated outside of Germany. This is provided for in the last sentence of § 12: "Dies gilt nicht für familienrechtliche und erbrechtliche Rechtsgeschäfte sowie für Verfügungen über ein in einem anderen Staat belegenes Grundstück."[111]

There are conflicting decisions of the German courts on the law applicable to the consequences of incapacity, for example, the voidness or voidableness of the contract. According to a decision of the *Oberlandesgericht* of Düsseldorf in 1994, the law applicable to the contract governs the consequences of incapac-

103 Staudinger/Hausmann (2013: 633). But see Staudinger/Hausmann (2013: 602), arguing in favour of a European-oriented interpretation of § 12 of the EGBGB.

104 Reithmann/Martiny/Hausmann (2010: 1913). *Cf* MünchKommBGB/Spellenberg (2010: 1744-1745).

105 Reithmann/Martiny/Hausmann (2010: 1880 and 1915); Staudinger/Hausmann (2013: 27, 604 and 634).

106 "leichte Fahrlässigkeit". Also see Reitmann/Martiny/Hausmann (2010: 1914-1915). *Cf* MünchKommBGB/Spellenberg (2010: 634).

107 BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; www.unalex.eu.

108 See the text at note 87 on the possible analogous interpretation of § 12 to incapable juristic persons.

109 The court takes a rather optimistic view of public bodies being able and willing to provide expeditious expert opinions on intricate legal questions: the capable party should have telephonically contacted the German ministry of trade, the Yugoslavian mission in Germany, the German mission in Yugoslavia or the chamber of commerce in Croatia.

110 It is unclear whether mere knowledge of the foreign nationality of the counterpart is sufficient to require the capable party to be alert: see Staudinger/Hausmann (2013: 634-635).

111 Translated at www.gesetze-im-internet.de/englisch_bgbeg/index.html as "This does not apply to legal transactions under family law and the law of succession neither to dispositions relating to immovable property situated in another country."

ity[112] but the *Oberlandesgericht* of Hamm decided in 1995[113] that the *lex patriae* should govern. The first view[114] seems to be closer to Article 12(1)(e) of the Rome I Regulation, providing that all consequences of the nullity of contract are governed by the (putative) proper law of the contract,[115] as well as Article 10(1) of the Rome II Regulation,[116] which determines that a claim for unjust enrichment closely related to a contractual relationship between the parties will be governed by the law (putatively) applicable to the contract.[117] However, the majority of the German authors favour the application of the *lex patriae* to determine the consequences of invalidity for the purposes of internal German private international law.[118] The following arguments are advanced: (a) The existence of capacity and the consequences of the absence of capacity cannot be separated; they should be governed by the same legal system. (b) Application of the *lex patriae* provides protection to the incapable party and should therefore also govern the consequences of the absence of capacity.[119] The German commentators surprisingly do not refer to the related February and March 2004 decisions of the *Bundesgerichtshof* in this regard.[120] The first of these merely states that the consequences of incapacity were governed by German law: "Die Rechtsfolgen der Handlungs- bzw. Geschäftsunfähigkeit richteten sich nach deutschem Recht." However, German law was the *lex patriae* of the incapable director of a Swiss company, the *lex loci contractus* and the law applicable to the contract.[121] In the second of the twin decisions, the *Bundesgerichtshof*, referring to the cases above and to doctrine, expressly leaves the relevant question open:

> "Ob sich die Rechtsfolgen fehlender Geschäftsfähigkeit ebenfalls nach dem sogenannten Wirkungsstatut … oder nach dem Personalstatut des Geschäftsunfähigen gemäß Art. 7 EGBGB … beurteilen, kann dahingestellt bleiben, da auch nach dieser Vorschrift aufgrund der deutschen Staatsangehörigkeit des Direktors der P. AG deutsches Recht Anwendung findet."[122]

112 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755.
113 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu.
114 Also see MünchKommBGB/Birk (2010: 1565-1566).
115 "The law applicable to a contract by virtue of this Regulation shall govern in particular- … the consequences of nullity of the contract."
116 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (the Rome II Regulation).
117 "If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship."
118 Kegel and Schurig (2000: 492); Kropholler (2006: 318); Staudinger/Hausmann (2013: 43-45). *Contra* MünchKommBGB/Birk (2010: 1565-1566).
119 See, for example, Staudinger/Hausmann (2013: 43-44).
120 BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) www.openjur.de/u/344496.html.
121 BGH (03.02.2004) NJW 2004 1315.
122 BGH (30.03.2004) www.openjur.de/u/344496.html.

In summary it may be stated that in German private international law, the *lex patriae* and, in certain circumstances, the *lex loci contractus* are applied to contractual capacity. The law (putatively) applicable to the contract is not a relevant legal system. In particular, the law chosen by the parties to govern their contract does not play any role. For instance, a minor cannot choose another law that would have been applicable to provide him or her with capacity.[123] This is also clear from the decision of the *Oberlandesgericht* of Hamm in 1995,[124] where a German minor had agreed to Spanish law governing the contract. The choice of law was held to be ineffective and German law applied as the *lex patriae*.[125]

The doctrine of public policy may be utilised to exclude an otherwise applicable legal system; this also applies in the context of contractual capacity. If, for instance, the *lex patriae* or the *lex loci contractus* were to consider a 10 year old as an adult, the law of nationality would be excluded. Of course, the fact that there is a different age of majority in the applicable legal system compared to that in the *lex fori* is no reason to exclude the foreign law. It is probably also not against public policy to have a (slightly) different age of majority for boys and girls.[126] However, having different rules in respect of capacity for clearly adult women compared to these for men, or different rules for people of minority religions, may indeed infringe the *ordre public*.[127]

4.2.9 Greece

Contractual capacity in the Greek Civil Code is addressed in Articles 7 and 9.[128] Article 7 contains the general provision that contractual capacity is governed by the *lex patriae*. Article 9 states that if a foreigner lacks contractual capacity in terms of his *lex patriae*, he is deemed to have such capacity in as far as he would have it in terms of Greek law. In other words, capacity in this case shall be determined by the *lex fori*. The latter provision applies neither in the context of family and succession law nor in respect of real agreements concerning foreign immovable property. Contractual capacity in Greek private international is therefore in general governed by both the *lex patriae* and the *lex fori*.

123 Staudinger/Hausmann (2013: 32).
124 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144.
125 German law was also the *lex loci contractus*. Also see note 98.
126 In some Latin American countries the majority age for girls is 12 and for boys 14. See Staudinger/Hausmann (2013: 27).
127 See MünchKommBGB/Birk (2010: 1563); and Staudinger/Hausmann (2013: 20-21 and 640).
128 Greek Civil Code (1940). See Riering (1997: 19). Article 7 in the German translation is titled: "Geschäftsfähigkeit" and Article 9 "Geschäftsfähigkeit des Ausländers im Inland".

4.2.10 Hungary

Chapter II of the Hungarian Private International Law Code[129] contains the following relevant provisions in respect of contractual capacity, namely § 10 [1], § 11(1), § 15 [1], [2] and [3].

Paragraph 10 [1] of the code reads: "The legal capacity, capacity to act, personal status and personal rights of the individual shall be determined according to his personal law." Contractual capacity of an individual is therefore generally governed by his or her personal law. "Personal law" refers to the *lex patriae* as § 11 [1] reads: "The citizenship of the individual shall determine his personal law."[130] Paragraph 11 [1] further provides that, once contractual capacity has been obtained, it shall not be affected by a subsequent change in citizenship (nationality).

Paragraph 15 [1]-[3] of the code contains the rules applicable to foreigners and provides the following:

> "[1] Unless a rule of law requires otherwise, legal capacity, capacity to act, personal rights, property rights, and obligations of foreign citizens … shall be governed by the same law which applies to Hungarian residents.
>
> [2] A foreign citizen, who has either a limited capacity or no capacity to act under his personal law, shall be considered to have that capacity to act in property law transactions concluded in Hungary, for the purpose of securing the necessities of everyday life, if he would have such capacity to act under Hungarian law.
>
> [3] A foreign citizen, who has either no capacity or limited capacity to act under his personal law, but would have the capacity to act if Hungarian law were applied, shall be considered to have that capacity to act in his other property law transactions if the legal consequences of the transaction shall take place in Hungary."

Paragraph 15 [2] and [3] refer specifically to foreigners lacking (or possessing limited) contractual capacity according to their *lex patriae* but having such according to the *lex fori*, and draws a distinction between transactions relating to essential and non-essential property. The *lex loci contractus / lex fori* governs contractual capacity where a transaction is concluded in Hungary and relates to essential property (the necessities of everyday life).[131]

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129 Hungarian Private International Law Code (1979). See Gabor (1980: 63-113). Chapter II has the title "Persons" and concerns the individual as a legal subject. See, in general, Burián (1999: 157-187).

130 See Mádl and Vékás (1998: 121-125 and 132-135).

131 See Mádl and Vékás (1998: 132-135). According to the authors, *the lex loci contractus* (read: *lex fori*) is applied for practical purposes. They state at 134: "Given the large volume of international personal transactions in our time, to ascertain whether a foreign buyer is somewhere subject to a law restricting his disposing capacity to a greater extent than Hungarian law does would be an unrealistic requirement, one impossible to meet in retail trade."

In respect of contracts relating to non-essentials, the *lex loci solutionis / lex fori* shall govern provided that the performances in terms of the agreement are effected in Hungary. Paragraph 15[2] and [3] do not provide for contracts concerning necessities concluded abroad and those involving non-necessities having its consequences abroad. In these instances, the *lex patriae* shall apply as § 15[1] refers to § 10[1], which must be read with § 11[1].

Contractual capacity in Hungarian private international law is thus governed by the *lex patriae* and, in particular circumstances,[132] the *lex fori* (*lex fori / lex loci contractus* or *lex fori / lex loci solutionis*).

4.2.11 Italy

Article 23 (sub-articles 1, 2 and 4) in Chapter II[133] of the Italian Statute on Private International Law[134] deals with contractual capacity and reads as follows:

> "1. An individual's national law determines his/her capacity to perform legal acts….
>
> 2. With respect to contracts made between persons who are in the same State, a person having legal capacity under the law of the State in which the contract is made may invoke an incapacity deriving from his/her national law only if the other contracting party, at the time of contracting, knew of such incapacity or was ignorant of it through his/her own fault.
>
> 4. The [limitation] of paragraph 2 … shall not apply to acts relating to family relations or to succession by reason of death nor to acts relating to rights in real property located in a State other than that in which the act is carried out."

Sub-article 1 of Article 23 states the general rule that the contractual capacity of an individual is governed by the *lex patriae*. Sub-article 2 provides an exception to the general rule which is applied where the contractants conclude a contract in the same country. A contractant having capacity according to the *lex loci contractus* may invoke his or her incapacity in terms of his or her *lex patriae* only where the other contractant, at the time of contracting,

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132 See Mádl and Vékás (1998). At page 122-123 the authors discuss the origin of the application of the *lex patriae* to contractual capacity in civil-law countries. This is compared to the application of the *lex domicilii* in the common-law countries (123-124). The authors submit that the latter legal system is more appropriate for modern purposes. The authors further discuss the emergence of the application of the law of the country of habitual residence, gaining impetus from the work of the Hague Conference on Private International Law (124-125).

133 Article 23 refers specifically to the "Capacity of Individual to Act" and Chapter II is titled "Capacities and Rights of Individuals".

134 Italian Statute on Private international Law (1995). For a translation, see Montanari and Narcisi (1997: 35). See, in general, Ballarino and Bonomi (2000: 99-131); and Mengozzi (2007: pars 240-245).

knew of the incapacity, or was ignorant thereof through his or her fault.[135] Sub-article 4 states that the exception in paragraph (sub-article) 2 does not apply to contracts concerning family or succession issues or to immovable property situated in a country outside of the *locus contractus*.[136]

In Italian private international law, contractual capacity is therefore governed by the *lex patriae* and, in particular circumstances, by the *lex loci contractus*.

4.2.12 Lithuania

Articles 1.16 and 1.17 in Book 1, Part 1, Chapter 2, Section 2 of the Civil Code of the Republic of Lithuania[137] contain the provisions relating to contractual capacity in private international law.[138] Article 1.16[139] provides the following:

> "1. Civil active capacity of foreign citizens … shall be governed by the laws of their state of domicile.
> 2. If such persons have no domicile or it cannot be determined with certainty, their legal active capacity shall be determined in accordance with the laws of the state within the territory of which these persons formed a relevant transaction.
> 3. If a person has residence in more than one state, the law of the state with which he is the most closely connected shall apply.
> 4. The ascertainment of incapacity or limited capacity of foreign citizens … shall be governed by the laws of the Republic of Lithuania.
> 5. A change of domicile shall not affect civil active capacity if that capacity was acquired prior to the change of domicile."

According to Article 1.16,[140] the *lex domicilii* shall govern contractual capacity in respect of foreigners. There seems to be no corresponding provision for the citizens of Lithuania. Where foreign citizens have no domicile, or if it is not ascertainable, contractual capacity shall be governed by the *lex loci contractus*. In situations where persons have multiple residences, the law of the country having the closest connection with the "individual" shall apply as the law of domicile. The determination of incapacity or limited capacity of foreign citizens shall be governed by the private international law of the *lex fori*.[141] Once capacity has been acquired, a subsequent change in domicile is irrelevant.

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135 Also see Mengozzi (2007: pars 241 and 243).
136 Also see Mengozzi (2007: par 245).
137 Civil Code of the Republic of Lithuania (2000) *per* http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=245495.
138 See, in general, Mikelenas (2005: 161-181).
139 This article is titled: "Civil active capacity of foreign citizens and stateless persons".
140 This summary is written on the assumption that the concepts translated as "domicile" and "residence" are not synonymous.
141 Also see Mikelenas (2005: 167-168).

Article 1.17[142] contains a prohibition to invoke incapacity and reads as follows:

> "1. A party to a transaction who is incapable under the law of the state of his domicile may not invoke his incapacity if he was capable under the law of the state in which the transaction was formed, unless the other party was or should have been aware of the first party's incapacity under the law of the state of the latter's domicile.
> 2. Provisions of paragraph 1 of this Article shall not apply to family law and the law of succession, as well as to real rights."

Article 1.17 seems to apply to citizens and non-citizens of Lithuania. The article by implication provides for the application of the *lex loci contractus* where a contractant lacks capacity in terms of his or her *lex domicilii* but would have such in terms of the *lex loci contractus*. The latter contractant would only be able to rely on his or her incapacity if the co-contractant was or should have been aware of the incapacity in terms of his or her *lex domicilii*. However, Article 1.17(1) applies neither to issues relating to family and succession law, nor to transactions involving real rights.

In Lithuanian private international law, therefore, the *lex domicilii* and, in particular circumstances, the *lex loci contractus* govern contractual capacity.

4.2.13 the Netherlands

The new Book 10 of the Dutch Civil Code[143] on private international law contains provisions on the contractual capacity of natural persons in respect of minority and in respect of the required consent of spouses and partners.[144] Article 11(1) of Book 10 determines that, whether a natural person is a minor and whether he or she has the capacity to perform legal acts, is determined by his or her *lex patriae*.[145]

According to Article 11(2), the *Lizardi*-inspired rule in Article 13 of the Rome I Regulation[146] is of corresponding application in respect of the legal capacity

142 Article 1.17 is titled "Prohibition to invoke incapacity".

143 Book 10 entered into force on 1 January 2012.

144 For the purposes of this study, the current author leaves aside the internal Dutch distinction between "handelings(on)bevoegdheid" and "handelings(on)bekwaamheid". In English, both concepts are assimilated under the broad notion of "contractual (in)capacity". Compare Article 13 of the Rome I Regulation, which refers to "handelingsbekwaamheid en handelingsbevoegdheid" in Dutch and to "capacity" in English. *Cf* Article 1(2)(a): "bevoegdheid" and "legal capacity", respectively.

145 The notion of *semel maior*, *semper maior* is generally accepted in the Netherlands: see Asser/Vonken (2013: 120-122); Ten Wolde (2013: 122); and Vonken (2015: 5990).

146 note 5. Van Rooij and Polak (1987: 280) provide the following alternative formulation of the *Lizardi* rule: "In commercial transactions, a person cannot rely on his national law, under which his capacity to engage in commercial transactions is limited, if he acted in another State where his capacity is unlimited and if the other party justifiedly relied on the law of the latter State."

of a natural person in the case of bilateral or multilateral legal acts[147] that fall outside the scope of the Regulation.[148] Unlike Article 11(1), the latter provision does not seem to be limited to minority as a ground for incapacity.[149] Accordingly, the views of the Dutch authors on the *Lizardi* rule[150] are discussed in Chapter 5 in the context of Article 13 of the Rome I Regulation.[151]

Applied to a scenario of spouses A and B, Article 40 determines that the question of whether spouse A requires the consent of spouse B for concluding a legal act, and what the consequences are if consent was not acquired, is governed by the law of the country of the habitual residence of spouse B at the time of the legal act.[152] This issue is classified as one of contractual capacity in Dutch law[153] and was inserted to protect the non-contracting spouse.[154]

Article 68 determines that the question of whether the one partner (A) under a registered partnership requires the consent of the other partner (B) for concluding a legal act, and what the consequences are if consent was not acquired, is governed by the law of the Netherlands if the other partner (B)

147 "meerzijdige rechtshandelingen".

148 Also see Article 154.

149 See Asser/Vonken (2013: 122). For the view that the *Lizardi* rule also applied in the context of Article 3 of the *Wet Conflictenrecht Huwelijksbetrekkingen* (WCHb), the predecessor of the current Article 40, see Polak (1988: 580-581) and Reinhartz (1997: 516-524). *Cf* Strikwerda (2012: 140): "onzekere kwestie" but, for today, see Strikwerda (2015: 145): "De onder de Wet Conflictenrecht Huwelijksbetrekkingen onzekere kwestie of en in hoeverre de wederpartij bij onbekendheid met de onbevoegdheid van de handelende echtgenoot zich kan beroepen op de zgn. Lizardi-regel …, is met de invoering van Boek 10 van het Burgerlijk Wetboek opgelost: ingevolge het bepaalde in artikel 10:11 lid 2 BW … staat buiten twijfel dat de Lizardi-regel niet alleen kan worden ingeroepen bij kwesties van handelingsonbekwaamheid, maar ook bij kwesties van handelingsonbevoegdheid…." See Ten Wolde (1994: 1064) in general on the WCHb.

150 See, in particular, Asser/Kramer/Verhagen (2015: 19-20, 440-441 and 600-602); Asser/Vonken (2013: 126-129); Strikwerda (2015: 89-90 and 145); Ten Wolde (2013: 121-125); and Vonken (2015: 5991-5993 and 6053).

151 Chapter 5, paragraph 5.3.1.

152 This rule applies irrespective of which law applies to the personal and proprietary consequences of the marriage: see Article 41. *Cf* Article 39 in respect of expenses incurred to maintain the common household.

153 See Asser/Vonken (2013: 125); and Reinhartz (1997: 216-219 and 516). The issue could also constitute a separate conflicts category (of a proprietary nature): see Asser/Vonken (2012: 91-92). In German law, the requirement of consent does not refer to capacity but forms part of the proprietary consequences of marriage. See paragraph 4.2.8.

154 Asser/Vonken (2012: 99); Strikwerda (2015: 145); Ten Wolde (2013: 144-145); and Vonken (2015: 6052). See Reinhartz (1997: 514 and 517) in respect of Article 3 WCHb. See Asser/Vonken (2013: 125) on the *ordre public* exception in this regard. For a detailed discussion of the relationship between Article 40 and the substantive provisions of Article 88 and 89 of Book 1 of the Dutch Civil Code, see Asser/Vonken (2012: 99-102). Also see Vonken (2015: 6052-6053).

was habitually resident in the Netherlands at the time of the legal act.[155] The *ratio* for applying Dutch law in this instance is probably that many other legal systems do not recognise the institution of a partnership as an alternative to marriage. Article 68 does not provide for the situation that the other partner (B) was not habitually resident in the Netherlands at the time. It is unclear whether a residual *lex patriae* approach should be followed here, referring to the national law of the partner that concluded the legal act,[156] or whether the law applicable to the patrimonial consequences of partnership should be applied.[157]

At least the following is therefore clear in Dutch private international law: The *lex patriae* applies to the contractual capacity of a minor. Whether spouse A requires the consent of spouse B for concluding a contract, and what the consequences are if consent was not acquired, are governed by the law of the country of the habitual residence of spouse B at the time of conclusion of the contract. Whether the one partner under a registered partnership needs the consent of the other partner for concluding a contract, and what the consequences are if consent was not acquired, are governed by Dutch law (the *lex fori*) if the other partner was habitually resident in the Netherlands at the time of the conclusion of the contract. In all these cases (minors, spouses and partners), the *lex loci contractus* will be of alternative application in the type of scenario envisaged in the *Lizardi*-inspired rule in the Rome I Regulation. This is the position in respect of all bilateral and multilateral legal acts even if the Regulation is not otherwise applicable. The *lex loci contractus* may therefore in specific circumstances be applicable in addition to the *lex patriae* (minors), the law of habitual residence (spouses) and the *lex fori* (registered partners).

4.2.14 Portugal

The relevant provisions of the Civil Code of Portugal[158] are Articles 25, 28, 29 and 31(1).[159] Article 25 stipulates that the contractual capacity of an individual is governed by his or her "personal law", subject to the specific rules

155 This rule applies irrespective of which law applies to the personal and proprietary consequences of the registered partnership: see Article 69. Reinhartz (1997: 526-528) proposed a similar rule in respect of marriages. *Cf* Article 67 in respect of expenses incurred to maintain the common household.

156 *Cf* Article 11(2); Asser/Vonken (2013: 117, 122 and 128); Strikwerda (2015: 89-90); and Van Rooij and Polak (1987: 212 and 280). But Article 6 of the *Wet Algemene Bepalingen* (which contained support for the *lex patriae* and, although formulated unilaterally, was generally interpreted in a bilateral sense) is revoked by Article 3 of Book 10. See Asser/Vonken (2013: 63).

157 See Reinhartz (1997: 526-528).

158 Civil Code of Portugal (1966). See the translation in Riering (1997: 108).

159 Article 25 is titled: "Âmbito da lei pessoal", Article 31 "Determinação da lei pessoal", Article 28 "Desvios quanto às consequências da incapacidade" and Article 29 "Maioridade". See, in general, Neuhaus and Rau (1968: 500-512); and Vicente (2007: 257-275).

that shall be discussed below. "Personal law" is described in Article 31(1) of the code as the *lex patriae*.

Article 28(1) contains a provision which resembles the *Lizardi* rule[160] in French private international law, as it stipulates that a contractant lacking capacity in terms of his or her *lex patriae* may not invoke such incapacity if he or she concluded the contract in Portugal and he or she would have possessed such capacity in terms of Portuguese law.

Article 28(2) determines that the exception in Article 28(1) does not apply where the co-contractant had knowledge of the incapacity. Further, the exception applies neither in the context of family and succession law nor to contracts in respect of immovable property situated outside of Portugal.

Article 28(3) contains limited support for the *lex fori* in cases where contracts are concluded in a foreign country (*ie* not in Portugal). The *lex loci contractus* must then be applied in as far as its rules correspond with those in Portugal.

Lastly, Article 29 states that a change in personal law does not influence status or contractual capacity.

Portuguese private international law therefore provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus / lex fori*.

4.2.15 Romania

In the Romanian Private International Law Code[161] contractual capacity is addressed in Chapter II, Section 1, Articles 11, 15 and 17.[162] Article 11 provides for the application of the *lex patriae* to capacity subject to the specific provisions contained in Article 17. Article 15 stipulates that contractual capacity obtained in terms of a previous *lex patriae* shall not be influenced by a subsequent change in nationality.

Article 17 provides that a contractant who lacks capacity or possesses limited capacity in terms of the *lex patriae* or the law of habitual residence may not rely on this fact against his or her counterpart who *bona fide* believed him or her to have full capacity on the basis of the *lex loci contractus*. In other words, the *lex loci contractus* shall apply in these instances. The rule contained in Article 17, however, neither applies in the context of family or succession law, nor to contracts in respect of the transfer of immovable property.

160 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

161 Romanian Private International Law Code (1992). See *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1994: 534-572) for a German translation.

162 Chapter II concerns natural persons and Section 1 refers specifically to personal status.

Thus, in Romanian private international law, contractual capacity is governed by the *lex patriae*, the law of habitual residence and, in particular circumstances, the *lex loci contractus*.

4.2.16 Russia

The relevant provisions of the Civil Code of the Russian Federation are contained in Chapter 67,[163] more specifically, Articles 1195 (1), 1197 (1) and (2) and 1201.[164]

Article 1195 (1) states that "[t]he personal law of natural person shall be the law of the country of which the person is a citizen". "Personal law" therefore refers to the *lex patriae*.[165]

Article 1197 of the code reads as follows:

> "1. The civil dispositive capacity of a natural person shall be determined by his/her personal law.
>
> 2. A natural person who does not have civil dispositive capacity according to his/her personal law shall have no right to refer to his/her lacking dispositive capacity if he/she has dispositive capacity at the place where the deal was made, except for the cases in which the other party knew or was obviously supposed to know of the lack of dispositive capacity."

According to sub-article 1, the contractual capacity of a natural person shall be determined by the *lex patriae*. Sub-article 2, however, provides that an individual who lacks capacity in terms of the *lex patriae* may not rely on this incapacity if he or she would have such according to the *lex loci contractus*. If the counterpart knew or was ignorant of the fact due to negligence, the incapacity may nevertheless be relied upon.[166] The rule therefore implies the application of the *lex loci contractus* in specific instances.

Article 1201 provides the following:

> "The natural person's right to pursue entrepreneurial activity as an individual entrepreneur ... shall be determined by the law of the country where the natural person is registered as an individual entrepreneur. If this rule cannot be applied due to lack of a compulsory registration the law of the country of the main place of business shall apply."

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163 Civil Code of the Russian Federation (2001). English translation available at http://www.russian-civil-code.com/PartIII/SectionVI/Subsection1/Chapter67.html. See Šarčević and Volken (2002: 352-353). The title of Chapter 67 is "The law governing determination of the legal status of persons". See, in general, Lebedev *et al* (2002: 117-144).

164 Article 1195 concerns the personal law of natural persons and Article 1197 concerns the law governing the determination of the civil dispositive capacity of a natural person. Article 1201 deals with the capacity of an individual to pursue entrepreneurial activities.

165 Also see Lebedev *et al* (2002: 126). See, further, Vorobieva (2012: 148, 151 and 152).

166 Also see, Lebedev *et al* (2002: 126-127). See, further, Vorobieva (2012: par 151).

The article therefore provides a rule regarding the capacity of an individual entrepreneur. Capacity in this case shall be governed by the law of the country of registration as entrepreneur. If registration is not compulsory, the law of the main place of business shall apply.

Therefore, the *lex patriae* and, in specific circumstances, the *lex loci contractus* are applied to contractual capacity in Russian private international law.[167] In the case of individual entrepreneurs, either the law of the country of registration or the main place of business is applied.

4.2.17 Slovakia

The private international law rules concerning contractual capacity of natural persons in Slovakia are contained in § 3 of the Private International Law and International Procedural Law Act.[168] According to § 3(1), contractual capacity is governed by the *lex patriae*.[169] § 3(2) contains the rules relating to the contractual capacity of foreigners and, in this regard, a distinction is drawn between contracts concluded in and outside Slovakia. Where a foreigner concludes a contract in Slovakia, his or her contractual capacity shall be governed by the *lex loci contractus* and the *lex patriae*, in the sense that the foreigner will be bound to the contract if he or she possesses capacity in terms of any one of these two systems.[170] Where the contract is concluded outside of Slovakia, contractual capacity shall be governed by the *lex patriae* and not the *lex loci contractus*.

Some specific conflicts provisions are also contained in the Act Concerning Bills of Exchange and Cheques.[171] In terms of the Act, the contractual capacity of an individual to assume liability in respect of a bill of exchange shall be governed by the *lex patriae*. Where the private international law of the *lex patriae* indicates the applicability of another legal system, *renvoi* must be applied.[172] The same rule applies to cheques: the contractual capacity of an individual to acquire liability on a cheque is governed by the *lex patriae* (but *renvoi* must be applied).[173]

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167 See, further, Sotbarn (2010: 329) for the text of Article 11(a) of the Kiev Treaty, determining that the contractual capacity of an entrepreneur is governed by the law of the state where the entrepreneur is registered.

168 Private International Law and International Procedural Law Act (1963). This legislation was also applicable in the Czech Republic prior to the enactment of the current Act on Private International Law (2012) (Riering (1997: 299-301)).

169 Pauknerová (2007: par 90).

170 Also see Riering (1997: 299).

171 No 191/1950 Coll as amended.

172 Section 91 of Part I of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.

173 Section 69 of Part II of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.

Therefore, according to Slovakian private international law, contractual capacity is governed by the *lex patriae* and, in particular circumstances, the *lex loci contractus / lex fori*. Contractual capacity in respect of cheques and bills of exchange is governed by the *lex patriae*. There is also a specific rule relating to *renvoi* which applies in respect of bills of exchange and cheques, in terms of which the law referred to by the *lex causae*'s private international law shall apply.

4.2.18 Slovenia

In terms of Article 13(1) of the Private International Law and Procedural Act of the Republic of Slovenia,[174] the contractual capacity of Slovenian citizens in foreign countries must be determined by the *lex patriae*.[175] According to Article 13(2) of the Act, a natural person who lacks capacity in terms of the *lex patriae* shall be regarded as possessing capacity if he or she has such under the law of the country where the obligation arose – the *lex loci contractus*. Lastly, Article 13(4) states that the exception in Article 13(2) shall not apply to issues relating to family and succession relationships.

Thus, in Slovenian private international law, the *lex patriae* and the *lex loci contractus* are applied to contractual capacity on an equal level.[176]

4.2.19 Spain

The first part of Article 9.1 of the Spanish Civil Code[177] provides the following in relation to contractual capacity: "The personal law which corresponds to natural persons is determined by their nationality. This law governs capacity and civil status, family rights and obligations and succession by death."[178] Thus, the general rule regarding contractual capacity in the Spanish legal system is that it is governed by the *lex patriae*. Further, in terms of the second sentence of Article 9.1, a change in nationality does not influence majority once this has been acquired.

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174 Private International Law and Procedural Act (1999). German translation in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2002: 750-751). See, in general, Puharič (2003: 155-167).

175 Puharič (2003: 160).

176 The position in Macedonian private international law is similar. Article 15 of the Macedonian Private International Law Act (2007) contains the provisions on contractual capacity. This article states that, in general, the capacity of a natural person shall be governed by the *lex patriae*. In addition, Article 15, paragraph 2, provides for the application of the *lex loci contractus* to contractual capacity, which supplements the *lex patriae* in this regard. The sole source available to the current author on Macedonian private international law does not state in which instances the *lex patriae* is so supplemented. See Šarčević (2008: 441-458).

177 Spanish Civil Code (1889–1981).

178 Fernández Arroyo, Martínez and Casas (2002: par 65).

Article 10.8 of the code contains an exception to the application of the *lex patriae*. Fernández Arroyo, Martínez and Casas describe its effect as follows:[179]

> "According to the Spanish legal system an onerous contract [concluded][180] in Spain by a foreigner, who is considered incapable pursuant to his national law, shall be valid if the cause of incapacity is not recognised by the Spanish legislation. This rule will not be applied to contracts relating to [immovable][181] property situated in a foreign country."

Thus, a contract concluded in Spain by a foreigner lacking capacity in terms of his or her *lex patriae*, shall be valid if he or she would have contractual capacity in terms of the *lex loci contractus / lex fori*.[182] This rule is, however, not applicable to matters involving immovable property situated outside of Spain.

Spanish private international law therefore recognises the application of the *lex patriae* and, in specific circumstances, the *lex loci contractus / lex fori* to contractual capacity.

4.2.20 Switzerland

Chapter 2 of the Swiss Federal Statute on Private International Law contains the relevant provisions regarding contractual capacity,[183] specifically Articles 35 and 36.[184]

Article 35 reads: "The capacity [of a natural person] to make juridical acts[185] is governed by the law of his domicile. Once acquired, such capacity is not affected by a change of domicile." In general, contractual capacity in Swiss law is thus governed by the *lex domicilii*, but is not affected by changes in domicile if once acquired.

179 Fernández Arroyo, Martínez and Casas (2002: par 66).

180 Fernández Arroyo, Martínez and Casas (2002) in par 68 use the word "celebrated"; the Spanish term is "celebrados".

181 Fernández Arroyo, Martínez and Casas (2002) in par 68 refer to "property" but the original has "inmuebles".

182 Although the meaning of "onerous contract" is unclear, it is suggested that it may refer to all contracts concluded *quid pro quo* (*cf* the requirement of valuable consideration in the English common-law).

183 Swiss Federal Statute on Private International Law (1987). Translation by Cornu, Hankins and Symeonides (1989: 204-205). Also see Samuel (1988: 681-695).

184 Article 35 is titled "Principle" and 36 "Security of transaction".

185 Karrer, Arnold and Patocchi (1994: 60) describe "to act" as the issuing of "transactional declarations of will and other declarations of will or opinion of legal consequences".

Article 36 further states:

> "1. A party to a juridical act[186] who lacks capacity under the law of the state of his domicile may not invoke this incapacity if he was capable under the law of the state where the act was made, unless the other party knew or should have known of this incapacity.
>
> 2. This provision does not apply to juridical acts relating to family law, to succession law, or to real rights in immovables."

Article 36(1) thus provides for the application of the *lex loci contractus* in addition to the *lex domicilii* in instances where a contractant lacking capacity in terms of the latter has capacity according to the former legal system. The *lex loci contractus* does not apply if the capable contractant knew or should have known of the incapacity in terms of the *lex domicilii*. According to Article 36(2), this rule is neither applicable to family law and the law of succession, nor to issues regarding real rights in immovable property.

Siehr[187] submits that the protection afforded to the capable contractant in terms of Article 36(1) shall only apply where the parties were in each other's physical presence when the contract was concluded. This means that protection shall not be offered to the capable contractant if the contract was, for example, concluded over the telephone.[188] The author suggests in his commentary on Article 36(2) that no protection is offered to the capable party in respect of the specific contracts mentioned[189] because in these circumstances capacity should be ascertained from the relevant documents.[190]

Contractual capacity, according to Swiss private international law is therefore governed by the *lex domicilii* and, in specific circumstances, by the *lex loci contractus*.

186 See Karrer, Arnold and Patocchi (1994: 61) who comment that these are transactions where rights and obligations are created by a single or several declarations of will, for example, contracts, contracts of partnership, wills and marriage.
187 Siehr (2002: 144-145).
188 Siehr (2002: 145). Also see Karrer, Arnold and Patocchi (1994: 60-61).
189 These are contracts relating to family and succession law, as well as immovable property.
190 Siehr (2002: 145).

4.2.21 Ukraine

The relevant provision of the Ukrainian Private International Law Code is contained in Articles 17, 18(2) and 19.[191] Article 17 states the following:

> "1. The arising and termination of civil legal capacity of a natural person shall be determined by his personal law.
> 2. Foreigners and stateless persons shall have civil legal capacity in Ukraine equally with citizens of Ukraine, except for instances provided for by a law or by international treaties of Ukraine."

This provision states that the contractual capacity of natural persons is generally determined by the *lex patriae*. Also, foreigners in the Ukraine without any citizenship shall have the same capacity as Ukrainian nationals unless this conflicts with local or international law. Article 18(2) of the code states that "[t]he grounds and legal consequences of deeming a natural person to lack dispositive legal capacity or the limitation of the civil dispositive legal capacity of a natural person shall be regulated by the personal law of this person". In other words, *lex patriae* determines the grounds and consequences of a lack of capacity or a limitation thereof.

Article 19(1) contains a specific rule concerning the capacity of an individual entrepreneur. It reads:

> "The right of a natural person to effectuate entrepreneurial activity shall be determined by the law of the State in which the natural person is registered as an entrepreneur. In the absence in a State of the requirements concerning obligatory registration the law of the State of the principle place of the effectuation of entrepreneurial activity shall be applied."

This provision therefore means that capacity shall be governed by the law of the country in which the individual is registered as an entrepreneur. Should there be no requirement of compulsory registration, the law of the country of the main place of business shall apply.

Ukrainian private international law therefore applies the *lex patriae* to contractual capacity. In the case of individual entrepreneurs, either the law of the country of registration or the main place of business is applied.

191 Ukrainian Private International Law Code (2005). English translation in Butler (2011). See Dovgert (2007: 131-159). Article 17 relates to the civil legal capacity of natural persons and Article 18 to the civil dispositive legal capacity of natural persons, while Article 19 concerns the capacity of natural persons to perform entrepreneurial activities.

4.3 The Middle East

4.3.1 Azerbaijan

In the Azerbaijani private international law code,[192] Articles 9(1) and 10 are relevant.[193] In terms of Article 10(1) the legal capacity of a natural person is governed by his or her "personal law". Article 9(1) defines "personal law" as the *lex patriae*. However, Article 10(2) states that contractual capacity is governed by the *lex loci contractus*.

In Azerbaijani private international law different rules therefore apply to legal and contractual capacity. Legal capacity, on the one hand, is governed by the *lex patriae* while contractual capacity, on the other, is governed by the *lex loci contractus*.

4.3.2 Iran

Articles 6, 7, 8, 962 and 963 of the Iranian Civil Code contain the private international law rules relating to contractual capacity.[194] Article 6 states that the Iranian laws of contractual capacity of individuals are applicable to all Iranians, even when they are abroad. This means that the *lex patriae* shall apply to Iranians. Article 7 provides that the same rule (*lex patriae*) shall govern the capacity of foreigners who are in Iran.[195] Article 8 stipulates that the capacity of foreigners to possess or acquire immovable property in Iran shall be governed by the *lex rei sitae*.

Similar to Article 6, Article 962 states that contractual capacity is generally determined by the *lex patriae*.[196] Where, however, a foreigner concludes a contract in Iran, he shall be deemed to possess contractual capacity if he would have such in terms of Iranian law, irrespective of whether he is fully or partially incapacitated according to his *lex patriae*. This means that the *lex loci contractus / lex fori* would be applied in this case. This rule does not, however, apply to contracts in respect of family or succession law or in respect of immovable property situated in Iran.[197]

192 Private International Law Code of Azerbaijan (2000). German translation in *Praxis des Internationalen Privat- und Verfahrensrechts* (2003: 387).

193 Article 9 concerns the personal status of natural persons and Article 10 specifically relates to the rights and capacity of natural persons.

194 Civil Code of Iran (1935). German translation in Kropholler *et al* (1999: 298).

195 within the limitations of existing treaties.

196 Article 963 provides that where spouses have different nationalities, the rights in respect of personal and property issues shall be governed by the husband's *lex patriae*.

197 Civil Code of Iran (1935: Article 962).

In Iranian private international law, as illustrated, the *lex patriae* or the *lex loci contractus / lex fori* are generally applied to contractual capacity, but the *lex rei sitae* is applicable in respect of immovable property.

4.3.3 Israel

In terms of § 77 of the Legal Capacity and Guardianship Law,[198] the contractual capacity of a minor or legally incompetent person shall be governed by the *lex domicilii*.[199] There are exceptions to the application of the general principle[200] and the relevant rule reads as follows:

> "[A] legal act performed in Israel by a person whose legal capacity is restricted or who has been deprived of capacity, being an act of a kind commonly performed by such persons, or a legal act performed in Israel between such a person and a person who neither knew nor ought to have known of the restriction or deprivation,[201] shall be valid, unless substantial harm was caused thereby to the first-mentioned person or his property."[202]

Einhorn submits that the exceptions should also apply multilaterally.[203] This would mean that a contractant incapable in terms of his or her *lex domicilii* may not rely on this incapacity if he or she would have had such capacity according to the *lex loci contractus* (whether or not the *locus contractus* is in the country of the forum), unless his counterpart was aware, or should have been aware, of this incapacity at the time of contracting. The *lex loci contractus* would thus apply unless the counterpart is shown to have fault.

The relevant exception is similar to the *Lizardi* rule[204] as applied in various civil-law countries. However, there are two elements of the exception that do not feature in any of the other jurisdictions: (1) the *lex loci contractus* applies as an additional legal system only if the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity;[205] and (2) the *lex loci contractus*[206] does not apply as an additional legal system if the relevant contract caused substantial harm to the person with no or limited contractual capacity.

198 Legal Capacity and Guardianship Law (1962), as in Einhorn (2012: par 125).
199 Einhorn (2012: pars 125-130). The author submits in pars 125-126 that the rule of "once mature, always mature" applies in Israel, which means that a change in domicile does not affect the status of maturity once attained.
200 Einhorn (2012: par 128) refers to those exceptions as "rules of estoppel".
201 Einhorn (2012: par 128) suggests that "at the time the act was made" should be added.
202 Legal Capacity and Guardianship Law (1962: § 77).
203 Einhorn (2012: par 129).
204 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
205 This is the multilateral version of the rule. In the unilateral version, *lex loci contractus* must be read as *lex fori*. See Neels (2010: 122-123).
206 *ibid.*

Einhorn further submits that the exception should not apply to contracts relating to family or succession law nor to agreements involving immovable property, because in these cases documents regarding capacity must be submitted and inspected by the counterpart. The latter, she continues, should also not be protected if, at the time of contracting, the incapable contractant was not physically present, thereby creating the impression that he possesses capacity. Where contracts are concluded telephonically, she asserts, the onus shall be on the capable party to make the necessary enquiries regarding capacity.[207] The author adds that the capable contractant should not be allowed to rely on his or her domestic law for protection; however, it has never been suggested that the capable party's *lex domicilii* should be applied to the determination of the capacity of his or her counterpart.[208]

4.3.4 Qatar

Article 11 of the Qatari Civil Code[209] contains the private international law provisions relating to contractual capacity. Generally, contractual capacity of a natural person, in this legal system, is governed by the "personal law". The "personal law" in turn refers to the natural person's nationality, indicating the application of the *lex patriae*. However, the *lex loci contractus* will apply if the following conditions are present:

a) a foreign contractant, lacking capacity in terms of his or her *lex patriae*, concludes a contract in Qatar;
b) the contract has to be performed in Qatar;
c) the reasons for the foreign contractant's incapacity in terms of the *lex patriae* are not readily ascertainable; and
d) the foreign contractant would have possessed the relevant capacity in terms of the internal law of Qatar.

Najm[210] explains that the exception amounts to the application of a rule that resembles that pronounced in the *Lizardi* decision,[211] albeit in a different manner. She correctly points out that the rule is incomplete as it does not provide what the position would be should a Qatari, lacking capacity in terms of his or her *lex patriae*, conclude a contract outside Qatar where he or she possesses such capacity. The rule therefore "diminishes its international effect, limiting it to the preservation of the stability of internal commerce".[212]

207 Einhorn (2012: par 130).
208 *Cf* the position in Quebec, discussion in paragraph 4.5.3.
209 Civil Code of Qatar (2004), as in Najm (2006: 249-266).
210 Najm (2006: 442).
211 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
212 Najm (2006: 442).

From the discussion it thus emanates that the *lex patriae* and, in specific circumstances, the *lex fori / lex loci contractus / lex loci solutionis* are applied to contractual capacity in Qatari private international law.

4.3.5 Syria

In Syrian private international law, the provision relating to contractual capacity is contained in Article 12(1) of the Civil Code.[213] In terms of this provision, contractual capacity is governed by the *lex patriae*. An exception to this rule exists when a commercial contract[214] is concluded in Syria where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae* but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account in the particular circumstances identified. The exception resembles the *Lizardi* rule,[215] although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the intention clearly is that the *lex loci contractus* will be applied.

Therefore, in Syrian private international law, the *lex patriae* is applied to contractual capacity and, in particular circumstances, the *lex loci contractus / lex fori / lex loci solutionis*.

4.3.6 Turkey

Article 8 in Section II of the 1982 Turkish statute on private international law[216] determined as follows:

> "The capacity of persons to have rights and to act is governed by their national law.
>
> If a foreigner has no capacity under his national law but has capacity under Turkish law, he is bound by legal transactions entered into in Turkey. This provision is not applicable to family and inheritance law and transactions creating real rights in immovables located in a foreign country.
>
> A person who has attained the age of majority under his national law shall not lose majority with a change of nationality…."

In terms of this article, contractual capacity is generally governed by the *lex patriae*. If, however, a foreigner lacks capacity according to his or her *lex patriae*, but would have such in terms of Turkish law, and the contract is con-

213 Civil Code of Syria (1949). German translation in Kropholler *et al* (1999: 771).
214 "une transaction d'ordre pécuniaire".
215 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
216 as translated by Ansay and Schneider (1990: 152). See, in general, Ansay and Schneider (1990: 139-151). Section I of the statute is titled "The Conflict of Laws Rules" and Article 8 "Capacity".

cluded in Turkey, the *lex loci contractus / lex fori* shall govern. The exception shall not be applicable to contracts involving family law, the law of succession and real rights concerning immovable property situated outside Turkey. Further, contractual capacity obtained by majority under a foreigner's *lex patriae* shall continue irrespective of a subsequent change in nationality.

Tekinalp *et al*[217] explain that the *lex patriae* rule governed both the degree and conditions of capacity.[218] "Degree" concerns the difference between full capacity, full incapacity, limited capacity and limited incapacity, while "the conditions of capacity" relate to the age of majority and the capacity to make reasonable judgments.[219]

According to the authors, the substitution of the *lex loci contractus / lex fori* for the *lex patriae* in the second paragraph of Article 8, was based on the principle of legal certainty. They are of the opinion that the following were the requirements for the relevant exception to apply:[220] (i) the person involved should have no capacity under his *lex patriae*; (ii) the contract must have been concluded in Turkey; (iii) the contract must have been concluded by the parties in each other's presence; and (iv) the nature of the contract should be appropriate.[221] It is, however, submitted by the current author that number (iii) above was not a requirement since physical (actual) presence is not mentioned in paragraph two of Article 8.

The 1982 statute has been replaced by the 2007 private international law code.[222] The relevant sections are contained in Part 1, Chapter 2, Article 9 (sub-articles 1-3)[223] of the code:

> "(1) The capacity to have rights and duties and to act shall be governed by the national law of the person concerned.
>
> (2) Any person who does not have capacity pursuant to her/his national law, shall be bound by the legal transaction she/he has carried out, provided she/he has capacity to act pursuant to the law of the country where the transaction has been carried out. This provision shall not apply to transactions relating to family and inheritance law and to real rights on immovable property in another country.
>
> (3) Majority attained pursuant to the national law of the person shall not be terminated due to change of nationality."

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217 Tekinalp, Nomer and Odman (2001: par 156-167).
218 Tekinalp, Nomer and Odman (2001: par 159).
219 *ibid.*
220 Tekinalp, Nomer and Odman (2001: par 169).
221 This refers to the fact that transactions relating to family or inheritance law and those pertaining to immovable property situated outside of Turkey were excluded by Article 8.
222 Private International Law Code of Turkey (2007). English translation in *Yearbook for Private International Law* (2007: 583-604). The code entered into force on 12 December 2007. See in general, Tekinalp (2007: 313-341).
223 Part 1 is titled: "Private International Law", chapter 2 concerns the "Conflict of Law Rules" and Article 9 refers specifically to "Capacity".

In terms of Article 9(1), contractual capacity shall be governed by the *lex patriae*. Article 9(2) states that the *lex loci contractus* shall govern capacity where a contractant lacks such according to his or her *lex patriae* but possesses capacity in terms of the *lex loci contractus*. The *lex loci contracus* shall not be applicable to contracts relating to family and succession law and real rights in immovable property situated outside of the *locus contractus*. According to Article 9(3), where an individual obtains capacity by attaining the age of majority in terms of his or her *lex patriae*, it shall not terminate upon a subsequent change in nationality.

From the discussion it emerges that contractual capacity in Turkish private international law today is governed by the *lex patriae* and the *lex loci contractus* on an equal level.

4.3.7 United Arab Emirates

Article 11 of the Civil Code of the United Arab Emirates contains the provisions regarding contractual capacity.[224] The general rule is that capacity is governed by the *lex patriae*. An exception exists when a commercial contract is concluded in the United Arab Emirates where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae*, but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account. The exception resembles the *Lizardi* rule[225] although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It merely prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is probably that the *lex loci contractus / lex fori* will then be applied.

Therefore, according to the private international law of the United Arab Emirates, the *lex patriae* and, in specific circumstances, the *lex loci contractus / lex fori / lex loci solutionis* are applicable to contractual capacity.

4.3.8 Uzbekistan

Article 1169 of Chapter 71 of the Civil Code of Uzbekistan determines that[226] "[t]he legal capacity and dispositive legal capacity of a natural person shall be determined by his personal law", which is defined in Article 1168 to be the *lex patriae*. However, "[c]ivil dispositive legal capacity of a natural person with respect to transactions … shall be determined according to the law of

224 Civil Code of the United Arab Emirates (1985). Translation in Kropholler *et al* (1999: 996).
225 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
226 Civil Code of the Republic of Uzbekistan (1997). Translation by Butler (1997). Article 1169 deals specifically with the legal capacity and dispositive legal capacity of natural persons.

the country of the place of concluding the transaction". Contractual capacity is therefore governed by the *lex loci contractus*.

The fourth paragraph of Article 1169 determines:

> "The legal capacity of a natural person to be an individual entrepreneur and to have the rights and duties connected therewith shall be determined according to the law of the country where the natural person is registered as an individual entrepreneur. In the absence of a country of registration, the law of the country of the principal place of effectuating individual entrepreneurial activity shall be applied."

The capacity of an individual in the context of entrepreneurial activity is therefore determined by the law of the country of registration as entrepreneur. If the relevant person is not so registered, the law of the country of the principle place of entrepreneurial activity shall be applied.

The *lex loci contractus* is therefore the primary applicable legal system in respect of contractual capacity in Uzbekistani private international law. There exists a special rule in respect of an individual entrepreneur for the application of the law of the country of either registration or the principal entrepreneurial activity.

4.4 The Far East

4.4.1 China

Prior to 2000, China had no specific rules applicable to the contractual capacity of individuals or juristic persons.[227] It could, however, be accepted that China, as the other socialist states and the majority of the civil-law countries, referred to the "personal law" of an individual in addressing the issue, that is: the law of nationality (the *lex patriae*). This legal system would, however, not apply where a foreign contractant lacking contractual capacity according to his or her *lex patriae* concluded a contract with a Chinese citizen. Under these circumstances Chinese law would apply if the foreigner had capacity in terms of this legal system.[228] The law of habitual residence was applicable to Chinese nationals permanently residing abroad.[229]

227 Chen (1987: 461).

228 It may perhaps be assumed that this rule refers to the situation that the contract was concluded in China and that Chinese law was therefore the *lex loci contractus*, but this is not clear.

229 Chen (1987: 461).

The fourth draft of the Chinese model law on private international law contained the proposed rules relating to contractual capacity in Article 67:[230]

> "The capacity to act is governed by the law of the country where a natural person has his domicile or habitual residence.
>
> If a foreigner lacks the capacity to act or has only limited capacity to act under the law of his domicile or habitual residence but possesses the capacity to act under Chinese law, Chinese law applies and the person is deemed to have capacity to act, except legal acts concerning marriage, family, inheritance or disposition of immovable property."

In terms of the fourth draft of the model law, therefore, capacity was to be governed by both the *lex domicilii* and the law of the country of habitual residence. Where a foreign contractant lacking capacity in terms of the *lex domicilii* or the law of habitual residence had such capacity according to the *lex fori*, the latter legal system would apply. This exception would not be applicable where the contract in issue concerned matrimonial, family or succession law or the alienation of immovable property. In terms of the fourth draft, therefore, the *lex domicilii*, the law of habitual residence and the *lex fori* would govern on an equal basis as far as foreign citizens are concerned.

Article 67 of the sixth draft of the model law on private international law determined in Section 2:[231]

> "The capacity to act of a natural person is governed by the law of his domicile or habitual residence.
>
> If a foreigner does a legal act in the territory of the PRC [People's Republic of China] for which he would have no capacity to act or a limited capacity to act under the law of his domicile or habitual residence, he is deemed to have capacity to act in so far as he would be capable under the law of the PRC, except the legal act relating to family and inheritance or concerning real rights in immovable property."

Therefore, according to this article, contractual capacity of an individual was in principle to be governed by both the *lex domicilii* and the law of habitual residence. Further, where a foreigner concluded a contract in China while lacking contractual capacity according to his or her *lex domicilii* or the law of habitual residence but possessed capacity in terms of the *lex fori*, then the latter legal system would apply.[232] This would, however, not be the position where the contract related to family law, the law of succession or real rights in immovable property. Also in terms of the sixth draft, therefore, the

230 Liu (2001: 24). Article 67 falls under the second section and refers to "The Capacity to Have Rights and the Capacity to Act".

231 See *Yearbook of Private International Law* (2001: 349-390). Section 2 is titled "Capacity for Rights and Capacity to Act", while Article 67 refers specifically to the "Capacity to Act of Natural Person". Also see, in general, Jin and Guomin (1999: 135-156).

232 Also see Zhu (2007: 283 at 291).

lex domicilii, the law of habitual residence and the *lex fori* would govern on an equal basis as far as foreign citizens were concerned. The sixth draft spelled out more clearly that the *lex fori* applied *when the contract was concluded in China*. This was perhaps also the intention of the fourth draft, but was there not stated in so many words.

The current Chinese private international law Act was adopted on 28 October 2010 and entered into force on 1 April 2011.[233] The relevant provision is contained in Chapter Two,[234] Article 12 of the Act, which stipulates:

> "Civil competence of a natural person is governed by the law of the place where the person habitually resides.
>
> Where a natural person engaging in civil activities is deemed incompetent pursuant to the law of the place where the person habitually resides but competent according to the law of the place where the act is performed, the law of the place where the act is performed shall be applied, with the exception of those related to marriage, family or succession."

Contractual capacity of a natural person is thus generally governed by the law of the country of habitual residence.[235] However, if a natural person lacks capacity in terms of the law of habitual residence but is capable under the *lex loci contractus*, then this legal system applies, except where the relevant contract concerns family or succession law. If the contract does not fall under the latter categories, the law of habitual residence and the *lex loci contractus* govern on an equal basis.

From the discussion it is thus clear that contractual capacity of a natural person in Chinese private international law is in general determined by the law of the country of habitual residence and the *lex loci contractus* on an equal basis.

4.4.2 Japan

Prior to 2007, the Japanese private international law provisions were contained in the Act on the Application of Laws of 1898.[236] In terms of Article 3(1) of the Act, the contractual capacity of an individual was governed by the

233 Chinese Private International Law Act (2010).

234 Chapter Two is titled: "Civil Entities".

235 The concept of habitual resident has been given content in § 15 of the Interpretation of the Supreme People's Court of 10 December 2012 (in force as of 7 January 2013). In terms of the paragraph, an individual would be accepted as habitually resident at a particular place if he or she has resided there for at least a year and this place of residence forms the centre of his or her life. For the text of § 15, see "Erläuterungen des Obersten Volksgerichts zu einigen Fragen des 'Gesetzes der Volksrepublik China über das anwendbare Recht auf zivilrechtliche Beziehungen mit Außenberührung'" (2013: 110). Also see Leibküchler (2013: 89-98) and Tong (2014: 206-211).

236 See Anderson and Okuda (2002: 230). See, in general, Kim (1992: 1-35).

lex patriae. According to Article 3(2), the *lex loci contractus* was to apply when a foreigner lacking contractual capacity in terms of his or her *lex patriae* concluded a contract in Japan, where he or she would have had such capacity.[237] Therefore both the *lex patriae* and the *lex loci contractus / lex fori* were applicable under the previous position.

On 1 January 2007 the Act on the General Rules of Application of Laws[238] entered into force, revising Japanese private international law. The provisions relating to contractual capacity are contained in (Chapter 3, Section 1) Article 4 of the Act:[239]

> "(1) The legal capacity of a person shall be governed by his or her national law.
>
> (2) Notwithstanding the preceding paragraph, where a person who has performed a juristic act is of full capacity under the law of the place where the act was done (*lex loci actus*), that person shall be regarded as having full capacity to the extent that at the time of the juristic act, all the parties were situated in a place under the same law.
>
> (3) The preceding paragraph shall not apply either to a juristic act by family law or succession law, or to a juristic act regarding immovables situated in a place where the law differs from the *lex loci actus*."

In principle, the contractual capacity of an individual is governed by the *lex patriae*. There is, however, an exception to this rule in terms of sub-article (2): when a contractant was in the same country as his or her counterpart at the time of contracting and had capacity according to the *lex loci contractus* (irrespective of the fact that he or she did not have contractual capacity in terms of the relevant *lex patriae*), *the lex loci contractus* shall apply. The *lex loci contractus* will, however, not apply in respect of contracts relating to family law or the law of succession and those concerning immovable property situated in a country where the law differs from the *lex loci contractus*.

Should a contractant conclude a contract when present in the same country as his counterpart but while lacking capacity in terms of the *lex loci contractus*, the *lex patriae*, being the generally applicable legal system, will apply. The same applies if a party were capable under the *lex loci contractus* but not present in the same country as his or her co-contractant at the moment of contracting.

Therefore, in terms of Japanese private international law, the *lex patriae* and, in specific circumstances, also the *lex loci contractus* are applicable to contractual capacity.

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237 See Takahashi (2006: 311 at 314). See, in general, Okuda (2006: 145-167).

238 Act on the General Rule of Application of Laws (2006). Translation in *Yearbook for Private International Law* (2006: 427-441).

239 Chapter 3 is titled "General Rules on Applicable Law", Section 1 relates specifically to "Persons" and Article 4 to "A Person's Legal Capacity".

4.4.3 Macau (China)

The relevant sections of the Civil Code of Macau[240] are found in (Book I, Title 1, Chapter III,[241] Division II, Subdivision I) Articles 24, 27 and 30 (subdivision IV) and Article 46.[242]

Article 24 reads: "The status and capacity of natural persons … shall be governed by the personal law of the respective subject, without prejudice to the restrictions in this Division."

Article 27 of the code states as follows:

> "1. Transactions concluded in [Macau][243] by a person who lacks legal capacity under the applicable personal law shall not be annulled on the ground of such incapacity, if the person would be considered capable under the internal law of [Macau], if it were applicable.
>
> 2. This exception no longer exists if the other party was aware of the incapacity or if the transaction is unilateral, pertains to family law or to the law of succession or deals with the transfer of immovables situated outside the territory of [Macau].
>
> 3. If the person without legal capacity concludes the transaction outside [Macau], the law of the place where the transaction is concluded shall apply, provided it contains rules identical to those laid down in the preceding paragraphs."

The relevant provisions of Article 30 read as follows:

> "1. The personal law of a natural person shall be the law of his or her habitual residence.
>
> 2. The habitual residence of a natural person shall be deemed the place where he or she has established the effective and stable centre of his/her personal life."

Article 46, which relates to immovable property, provides that "[t]he capacity to acquire or transfer real rights in immovable property shall also be governed by the law of the country where the property is situated if that law thus provides; otherwise the personal law shall apply".

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240 Civil Code of Macau (1999). Translated by Marques dos Santos (2000: 343). See, in general, Marques dos Santos (2000: 133-151).

241 Book I is the "General Part", Title I refers to the rules of law, their interpretation and application, while Chapter III relates to the rights of foreigners and private international law.

242 Division II is titled "Choice of Law Rules", while Subdivision I concerns the scope and determination of the personal law. Articles 24, 27 and 30 focus on the scope of the personal law, the exceptions with respect to the effects of incapacity and determining the personal law respectively. Subdivision IV relates to the law applicable to property and Article 46 deals with the capacity to acquire or transfer real rights in immovable property.

243 The translated text of the code reads: "Macao", from the original Portuguese, but the correct English translation is "Macau".

Article 30 of the Civil Code of Macau forms the basis of Articles 24, 27 and 46, as it describes what is meant by "personal law", namely the law of the natural person's habitual residence. It also provides a definition of the concept "habitual residence". Accordingly, Article 24 in effect states that the contractual capacity of an individual shall in principle be governed by the law of his or her habitual residence.

Article 27 deals with the position of the individual lacking contractual capacity and amounts to a rule resembling that of *Lizardi*.[244] Sub-article (1) states that where a contractant lacking capacity according to his or her law of habitual residence concludes a contract in Macau and is regarded as having such capacity in terms of the internal *lex loci contractus / lex fori*, the latter legal system shall apply. Sub-article (2) provides in effect that a contractant may rely on his or her incapacity in terms of his or her law of habitual residence if the counterpart was aware of this. The *Lizardi*-inspired exception does not apply where the contract in question is unilateral, relates to family law, the law of succession or the sale of immovable property situated outside of Macau. Sub-article (3) concerns contracts concluded outside Macau by an individual lacking capacity in terms of his or her law of habitual residence; it determines that the *lex loci contractus* shall apply. There is, however, a proviso that the country of conclusion of the contract should have legal rules identical to that of Macau in terms of subsections (1) and (2).

Article 46 provides that contractual capacity relating to real rights in immovable property shall be governed by the *lex rei sitae* if that law stipulates that the *lex situs* indeed applies. If not, the law of the country of habitual residence shall apply.

Therefore, in terms of the private international law rules of Macau, contractual capacity is governed by the law of habitual residence, while the *lex loci contractus / lex fori*, the *lex loci contractus* and the *lex rei sitae* may play a role in specific circumstances.

4.4.4 Mongolia

Article 543(2) and (5) in Chapter 62 of the Mongolian civil code deals with the law applicable to contractual capacity in private international law.[245] According to sub-article 2, the contractual capacity of foreign citizens shall be governed by the *lex patriae*. Sub-article (5) states that capacity of foreign citizens relating to contracts which were concluded in Mongolia shall be governed by the *lex fori*.

244 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

245 Civil Code of Mongolia (2002). See for a translation *Praxis des Internationalen Privat- und Verfahrensrechts* (2003: 381).

As far as foreign citizens are concerned, contractual capacity in Mongolian private international law is therefore governed by the *lex patriae* and, as far as contracts are concluded in Mongolia, by the *lex loci contractus / lex fori*.

4.4.5 Philippines

There is only one provision relating to contractual capacity in the private international law section of the Philippine civil code.[246] Article 15 reads: "Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad." This conflicts rule entails that the contractual capacity of citizens of the Philippines is governed by the *lex patriae*, which will also be the *lex fori*.

4.4.6 South Korea

As far as South Korean private international law is concerned, the provisions relating to contractual capacity are to be found in (Chapter 2) Articles 13 and 15 of the Conflict of Laws Act.[247] Article 13 provides the following:

> "(1) A person's capacity to act shall be governed by his *lex patriae*. The same shall apply where the capacity to act is extended by marriage.
>
> (2) A capacity to act that has been previously acquired shall not be deprived or restricted by a change of nationality."

Article 15 reads:

> "(1) If a person who effects a juridical act and the opposite party are in the same country at the time of the formation of the juridical act, a person who would have capacity under the law of that country cannot invoke incapacity under his *lex patriae*, unless the other party was or could have been aware of his incapacity at the time the juridical act was effected.
>
> (2) The provisions of paragraph (1) shall not apply to juridical acts under the provisions of the family law or the inheritance law and juridical acts relating to real estate located in a country other than the place where the act was effected."

Contractual capacity, according to Article 13(1), is in principle governed by the *lex patriae*. This legal system also determines whether capacity has been acquired through marriage. According to sub-article (2), once contractual capacity is obtained, it will not be affected by a change in nationality.

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246 Civil Code of the Philippines (1949), in Kropholler *et al* (1999: 712).

247 Conflict of Laws Act of the Republic of Korea (2001). See Šarčević and Volken (2003: 318). Chapter 2 is titled "Persons" and Article 13 focuses specifically on the capacity to act. Article 14 concerns the "Declaration of Quasi-Incompetence and Incompetence" and Article 15 is titled "Protection of Transactions". See, in general, Suk (2003: 99-141).

Article 15 contains an exception to the application of the *lex patriae* and resembles the *Lizardi* rule.[248] In terms of this article, where a contractant lacking capacity in terms of his or her *lex patriae* concludes a contract with his or her counterpart while present in the same country, the *lex loci contractus* shall apply if he or she has capacity according to the latter legal system. This contractant may nevertheless rely on his or her incapacity if the counterpart was or should have been aware of the legal position in terms of the *lex patriae*. This exception, however, shall neither apply to contracts relating to family and succession law, nor to those concerning immovable property situated outside the country of the *locus contractus*.

As the discussion indicates, contractual capacity in South Korean private international law is governed by the *lex patriae* and, in specific circumstances, by the *lex loci contractus*.

4.4.7 Taiwan

Paragraph 10 in Chapter 2 of the Taiwanese Private International Law Act[249] contains the relevant provisions regarding contractual capacity. This paragraph provides that the contractual capacity of a person shall be governed by the *lex patriae*. Further, a change in nationality by a capable person shall not result in the loss or limitation of contractual capacity. Where a foreign contractant concludes a contract in Taiwan ("the Republic of China"), while lacking contractual capacity according to his or her *lex patriae* but possessing such in terms of the *lex loci contractus / lex fori*, then the latter legal system shall apply. This exception, however, shall apply neither where the contract in issue relates to family and succession law, nor to immovable property located outside Taiwan.

Contractual capacity in Taiwanese private international law is therefore governed by the *lex patriae* and, if the contract was concluded in Taiwan, also by the *lex loci contractus / lex fori*.

4.4.8 Thailand

The Thai Act on Conflict of Laws[250] also contains provisions relating specifically to contractual capacity. These are found in Section 10, Chapter II[251] of the Act. This section reads as follows in the English translation:

248 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

249 Private International Law Act (2010). German translation available at http://www.mpipriv.de/files/pdf3/ipr-gesetztaiwan2010.pdf.

250 Act on Conflict of Laws (1938), in Kropholler *et al* (1999: 810); also available at http://www.judiciary.go.th/ eng/LawsEbg1/EE1.html.

251 Chapter II is titled "Status and Capacity of Persons".

> "The capacity or incapacity of a person is governed by the law of the nationality of such person.
>
> But if an alien does a juristic act in Siam for which he would have no capacity or a limited capacity under the law of his nationality, he is deemed to have capacity for it in so far as he would be capable under Siamese law. This provision does not apply to juristic acts under the Family law and the law of Succession.
>
> In case of juristic act relating to immovable property, the capacity of a person to enter into such juristic act is governed by the law of the place where the immovable property is situated."

In terms of the first paragraph of Section 10, contractual capacity of an individual is governed by the *lex patriae*. The second paragraph provides for the application of the *lex loci contractus / lex fori* where a foreigner, lacking capacity according to his *lex patriae*, concludes a contract in Thailand, where he has such capacity. This rule, however, applies neither to contracts relating to family law nor to the law of succession. Lastly, in terms of the third paragraph, contractual capacity relating to immovable property is governed by the *lex rei sitae*.

In Thai private international law, therefore, contractual capacity is determined by the *lex patriae* and, if the contract was concluded in Thailand, also by the *lex loci contractus / lex fori*. The capacity to contract in respect of immovable property is governed by the *lex rei sitae*.

4.4.9 Vietnam

The relevant provisions of the Vietnamese civil code[252] are contained in Article 831, Sections (1) and (2). The English translation reads:[253]

> "(1) The legal capacity of foreigners is determined by the law of the country whose citizens foreigners are (*sic*) except for the cases where this Code or other laws of Vietnam provide otherwise.
>
> (2) When foreigners create and perform civil transactions in Vietnam their legal capacity shall be determined by Vietnamese law."

Article 831(1) of the Vietnamese code thus provides that the contractual capacity of foreigners is generally governed by the *lex patriae*. According to Article 831(2), the *lex loci contractus / lex fori / lex loci solutionis* is applicable where a contract was concluded and the performances rendered in Vietnam. From the text of Article 831, it cannot be deduced, for instance, what the position would be where a foreigner concludes a contract in Vietnam but the

252 Civil Code of the Socialist Republic of Vietnam (1996), in Kropholler *et al* (1999: 1040).

253 Part 7 of the code relates to the "Civil relations with a foreign element" and Article 831 is titled "Legal capacity of foreigners".

performances are to be effected elsewhere, when the parties contract abroad having the performances rendered in Vietnam (or elsewhere) or when the performance must take place in Vietnam according to the terms of the contract but the performance in actual fact takes place elsewhere. It also does not specify what the position is in respect of citizens of Vietnam.

The *lex patriae* and, in specific cases, the *lex loci contractus / lex fori / lex loci solutionis* are therefore applicable to contractual capacity in Vietnamese private international law (in as far as foreign citizens are concerned).

4.5 North America

4.5.1 Louisiana (United States of America)

The provision relating to contractual capacity in the Civil Code of Louisiana,[254] contained in Article 3539,[255] states the following:

> "A person is capable of contracting if he possesses that capacity under the law of either the state in which he is domiciled at the time of making the contract or the state whose law is applicable to the contract under Article 3537."

Article 3537 lists the policies that must be taken into account in determining the proper law of the contract.

It is thus clear that contractual capacity in Louisianan private international law is governed by both the *lex domicilii* (at the conclusion of the contract) and the proper law of the contract.[256]

4.5.2 Oregon (United States of America)

Section 5 of Oregon's Conflicts Law Applicable to Contracts[257] is specifically titled "capacity to contract". It reads as follows:

> "(1) A party has the capacity to enter into a contract if the party has that capacity under the law of the state in which the party resides or the law applicable to this issue under section 3, 9 or 10, chapter 164, Oregon Laws 2001.
>
> (2) A party that lacks capacity to enter into a contract under the law of the state in which the party resides may assert that incapacity against a party that knew or should have

254 Civil Code of Louisiana (1991), in Kropholler *et al* (1999: 1002). See Symeonides (2008a: 128-129). See, in general, Symeonides and Rouge (1993: 460-507).
255 Kropholler *et al* (1999: 1022). Article 3539 is titled "Capacity".
256 See Symeonides and Rouge (1993: 500).
257 Oregon's Conflicts Law Applicable to Contracts (2001). Available in Nafziger (2001: 405). See, in general, Nafziger (2001: 391-418). Also see Symeonides (2008a: 130-131). See, in general, Symeonides (2008a: 130-132).

> known of the incapacity at the time the parties entered into the contract. If a party establishes lack of capacity in the manner provided by this subsection, the consequences of the party's incapacity are governed by the law of the state in which the incapable party resides."

The Sections 3 and 9 referred to determine how the proper law of a contract must be ascertained, while Section 10 provides various presumptions in this regard in respect of specific types of contracts.[258] The primary rule in Oregon's private international law is therefore clear – contractual capacity is governed by the law of an individual's habitual residence and the proper law of the contract.

Section 5(2) of the code provides that a contractant may rely on his or her incapacity (in terms of the law of his or her residence) where his or her counterpart knew, or should have known of this incapacity at the time of contracting. In such a case, the consequences of the incapacity are governed by the law of the incapable party's residence. No rule is provided for the consequences of incapacity in any other case.

In general, contractual capacity in Oregon's private international law is governed by the law of residence and the proper law of the contract and, in specific circumstances, by the law of residence only.

4.5.3 Quebec (Canada)

The relevant provisions of the Civil Code of Quebec[259] are contained in Book Ten, Title Two, Chapter 1, Division I (Article 3083) and II (Article 3086).[260] Only the first paragraph of Article 3083 is relevant regarding contractual capacity, where it states: "The status and capacity of a natural person are governed by the law of his domicile."

Article 3086 provides the following:

> "A party to a juridical act who is incapable under the law of the country of his domicile may not invoke his incapacity if he was capable under the law of the country in which the other party was domiciled when the act was formed in that country, unless the other party was or should have been aware of the incapacity."

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258 Section 3 concerns "specific types of contracts governed by Oregon law", Section 9 contains a general rule while Section 10 provides "presumptive rules for specific types of contracts".

259 Civil Code of Quebec (1991). English translation available at http://ccq.lexum.org/ccq/section.do?lang=en&article=3086. German translation available in Kropholler *et al* (1999: 331).

260 Book Ten is titled "Private International Law" and Title 2 "Conflict of Laws". Chapter 1 concerns personal status. Division I relates to the general provisions, while Division II (where specific reference is made to "incapacity") concerns special provisions. See, in general, Glenn (1996: 231-268).

Article 3086 contains a principle that resembles the *Lizardi* rule[261] as an incapable contractant (in terms of his or her *lex domicilii*) may not rely on his or her incapacity in terms of the *lex domicilii* if the contract was concluded between the parties in the country of domicile of the counterpart and if he or she would have had capacity in terms of the *lex domicilii* of the latter party. If the counterpart was or should have been aware of the incapacity in terms of the *lex domicilii*, the incapable contractant may indeed rely on his or her incapacity in terms of his or her *lex domicilii*.

Contractual capacity in Quebecian private international law is therefore governed by the *lex domicilii* and, in particular circumstances, by the *lex loci contractus* if the latter coincides with the *lex domicilii* of the other contractant.

4.6 South America

4.6.1 Argentina

In Argentina the private international law rules regarding contractual capacity are found in Articles 6-10 of the Civil Code of Argentina,[262] which read as follows:[263]

> "The capacity or incapacity of persons domiciled in the territory of the Republic, whether nationals or aliens, shall be judged according to the laws of this Code, even when acts executed or property situated in a foreign country are involved.
>
> The capacity or incapacity of persons domiciled outside the territory of the Republic, whether nationals or aliens, shall be judged according to the laws of their respective domiciles, even when acts executed or property situated in the Republic are involved.
>
> Acts done, contracts made and rights acquired outside the place of a person's domicile, are governed by the laws of the place where they have taken place; but they shall not be carried out in the Republic, with respect to property situated in its territory, if they do not conform to the laws of the country, which govern the capacity, status and condition of persons.
>
> Incapacities which contravene natural law, such as slavery, or which are penal in character, are merely territorial.
>
> Real property situated in the Republic is governed exclusively by the laws of the country, with respect to its qualification as such, to the rights of the parties, to capacity to acquire it, to the modes of transferring it, and to the formalities which must accompany these acts. Title to real property, therefore, may be acquired, transferred or lost only in conformity with the laws of the Republic."

261 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
262 Civil Code of Argentina (1869–1987–1997), in Kropholler *et al* (1999: 77-78).
263 as found in Goldschmidt and Rodriguez-Novás (1966: 9, 28, 47 and 48).

From Articles 6 and 7 it is clear that the *lex domicilii* in principle governs contractual capacity (which is, of course, the *lex fori* in respect of *domicilium* of Argentina). In terms of Article 8, contracts concluded outside the country of domicile are in principle governed by the *lex loci contractus* (with a certain exception). Article 9 provides a public policy exception in that, for instance, incapacities against natural law will not be applied in Argentina. Article 10 determines that contractual capacity in respect of immovable property located in Argentina will be governed by the *lex situs*.

In Argentinean private international law, depending on whether or not the contract is concluded in the country of domicile, the *lex domicilii* or the *lex loci contractus* apply to contractual capacity; in respect of immovable property in Argentina, the *lex situs* applies.

4.6.2 Brazil

There is only one provision regarding contractual capacity in the Brazilian civil code.[264] Article 7 simply states that the contractual capacity of an individual is governed by the law of the country of his or her domicile – the *lex domicilii*.[265]

4.6.3 Mexico

Article 13(II) of the Mexican Civil Code of 1928 simply states that the contractual capacity of a natural person shall be determined by the law of the country of his or her domicile – the *lex domicilii*.[266]

4.6.4 Puerto Rico

The *Projet* for the Codification of Puerto Rican Private International Law[267] was completed in 1991 and introduced to the Puerto Rican legislature in 1992. It has, to date, not been passed into legislation.[268] Irrespective of its ultimate legislative fate, its provisions regarding contractual capacity deserve particular attention. These are contained in Chapter 2 of the *Projet*, specifically Article 39.[269] This article states the following:

> "A person is considered capable of contracting if he is capable under either the law of his domicile or the law applicable to this issue under Article 36. When a person lacks capacity under both laws, the consequences of incapacity are governed by the law applicable under Article 36.

264 Introductory Act to the Civil Code of Brazil (1942), in Kropholler *et al* (1999: 108).
265 See Dolinger (2012: 52 and 77).
266 Civil Code of Mexico (1928–1988), in Kropholler *et al* (1999: 527).
267 *Projet* for the Codification of Puerto Rican Private International Law (1991). See, in general, Symeonides (2002: 419-437); Symeonides (1990: 413-447) and Symeonides (2008a: 130).
268 See Symeonides (2002: 419-437) and Symeonides (2014: 12 note 118).
269 Chapter 2 relates to "specific issues" and Article 39 is titled "capacity".

> A party who lacks contractual capacity under the law of his domicile may assert his incapacity against a party who knew or should have known of such incapacity. In this case, the consequences of incapacity are governed by the law of the domicile of the incapable party."

Article 36 referred to in the first paragraph of Article 39 describes the "general rule" for determining the law applicable to contracts or the proper law of the contract. In terms of this article, the law to be applied would be that of the state that "with regard to the issue in question, has the most significant connection to the parties and the dispute".[270]

In terms of Article 39, therefore, contractual capacity is governed by both the *lex domicilii* and the proper law of the contract. Where a contractant lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the consequences of the incapacity shall be determined by the proper law. The second paragraph of the article provides that, where a contractant lacks capacity in terms of his or her *lex domicilii*, he or she may invoke this incapacity if the counterpart was or should have been aware of it. The *lex domicilii* will then apply. The effects of incapacity shall also be governed by the incapable contractant's *lex domicilii*.

The *Projet* therefore applies the *lex domicilii* and the proper law of the contract to contractual capacity. In specific cases, only the *lex domicilii* applies. Specific rules relating to the consequences of incapacity also exist: either the *proper law* or the *lex domicilii* will be applied.

4.6.5 Uruguay

In Uruguayan private international law, Article 2393 of the Civil Code of 1868 is relevant in respect of capacity.[271] It states that the contractual capacity of natural persons[272] shall be governed by the law of the country of their domicile. Idiarte *et al* add that, once capacity has been acquired, it cannot be altered by a subsequent change in domicile.[273] The Uruguayan civil code does not distinguish between the existence and the consequences of capacity. Therefore, both aspects are governed by Article 2393, that is: the *lex domicilii* applies.[274]

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270 See Symeonides (2002: 424-426) for a discussion of Article 36.

271 Civil Code of Uruguay (1868–1941–1994), German translation in Kropholler *et al* (1999: 909). See, in general on conflicts conventions that are applicable in Uruguay, Idiarte, Pedrouzo and Pereiro (2007: pars 186-197, 198 and 206-223).

272 Idiarte, Pedrouzo and Pereiro (2007: par 185) define the "capacity to exercise rights" as "the right of the individual to act on his own behalf in order to achieve valid juridical results".

273 Idiarte, Pedrouzo and Pereiro (2007: par 187).

274 Idiarte, Pedrouzo and Pereiro (2007: par 202).

A special conflicts rule relating to capacity exists in two conventions to which Uruguay is a party, drafted under the auspices of the Inter-American Conference on Private International Law: the Inter-American Convention in Matters of Bills of Exchange, Payments and Invoices (CIDIP I) and the Inter-American Convention on Conflicts of Law regarding Cheques (CIDIP II). In both conventions, Article 1 states that the capacity to incur obligations in respect of bills of exchange or cheques is governed by the "law of the place in which the obligation is contracted". In other words, the *lex loci contractus* shall apply.

Contractual capacity in Uruguayan private international law is therefore governed by the *lex domicilii* and, in certain cases governed by regional conventions, by the *lex loci contractus*.

4.6.6 Venezuela

Articles 16-19 of the Venezuelan Act on Private International Law[275] contain specific provisions relating to contractual capacity:

> "The existence, status and capacity of persons are governed by the law of their domicile.
>
> The change of domicile does not restrict any acquired capacity.
>
> A person subject to incapacity under the provisions of the preceding articles acts validly if he/she is deemed capable by the law governing the substance of the act.
>
> Limitations on capacity, established by the law of the domicile, which are based upon differences of race, nationality, religion or class shall not be effective in Venezuela."

According to Articles 16 and 17, contractual capacity is governed by the *lex domicilii* and capacity, once acquired, is not influenced by changes in domicile. In terms of Article 18, a contractant who lacks capacity according to his *lex domicilii*, but has such capacity according to the proper law of the contract, shall be regarded as having contractual capacity. Article 19 contains a provision relating to public policy as it states that limitations on contractual incapacity in terms of the *lex domicilii* shall be ineffective in Venezuela if they are based on discrimination on the basis of race, nationality, religion or class.[276]

Contractual capacity in Venezuelan private international law is therefore governed by both the *lex domicilii* and the proper law of the contract on an equal level.

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275 Venezuelan Act on Private International Law (1998). *Yearbook of Private International Law* (1999: 343-344). See, in general, Parra-Aranguren (1999: 103-117). The text may also be found at http://www.analitica.com/bitblioteca/congreso_venezuela/private.asp. Also see, in general, Fernandez Arroyo (2005: 109-115).

276 Staudinger/Hausmann (2013: 21). Also see Parra-Aranguren (1999: 112).

4.7 Africa

4.7.1 Algeria

Article 10 in Chapter II[277] of the Civil Code of Algeria[278] contains the private international law provisions regarding contractual capacity. The article states that the contractual capacity of Algerians is governed by Algerian law even when they are in another country. In other words, in the case of Algerian citizens, capacity shall be determined by the *lex patriae*. There is no provision in the Civil Code in respect of non-Algerians. Article 10 also provides an exception to this rule – when a contract is concluded in Algeria, where it shall have its effects, and one of the contractants lacks capacity in terms of the *lex patriae*, the grounds of which are concealed and not readily ascertainable, the incapacity shall have no influence on the consequences of the contract. The exception resembles the *Lizardi* rule,[279] although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is probably that the *lex loci contractus / lex fori* should be applied. Therefore, in Algerian private international law the *lex patriae* (at least in respect of Algerians) and, in specific cases, the *lex loci contractus/lex fori* govern contractual capacity.

4.7.2 Angola

In Angola[280] the private international law rules regarding contractual capacity are those that apply in Portugal since the Portuguese Civil Code was introduced there in 1977.[281] This means that Angolan private international law provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus / lex fori*.[282]

4.7.3 Burkina Faso

The private international law rules relating to contractual capacity in Burkina Faso are contained in Chapter II, Articles 1017 and 1018 of the Civil Code.[283] Article 1017 states that the general contractual capacity of a natural person is governed by the *lex patriae*. This law also applies where capacity is extended by the conclusion of marriage. Further, the elimination and limita-

277 Chapter II is titled "Des conflits de lois dans l'espace".
278 Civil Code of Algeria (1975), in Kropholler *et al* (1999: 26).
279 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
280 Civil Code of Angola (1966), in Kropholler *et al* (1999: 36).
281 Civil Code of Portugal (1966). Translation in Riering (1997: 108). Also see Kropholler *et al* (1999: 37 note 2).
282 See the discussion of Portuguese private international law in par 4.2.14.
283 Code on the Law of Persons and the Family (1989), in Kropholler *et al* (1999: 141-142). Chapter II of the code is titled "Des conflits de lois dans l'espace".

tion of the general contractual capacity is governed by the *lex patriae* of the natural person whose capacity is in question. The applicable *lex patriae* in respect of contractual capacity also governs the legal consequences of the intended contract.

Article 1018 contains an exception as it provides that, when a contract between natural persons is concluded while both parties are present in the same state, the incapable party may not invoke his or her incapacity in terms of the law of another state or on the grounds of an official measure[284] in another state, unless the counterpart was aware or should have been aware of the incapacity. In other words, the *lex loci contractus* shall apply in this case. This rule, however, applies neither to contracts relating to family law nor to immovable property situated outside Burkina Faso.

Therefore, in the private international law of Burkina Faso, the *lex patriae* and, in particular circumstances, the *lex loci contractus* are applied to contractual capacity.

4.7.4 Egypt

The only provision relating to contractual capacity in the Egyptian civil code is contained in Article 11.[285] In terms of this article, contractual capacity is governed by the *lex patriae*. An exception to this rule exists when a contract is concluded in Egypt and where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae*, but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account. The exception resembles the *Lizardi* rule,[286] although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is, probably, that the *lex loci contractus / lex fori* will be applied. Therefore, in Egyptian private international law, the *lex patriae* is applied to contractual capacity and in particular circumstances, the *lex loci contractus / lex fori*.

4.7.5 Mozambique

As is the case in Angola, the private international law rules regarding contractual capacity in Mozambique[287] are those that apply in Portugal, since the Civil Code of Portugal was introduced there in 1975.[288] As such, Mozam-

284 for instance, a court order.
285 Civil Code of Egypt (1948), in Kropholler *et al* (1999: 14).
286 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.
287 Civil Code of Mozambique (1966), in Kropholler *et al* (1999: 566).
288 Civil Code of Portugal (1966). Translation in Riering (1997: 108). See Kropholler *et al* (1999: 567 note 2).

bican private international law provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus / lex fori*.[289]

4.7.6 Tunisia

Article 40 in Chapter II of the Tunisian Civil Code contains the provisions relevant to contractual capacity.[290] Generally, the contractual capacity of natural persons is governed by the *lex patriae*. The article further provides that a contractant who concludes a contract in a country where he or she possesses capacity, is precluded from asserting his or her incapacity in terms of the *lex patriae* or the law of the country where he or she is established or conducting business, unless his or her counterpart was aware of this incapacity at the time of contracting or ought to have knowledge thereof. By implication, in these instances, the *lex loci contractus* shall apply. The *lex patriae* and, in particular circumstances, the *lex loci contractus* are therefore applicable to contractual capacity in Tunisian private international law.

4.8 Summary

In summary, 30 of the 53 jurisdictions discussed (in other words, almost 57%) apply the *lex patriae* to contractual capacity as a legal system of departure.[291]

289 See the discussion of Portuguese private international law in par 4.2.14.

290 Private International Law Code (1998), in Kropholler *et al* (1999: 854). Chapter II is titled: "Droit des personnes".

291 Algeria (Civil Code of Algeria (1975: Chapter II, Article 10)); Angola (Civil Code of Angola (1966: Articles 25 and 31(1))); Austria (Austrian Private International Law Act (1978: Chapter 2, § 9)); Belarus (Civil Code of the Republic of Belarus (1999: Article 1104(1))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(1))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Egypt (Civil Code of Egypt (1948: Article 11)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 10[1] and § 11[1])); Iran (Civil Code of Iran (1935: Articles 6 and 962)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(1))); Japan (Act on the General Rules of Application of Laws (2006: Article 4(1))); Mongolia (Civil Code of Mongolia (2002: Chapter 62, Article 543(2))); Mozambique (Civil Code of Mozambique (1966: Articles 25 and 31(1))); Portugal (Civil Code of Portugal (1966: Article 25 and 31(1))); Qatar (Civil Code of Qatar (2004: Article 11)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 11)); Russia (Civil Code of the Russian Federation (2001: Chapter 67, Article 1195(1))); Slovakia (Private International Law and International Procedural Law Act (1963: § 3(1))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1)); Spain (Spanish Civil Code (1889–1981: Article 9.1)); Syria (Civil Code of Syria (1949: Article 12(1))); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Thailand (Act on Conflict of Laws (1938: Section 10)); Tunisia (Private International Law Code (1998: Article 40)); the Ukraine (Ukrainian Private International Law Code (2005: Article 17(1))); the United Arab Emirates (Civil Code of the United Arab Emirates (1985: Article 11)); and Vietnam (Civil Code of the Socialist Republic of Vietnam (1996: Article 831(1))).

Jurisdictions such as Argentina,[292] Brazil,[293] Israel,[294] Lithuania,[295] Mexico,[296] Quebec,[297] Switzerland[298] and Uruguay[299] in general utilise the *lex domicilii* to govern contractual capacity. Some jurisdictions, as Estonia[300] and Macau,[301] employ the law of the country of habitual residence in this regard. The *lex loci contractus* is applied as point of departure in Azerbaijan[302] and Uzbekistan,[303] while in Belgium[304] the proper law of the contract plays this role. In Louisiana's Civil Code,[305] and according to the Puerto Rican *Projet*,[306] the *lex domicilii* and the proper law of the contract apply to contractual capacity in the alternative. In Oregon[307] contractual capacity is governed by the law of the country of residence and the proper law of the contract on an equal level. Dutch private international law follows a differentiated approach in that dissimilar legal systems are in principle applied to the contractual capacity of minors, spouses and registered partners, namely the *lex patriae*, the law of habitual residence and the *lex fori* respectively.[308] In Greek, Slovenian and Turkish private international law, contractual capacity is governed by the *lex patriae* and another legal system on an equal level. In Greece,[309] the *lex patriae* applies together with the *lex fori* but in Slovenia[310] and Turkey[311] it governs together with the *lex loci contractus*. Similar provisions exist in Czech, Venezuelan and Chinese private international law. In Venezuela[312] the *lex domicilii* and the proper law of the contract apply on an equal level; in China[313] and the Czech Republic,[314] the law of habitual residence and the *lex loci contractus*.

292 Civil Code of Argentina (1869–1987–1997: Article 6).
293 Introductory Act to the Civil Code of Brazil (1942: Article 7).
294 Legal Capacity and Guardianship Law (1962: § 77).
295 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).
296 Civil Code of Mexico (1928–1988: Article 13(II)).
297 Civil Code of Quebec (1991: Book Ten, Chapter 1, Article 3083).
298 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).
299 Civil Code of Uruguay (1868–1941–1994: Article 2393).
300 Estonian Private International Law Act (2002: § 12(1)).
301 Civil Code of Macau (1999: Chapter III, Articles 24 and 30).
302 Private International Law Code of Azerbaijan (2000: Article 10(2)).
303 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).
304 Belgian Private International Law Code (2004: Chapter II, Article 34 § 2).
305 Civil Code of Louisiana (1991: Article 3539).
306 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 39 (and 36)).
307 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1)).
308 Book 10 of the Dutch Civil Code (2012: Articles 11(1), 40 and 68).
309 Greek Civil Code (1940: Articles 7 and 9).
310 Private International Law and Procedural Act (1999: Article 13(1) and (2)).
311 Private International Law Code of Turkey (2007: Chapter 2, Article 9(1) and (2)).
312 Venezuelan Act on Private International Law (1998: Articles 16 and 18).
313 Chinese Private International Law Act (2010: Chapter Two, Article 12).
314 Act on Private International Law (2012: Part Four, Title I, § 29).

Many jurisdictions, which in principle apply the *lex patriae*, the *lex domicilii* and/or the law of (habitual) residence to contractual capacity, utilise the *lex loci contractus* in addition, but only if one or more of the following conditions are present:

1 the contract in question was concluded in the forum state;
2 the parties to the contract were present in the same country at its conclusion;
3 the forum state is the country where performance is to be effected; and
4 the absence of fault on the part of the capable contractant.[315]

Condition 4 requires further explanation. Fault plays differentiated roles in the context of the additional application of the *lex loci contractus*. First, the *presence* of fault may function as an exception to the applicability of the *lex loci contractus*. The line of argumentation in these cases entails three steps. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)): namely the *lex patriae* and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3 referred to above and as prescribed by the *lex fori's* private international law, are present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant. Fault exists where the latter contractant was aware of the counterpart's incapacity (in terms of the latter's personal law)[316] at the conclusion of the contract, or was not aware thereof as a result of negligence. The existence of fault therefore leads to the non-application of the *lex loci contractus*. This method of argumentation will be referred to as the three-step model. It may be illustrated with reference to the conflicts rules on capacity in jurisdictions such as Burkina Faso, Germany and South Korea as an example. In these jurisdictions, the personal law, the *lex patriae*, in principle applies to capacity (step 1).[317] If a contractant lacks capacity in terms of this legal system, the *lex loci contractus* may be applied. The *lex loci contractus* will apply in Burkina Faso,[318] Germany[319] and South Korea[320] when the parties were present in the same country at the moment of conclusion of the contract (condition 2 listed above) (step 2). If the capable contractant was aware of the incapacity of his or her counterpart in terms of this individual's *lex patriae*, or was not aware thereof as a result of negligence, the *lex loci contractus* does not apply; the issue is again governed solely by the *lex patriae* (step 3).

315 On the possible requirement that the capable contractant must be a French national to invoke the *lex loci contractus*, see the discussion in paragraph 4.2.7.
316 the *lex patriae*, the *lex domicilii* or the law of habitual residence.
317 Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); and South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1)).
318 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
319 Introductory Act to the Civil Code (1994: § 12).
320 Conflict of Laws Act of the Republic of Korea (2001: Article 15(1)).

Secondly, the *absence* of fault may play the role of a requirement which must be fulfilled for the *lex loci contractus* to be applied. The line of argumentation here entails only two steps. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)): namely, the *lex patriae*, and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3,[321] referred to above and prescribed by the *lex fori*'s private international law are fulfilled *and* fault is absent on the part of the capable contractant. Fault is absent where the contract assertor, at the time of the conclusion of the contract, was not aware of the incapacity of the other party and the non-existence of the knowledge of the incapacity was not due to negligence. Fault is therefore absent when two requirements are met: (i) the contract assertor must *bona fide* have believed that the incapacitated contractant indeed had full capacity to contract; and (ii) a reasonable person in the position of the contract assertor would not have known of the incapacity, for instance, where a contractant's incapacity is not reasonably ascertainable (where the incapacity is concealed). The absence of fault therefore leads to the application of the *lex loci contractus*. This method of argumentation will be referred to as the two-step model. It may be illustrated with reference to the conflicts rules on capacity in jurisdictions such as Egypt and Qatar as an example. In these jurisdictions, the personal law, the *lex patriae*, in principle applies to capacity.[322] If a contractant lacks capacity in terms of this legal system, the *lex loci contractus* may possibly be applied. In both these jurisdictions the *lex loci contractus* will apply where the contract was concluded in the forum state (condition 1), which is also the country where performance in terms of the contract is to be effected (condition 3) and fault, on the part of the capable contractant, is absent (condition 4) (step 2).[323]

In some jurisdictions, the presence of only one of the conditions listed above is sufficient for the application of the *lex loci contractus* in addition to the default legal system(s). For example, jurisdictions such as Belarus,[324] Iran,[325] Mongolia,[326] Slovakia,[327] Spain,[328] Taiwan[329] and Thailand[330] utilise the *lex loci contractus* in addition to the personal law if the contract was concluded

321 But see the discussion on Romanian private international law, paragraph 4.2.15.
322 Qatar (Civil Code of Qatar (2004: Article 11)); and Egypt (Civil Code of Egypt (1948: Article 11)).
323 Qatar (Civil Code of Qatar (2004: Article 11)); and Egypt (Civil Code of Egypt (1948: Article 11)).
324 Civil Code of the Republic of Belarus (1999: Article 1104 (3)).
325 Civil Code of Iran (1935: Article 962).
326 Civil Code of Mongolia (2002: Chapter 62, Article 543(5)).
327 Private International Law and Procedural Law Act (1963: § 3(2)).
328 Spanish Civil Code (1889–1981: Article 10.8).
329 Private International Law Act (2010: Chapter 2, § 10).
330 Act on Conflict of Laws (1938: Section 10).

in the forum state – condition 1. Similarly, in Japanese[331] private international law, the *lex loci contractus* applies in addition to the personal law where the parties to the contract were in the same country at its conclusion – condition 2.

In certain jurisdictions, the absence of fault on the part of the capable contractant (condition 4) is sufficient for the application of the *lex loci contractus*. In Romania,[332] the absence of fault is the sole requirement for the *lex loci contractus* to be applied (within the context of the two-step model). In Estonian,[333] Lithuanian,[334] Russian[335] and Tunisian[336] private international law, the presence of fault would indicate the non-application of the *lex loci contractus*. The formulation of the rule in these jurisdictions veers towards the three-step model. A more appropriate formulation for these legal systems to adopt would be to determine that the *lex loci contractus* applies unless fault is present on the part of the capable contractant. The provisions regarding fault in Oregon's[337] private international law and the Puerto Rican *Projet*[338] in effect also amount to the use of the three-step model, although not in the context of the additional application of the *lex loci contractus*. The presence of fault would here lead to the non-application of the proper law of the contract.

A number of jurisdictions apply the *lex loci contractus* in addition to the default legal system(s) only where two of the conditions listed above are present. Jurisdictions such as Angola,[339] Israel,[340] Macau,[341] Mozambique[342] and Portugal[343] apply the *lex loci contractus* only where conditions 1 and 4 (in the context of the three-step model in respect of the absence of fault) are present. The effect thereof is the application of a conflicts rule that resembles the one pronounced in *Lizardi*[344] for purposes of French private international law. The *lex loci contractus / lex fori* is therefore applied where a contractant, incapable in terms of his or her personal law, concluded a contract in the forum state, where he or she would have had contractual capacity. However, the *lex loci contractus* shall not be applied where the counterpart was or should have been aware of the incapacity at the moment of contracting, in other words, where fault is present on the part of the capable contractant.

331 Act on the General Rules of Application of Laws (2006: Article 4(2)).
332 Romanian Private International Law Code, Chapter II, Article 17.
333 Estonian Private International Law Act (2002: § 12(3)).
334 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(1)).
335 Civil Code of the Russian Federation (2001: Chapter 67, Article 1197(2)).
336 Private International Law Code (1998: Article 40).
337 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).
338 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 39).
339 Civil Code of Angola (1966: Article 28(2)).
340 Legal Capacity and Guardianship Law (1962: § 77).
341 Civil Code of Macau (1999: Chapter III, Article 27(2)).
342 Civil Code of Mozambique (1966: Article 28(2)).
343 Civil Code of Portugal (1966: Article 28(2)).
344 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

One should, however, take note that the *Lizardi* case also referred to the French nationality of the capable contractant in this regard. The position in France today may well be that, if the Rome Convention[345] or the Rome I Regulation[346] are not applicable, the capable party may only invoke the protection of the *Lizardi* rule if he or she is a French national.[347]

The provisions in the codes of Angola,[348] Macau,[349] Mozambique[350] and Portugal[351] are also of interest here, as these jurisdictions, apart from employing the *Lizardi* rule in respect of contracts concluded in the forum state, in addition apply the *lex loci contractus* where contracts are concluded outside the forum state but the *lex loci contractus* has rules that correspond with those of the *lex fori*.

Two conditions are also required in jurisdictions such as Bulgaria,[352] Burkina Faso,[353] Germany,[354] Italy,[355] the Netherlands,[356] Quebec,[357] South Korea[358] and Switzerland,[359] but here reference is made to conditions 2 (that the parties be in the same country at the conclusion of the contract) and 4 (in the context of the three-step model in respect of the absence of fault). The *lex loci contractus* is applied where a contractant, incapable in terms of his or her personal law, concluded a contract with his counterpart while present in the same country, where the incapable party would have possessed contractual capacity. However, the *lex loci contractus* shall not be applied where the counterpart was or should have been aware of the incapacity at the moment of contracting, in other words, where fault is present on the part of the capable contractant. Two conditions are also required in Vietnamese private international law, namely, conditions 1 and 3 (that the forum state is also the country where the relevant performance is to be effected).[360]

345 note 5.
346 *ibid*.
347 See paragraph 4.2.7.
348 Civil Code of Angola (1966: Article 28(3)).
349 Civil Code of Macau (1999: Chapter III, Article 27(3)).
350 Civil Code of Mozambique (1966: Article 28(3)).
351 Civil Code of Portugal (1966: Article 28(3)). The law in Angola, Macau and Mozambique is modelled on Portuguese law for historical reasons.
352 Bulgarian Private International Law Code (2005: Article 50(2)).
353 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
354 Introductory Act to the Civil Code (1994: § 12).
355 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).
356 Book 10 of the Dutch Civil Code (2012: Article 11(2)).
357 Civil Code of Quebec (1991: Book Ten, Chapter 1, Article 3086).
358 Conflict of Laws Act of the Republic of Korea (2001: Article 15(1)).
359 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)).
360 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)). It is not clear which performance is referred to, payment or the characteristic performance.

Some jurisdictions, such as Algeria,[361] Egypt,[362] Qatar,[363] Syria[364] and the United Arab Emirates,[365] apply the *lex loci contractus* in addition to the primary applicable legal system(s) only when three conditions are present, namely, conditions 1, 3[366] and 4 (in the context of the two-step model in respect of the absence of fault).

Jurisdictions such as Argentina,[367] Israel[368] and Lithuania[369] apply the *lex loci contractus* in addition to the default legal system(s) in situations not covered by the conditions listed above. In Argentinean private international law, the *lex loci contractus* is applied to capacity only where contracts are concluded outside the forum state, while in Israel it applies when the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity. In Lithuania, on the other hand, the *lex loci contractus* is utilised when foreign citizens have no domicile.

Hungarian private international law is unique in that the *lex loci contractus* only governs capacity when the contract is concluded in the forum state and relates to essentials. However, when performance in terms of the contract is to be effected in Hungary and the agreement relates to non-essentials, the *lex fori / lex loci solutionis* is to be applied.[370]

In certain jurisdictions, the additional application of the *lex loci contractus* (together with the default legal system(s)) is not applicable to particular types of contracts. In all these jurisdictions the *lex loci contractus* does not apply in addition to the personal law when the contract in question concerns family law or the law of succession. In Chinese, Slovenian and Thai private international law, the limitation regarding family or succession law is the only limitation in this regard.[371] Some jurisdictions apply further limitations.

361 Civil Code of Algeria (1975: Chapter II, Article 10).
362 Civil Code of Egypt (1948: Article 11).
363 Civil Code Qatar (2004: Article 11).
364 Civil Code of Syria (1949: Article 12(1)).
365 Civil Code of the United Arab Emirates (1985: Article 11).
366 Here as well, it is not clear which performance is referred to, payment or the characteristic performance.
367 Civil Code of Argentina (1869–1987–1997: Article 7).
368 Legal Capacity and Guardianship Law (1962: § 77).
369 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).
370 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).
371 China (Chinese Private International Law Act (2010: Chapter Two, Article 12)); Slovenia (Private International Law and Procedural Act (1999: Article 13(4))); and Thailand (Act on Conflict of Laws (1938: Section 10)).

In Angola,[372] Burkina Faso,[373] Estonia,[374] Germany,[375] Italy,[376] Macau,[377] Mozambique,[378] Portugal,[379] South Korea[380] and Taiwan,[381] the *lex loci contractus* shall also not apply if the contract in question concerns immovable property situated abroad. Bulgarian,[382] Israeli[383] and Swiss[384] private international law determines that the *lex loci contractus* shall not apply if the relevant contract relates to real rights in respect of immovable property in general. In Turkish[385] private international law, on the other hand, the added limitation concerns contracts involving real rights in respect of immovable property situated abroad.[386] In Lithuanian[387] private international law, the additional limitation relates to contracts involving real rights in general, while in Romania[388] it deals with the transfer of immovable property. The added limitation in Japanese[389] private international law concerns contracts relating to immovable property situated in a country where the law regarding immovables differs from the *lex loci contractus*. Israeli private international law is unique in this regard in that[390] the *lex loci contractus* will not apply as an additional legal system where the relevant contract caused substantial harm or prejudice to the person with no or limited contractual capacity.[391]

Some jurisdictions have specific rules regarding the capacity of an individual to perform entrepreneurial activities. In all of these jurisdictions (Belarus,[392] Bulgaria,[393] Russia,[394] the Ukraine[395] and Uzbekistan),[396] the law of the country of registration as an entrepreneur governs capacity as the primary legal system. Different legal systems are applicable in the absence of such

372 Civil Code of Angola (1966: Article 28(2)).
373 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
374 Estonian Private International Law Act (2002: § 12(4)).
375 Introductory Act to the Civil Code (1994: § 12).
376 Italian Statute on Private International Law (1995: Chapter II, Article 23(4)).
377 Civil Code of Macau (1999: Chapter III, Article 27(2)).
378 Civil Code of Mozambique (1966: Article 28(2)).
379 Civil Code of Portugal (1966: Article 28(2)).
380 Conflict of Laws Act of the Republic of Korea (2001: Article 15(2)).
381 Private International Law Act (2010: Chapter 2, § 10).
382 Bulgarian Private International Law Code (2005: Article 50(3)).
383 as submitted by Einhorn (2012: par 130).
384 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(2)).
385 Private International Law Code of Turkey (2007: Chapter 2, Article 9(2)).
386 A similar provision exists in Greek private international law but there the limitation relates to the additional application of the *lex fori* and not the *lex loci contractus*.
387 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(2)).
388 Romanian Private International Law Code (1992: Chapter II, Article 17).
389 Act on the General Rules of Application of Laws (2006: Article 4(3)).
390 Perhaps apart from the limitation submitted by Einhorn (2012: par 129).
391 Legal Capacity and Guardianship Law (1962: § 77).
392 Civil Code of the Republic of Belarus (1999: Article 1104(4)).
393 Bulgarian Private International Law Code (2005: Article 52).
394 Civil Code of the Russian Federation (2001: Article 1201).
395 Ukrainian Private International Law Code (2005: Article 19).
396 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).

a country of registration. In jurisdictions such as Belarus,[397] Russia,[398] the Ukraine[399] and Uzbekistan,[400] the law of the country shall apply where the principle or major entrepreneurial activities are effected, while in Bulgaria[401] the law of the country governs where the core establishment is situated.

A number of jurisdictions such as Angola,[402] Austria,[403] Belgium,[404] Bulgaria,[405] Estonia,[406] Germany,[407] Hungary,[408] Lithuania,[409] Mozambique,[410] Portugal,[411] Romania,[412] South Korea,[413] Spain,[414] Switzerland,[415] Turkey,[416] Uruguay[417] and Venezuela[418] have a specific conflicts rule that, once an individual has obtained contractual capacity, subsequent changes in his or her personal law shall not affect this capacity.

Specific rules relating to the consequences of contractual incapacity exist in some jurisdictions. Although some uncertainty exists on the issue in Austrian law, the consequences of incapacity would probably be governed by either the *lex patriae* or the proper law of the contract.[419] There is a strong indication in French law that the *lex patriae* would govern in this regard.[420] Authority exists in German private international law for the application of the *lex patriae*[421] or the proper law of the contract[422] to the consequences of

397 Civil Code of the Republic of Belarus (1999: Article 1104(4)).
398 Civil Code of the Russian Federation (2001: Article 1201).
399 Ukrainian Private International Law Code (2005: Article 19).
400 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).
401 Bulgarian Private International Law Code (2005: Article 52).
402 Civil Code of Angola (1966: Article 29).
403 as submitted by Schwimann (2001: 53-54).
404 Belgian Private International Law Code (2004: Chapter II, Article 34 § 1).
405 Bulgarian Private International Law Code (2005: Article 51).
406 Estonian Private International Law Act (2002: § 12(2)).
407 Introductory Act to the Civil Code (1994: § 7(2)). Also see Kegel and Schurig (2000: 493); Kropholler (2006: 318); Reithmann/Martiny/Hausmann (2010: 1877); and Staudinger/Hausmann (2013: 49 and 52-53).
408 Hungarian Private International Law Code (1979: Chapter II, § 11[1]).
409 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(5)).
410 Civil Code of Mozambique (1966: Article 29).
411 Civil Code of Portugal (1966: Article 29).
412 Romanian Private International Law Code (1992: Chapter II, Article 15).
413 Conflict of Laws Act of the Republic of Korea (2001: Article 13(2)).
414 Spanish Civil Code (1889–1981: Article 9(1)).
415 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).
416 Private International Law Code of Turkey (2007: Chapter 2, Article 9(3)).
417 as submitted by Idiarte, Pedrouzo and Pereiro (2007: par 187).
418 Venezuelan Act on Private International Law (1998: Article 17).
419 Schwimann (2001: 54).
420 Batiffol and Lagarde (1983: par 490).
421 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu; Kegel and Schurig (2000: 492); Kropholler (2006: 318); Staudinger/Hausmann (2013: 43-45). *Contra* MünchKommBGB/Birk (2010: 1565-1566).
422 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755. *Cf* BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; www.openjur.de/u/344496.html.

incapacity. In terms of the Puerto Rican *Projet*, where an individual lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the latter governs the consequences of incapacity. However, where an individual is able to rely on his or her incapacity in terms of the *lex domicilii* (due to the fault of the capable party), the consequences of the incapacity shall be governed by the *lex domicilii* of the incapable contractant.[423] A similar approach is followed in Oregon,[424] but there, the consequences are governed by the law of residence instead of the *lex domicilii*. In some jurisdictions (Burkina Faso[425] and the Ukraine),[426] a specific provision refers to the primary legal systems to govern the consequences of incapacity. Uruguayan doctrine is to the same effect.[427] Most legal systems do not have a specific rule about the consequences of incapacity.

Some jurisdictions apply specific rules to the contractual capacity of an individual to assume liability in respect of bills of exchange (including cheques). In the Czech Republic[428] and Slovakia,[429] the *lex patriae* governs the issue in general. In Czech law, the *lex loci contractus* may in certain circumstances be applied as an additional governing system.[430] However, in both jurisdictions, *renvoi* must be applied where the private international law of the *lex patriae* refers to another legal system.[431] In contrast, Uruguayan private international law determines that capacity in respect of bills of exchange (including cheques) is in general governed by the *lex loci contractus*.[432]

Specific rules concerning the capacity to conclude contracts relating to immovable property have emerged in some jurisdictions.[433] In Argentina[434] and Iran,[435] the *lex rei sitae* governs capacity relating to immovable property situated in the forum state. In Thai private international law, the *lex rei sitae* applies in respect of immovable property situated in either the forum state

423 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 39).
424 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).
425 Code on the Law of Persons and the Family (1989: Chapter II, Article 1017).
426 Ukrainian Private International Law Code (2005: Article 18(2)).
427 Civil Code of Uruguay (1868–1941–1994: Article 2393).
428 Act on Private International Law (2012: Part Four, Title I, § 31(1)).
429 Section 91 of Part I of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll and Section 69 of Part II of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.
430 Act on Private International Law (2012: Part Four, Title I, § 31(2)).
431 The Czech Republic (Act on Private International Law (2012: Part Four, Title I, § 31(1)) and Slovakia (Act Concerning Bills of Exchange and Cheques No. 191/1950 Coll, Sections 69 and 91).
432 Article 1 in both CIDIP I and II (*supra*).
433 In certain jurisdictions, the additional application of the *lex loci contractus* together with the default legal system is not employed where the relevant contract concerns immovable property. See the text at notes 370-391.
434 Civil Code of Argentina (1869–1987–1997: Article 10).
435 Civil Code of Iran (1935: Article 8).

or abroad.[436] In Macau,[437] capacity in respect of immovable property shall be governed by the *lex rei sitae* if that law so stipulates; otherwise, the law of habitual residence shall apply.

Some jurisdictions have specific provisions on disregarding contractual incapacity in terms of a *prima facie* applicable foreign legal system on the basis of public policy. In Argentina, incapacity will be disregarded when it contravenes natural law or when it is of a punitive character.[438] A similar provision exists in Venezuelan private international law: limitations on capacity shall not be recognised if they are based on differences in race, nationality, religion or class.[439] In other countries, the general provision on public policy (*ordre public*) may be invoked.[440] According to German authors, having different rules in respect of capacity for adult women compared to that of men, or different rules for members of minority religions, may indeed infringe the *ordre public*.[441] The French position on the matter is that foreign law can only be excluded on the basis of public policy when the content of this law is incompatible with French civilization or legislative policies. A different age of majority in the foreign law is, however, not a sufficient reason to apply the doctrine of public policy.[442]

To conclude, in this chapter the conflicts provisions regarding capacity in a variety of codes from Europe, the Middle East, the Far East, North America and Africa are examined; an exercise comprising the study of 53 jurisdictions in total. From the investigation it emerged that the majority of jurisdictions applied the *lex patriae* to capacity as a point of departure. The remainder applied legal systems such as (in order of occurrence in this overview) the *lex domicilii*, the law of the country of habitual residence, the *lex loci contractus* and the proper law of the contract. In some jurisdictions, a combination of the mentioned legal systems applied in the alternative as a point of departure, while in others, they are applicable on an equal level. As inspired by the all-important French decision *Lizardi v Chaize*,[443] jurisdictions that in principle apply the *lex patriae*, the *lex domicilii* or the law of habitual residence, would employ the *lex loci contractus* as an additional applicable legal system where certain conditions are satisfied. Some jurisdictions apply the *lex loci contractus* where merely one condition is met, demonstrating partial adherence to *Lizardi*, while others would only do so when conditions identi-

436 Act on Conflict of Laws (1938: Section 10).
437 Civil Code of Macau (1999: Chapter III, Article 46).
438 Civil Code of Argentina (1869–1987–1997: Article 9).
439 Venezuelan Act on Private International Law (1998: Article 19). See Staudinger/Hausmann (2013: 21).
440 See, in general, Collins *et al* (eds) (2012b: 1871) and Forsyth (2012: 120ff) on the role of public policy in private international law.
441 See MünchKommBGB/Birk (2010: 1563); Staudinger/Hausmann (2013: 20-21 and 640).
442 Batiffol and Lagarde (1983: par 491).
443 *Lizardi v Chaize* (*supra*).

cal to these in *Lizardi* are satisfied. Of course, there are also jurisdictions that require the fulfilment of supplementary conditions. But some jurisdictions apply the *lex loci contractus* as the additional legal system in situations not related to the *Lizardi* decision. Many jurisdictions would not apply the *lex loci contractus* as an additional legal system where the contract in question involves family law or the law of succession. Divergent approaches exist in this regard where the contract involves immovable property. A-typical rules also emerged in certain jurisdictions such as those relating to the capacity of individuals to perform entrepreneurial activities; those concerning the consequences of contractual incapacity; the contractual capacity of an individual to assume liability in respect of bills of exchange; and the exclusion of the rules in respect of capacity in terms of a *prima facie* applicable foreign legal system on the basis of public policy. A more common occurrence, on the other hand, is the rule that once an individual obtained contractual capacity, subsequent changes in his or her personal law are inconsequential to this capacity. Lastly, the codes of only a few jurisdictions expressly provide for a separate rule in respect of the capacity to conclude contracts relating to immovable property.

5 International, Supranational and Regional Instruments

5.1 Introduction

In this chapter, the provisions on contractual capacity in international, regional and supranational instruments will be examined. With regard to international instruments, the United Nations Convention on Contracts for the International Sale of Goods (CISG) (the Vienna Sales Convention) of 1980, the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (the Hague) of 1955 and the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 will be investigated. The Hague Principles on Choice of Law in International Commercial Contracts (2015)[1] will also be considered. In respect of regional and supranational instruments, regard will be had to the Convention on the Law Applicable to Contractual Obligations of 1980[2] (the Rome Convention) (a regional convention) and the Regulation on the Law Applicable to Contractual Obligations of 2008[3] (the Rome I Regulation) (a supranational instrument).[4] Some attention will also be devoted to the regional Inter-American conventions and the envisaged African instruments. Of course, if contractual capacity is excluded from the scope of these instruments, the domestic private international law rules of the forum will apply.

1 See www.hcch.net.

2 Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention).

3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) ("the Rome I Regulation").

4 The Rome I Regulation is considered to be a supranational instrument, rather than regional, as it proceeds from an authority beyond any national government (see Anderson *et al* (2006: 1637 ("supranational")). The Rome Convention is a public international law treaty between states in the same region (Europe). Of course, both regional and supranational instruments are also international in nature as they apply in respect of more than one country.

5.2 International instruments

5.2.1 United Nations Convention on Contracts for the International Sale of Goods (Vienna) (1980) (CISG)

The CISG is mentioned here as it contains some provisions that are relevant to the conflict of laws,[5] although it is primarily a substantive-law convention.[6] The drafters of this international treaty recognised the fact that the conflict of laws remains relevant in a substantive-law context. The CISG refers to and utilises private international law to facilitate its functioning.[7] The relevant provision in the context of contractual capacity is contained in Article 4:

> "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
> (a) the validity of the contract or of any of its provisions or of any usage; …."

Since capacity relates to the validity of a contract, it is clear that Article 4 excludes any consideration of capacity from the ambit of the convention[8] and therefore defers to the arrangement in the applicable rules of private international law.

The other international, regional and supranational instruments to be discussed are all of a pure conflicts nature.

5.2.2 *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (The Hague) (1955)

Contractual capacity is clearly excluded from the ambit of this Hague convention as Article 5 stipulates: "This Convention shall not apply to: (1) The capacity of the parties…."[9]

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5 See Articles 1(1)(b), 6, 7(2), 28 and 95 of the CISG. For a detailed discussion, see Wethmar-Lemmer (2010).

6 On the relationship between private international law and uniform private law, see Schaafsma (2014).

7 Wethmar-Lemmer (2010: 55).

8 See Kröll, Mistelis and Viscasillas (eds) (2011: 69); Schwenzer (ed) (2010: 49); and Schwenzer, Hachem and Kee (2012: 203). Also see Article 3.1.1 of the UNIDROIT Principles of International Commercial Contracts, which excludes capacity from the scope of its application (*cf* Vogenauer and Kleinheisterkamp (eds) (2009: 401-402)).

9 translation available at http://www.lexmercatoria.org.

5.2.3 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986)

The Hague Convention of 22 December 1986 has never entered into force. In any event, Article 5 expressly excludes capacity from the ambit of the convention: "The Convention does not determine the law applicable to: (a) the capacity of the parties or the consequences of nullity or invalidity of the contract resulting from the incapacity of a party…."[10]

5.2.4 Hague Principles on Choice of Law in International Commercial Contracts (2015)

The provision with regard to capacity is contained in Article 1(3)(a) of the Hague Principles. It clearly excludes capacity from its scope of application. Article 1(3) states: "These Principles do not address the law governing – (a) the capacity of natural persons;…."[11]

5.3 Regional and supranational instruments

5.3.1 Rome Convention[12] and Rome I Regulation[13]

Article 1(2)(a) of the Rome Convention states that the rules of the convention shall not apply to "questions involving the status or legal capacity of natural persons, without prejudice to Article 11". This means that contracting states must in principle apply their domestic private international law rules to the issue of contractual capacity.[14] Article 11, titled "Incapacity", may, however, be relevant in certain scenarios. It reads:

> "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

The Rome Convention has, for contracts concluded as from 17 December 2009, been replaced by the Rome I Regulation. Article 1(2)(a) excludes capacity from its scope in almost identical wording, besides now referring to Article 13 of the Regulation. Article 1(2)(a) provides that "questions involving the status or legal capacity of a natural person, without prejudice to Article 13" are excluded from the scope of the Regulation. Article 13 reads:

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10 available at http://www.hcch.net/index_en.php?act=conventions.text&cid=61&zoek=1986.
11 available at http://www.hcch.net.
12 See note 2.
13 See note 3.
14 The Giuliano-Lagarde Report (1980: *ad* Article 11)

> "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

The wording is therefore identical to Article 11 of the Rome Convention, except that "another law" now reads "the law of another country" and the word "this" has been substituted with "that". The changes do not impact on the meaning of the provision.

The scenario envisaged in Article 11 and Article 13 entails the conclusion of a contract in a country where both parties are physically present. The Giuliano-Lagarde Report[15] and all the authors that were consulted in this regard agree that "the law of the presence of the parties" ("the law of that country") is merely another formulation of "the law of the country where the contract was concluded".[16] Article 11 and Article 13 therefore in effect determine that, if one of the parties to the contract, which was concluded between persons present in the same country at the time of contracting, lacks the contractual capacity in terms of the law or laws applicable to capacity according to the *lex fori*'s private international law,[17] but has such capacity in terms of the *lex loci contractus*, he or she may not invoke this incapacity unless the other par-

15 The Giuliano-Lagarde Report (1980: *ad* Article 11) (*cf* the Giuliano-Lagarde Report *ad* Article 9).

16 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Gaudemet-Tallon (2009: Fasc 552-15); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); and Vonken (2015: 5992). However, in exceptional circumstances the law of the physical presence of the parties and the *lex loci contractus* will not coincide. *Cf* Santa-Croce (2008: Fasc 552-60). The following example may be provided from the perspective of South African law. Natural person A (habitually resident in country X) concludes a contract with B while both parties are present in country Y. A made the offer and B accepted the offer, both by electronic means. In terms of Article 23 of the South African Electronic Communications and Transactions Act 25 of 2002, the contract is concluded in country X (unless A runs a business, in which case the contract will be held to be concluded in the usual place of business).

17 The phrase "another law" in Article 11 and "the law of another country" in Article 13 obviously refer to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law (see Briggs (2014: 583)), (but see Hill (2014: 68)). These may, for instance, be the *lex domicilii* (see Asser/Vonken (2013: 128); and Vonken (2015: 5992)), the *lex patriae* (see Vonken (2015: 5992)), the *lex loci contractus*, the *lex loci solutionis*, the *lex situs*, the *lex fori*, or the proper law of the contract in either a subjective or an objective sense (but see Symeonides (2014: 131 note 125: "In any event, the combined result of these two provisions [Article 1(2)(a) and Article 13] is that contractual capacity is *not* governed by the contractually chosen law."). It may in some countries be difficult to determine what the primary applicable systems are: see, for example, Anton and Beaumont (1990: 336) and Beaumont and McEleavy (2011: 491) on Scots law.

ty was aware of that incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence.

The articles do not distinguish between contracts in respect of immovable property and other contracts, including those involving movable property. The rule therefore applies to all forms of contracts, unless excluded from the scope of the instruments.

The articles provide for the application of the *lex loci contractus* in addition to the law applicable to capacity in terms of the *lex fori*'s private international law when certain requirements are fulfilled, namely, that the contractants were present in the same country at the moment of contracting and that the incapable party had capacity in terms of the *lex loci contractus* (which capacity he or she did not have in terms of the legal system primarily applicable to contractual capacity), unless the capable contractant was aware of the incapacity or was unaware thereof due to his or her negligence. The articles therefore have the same effect as the *Lizardi*[18] rule in French private international law (the application of the *lex loci contractus* in addition to the default legal system).[19] However, in terms of Articles 11 and 13, the contractants are merely required to have been in the same country at the moment of contracting for the *lex loci contractus* to be applied as an additional legal system, while in terms of the *Lizardi*[20] rule the contract in question must have been concluded in the forum state. Articles 11 and 13 are therefore more complete versions of the rule articulated in *Lizardi*, in that they also apply to contracts concluded abroad and as such have a broader scope of application.[21] On the other hand, both Articles 11 and 13 and the original *Lizardi* rule make provision for a fault-related exception to the application of the *lex loci contractus* by way of a three-step model, as identified in Chapter 4, paragraph 4.8.

The rule advanced in Articles 11 and 13 is not relevant when the *lex loci contractus* is in any event a primarily applicable legal system governing capac-

18 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

19 as discussed in Chapter 4, paragraph 4.8 (and also in Chapter 6, paragraph 6.2.5). See paragraph 4.2.7 on the question of whether the capable contractant must be a French national to be protected under the *Lizardi* rule in French private international law. Nationality plays no role under Article 11 of the Rome Convention and Article 13 of the Rome I Regulation: Gaudemet-Tallon (2009: Fasc 552-15).

20 *Lizardi v Chaize* (*supra*).

21 Asser/Vonken (2013: 128); Mayer and Heuzé (2010: 395-396); Niboyet and de Geouffre de la Pradelle (2009: 179-180). On the use of the terms "unilateral" and "bilateral" in this regard, see Chapter 4, paragraph 4.2.7.

ity in terms of the private international law of the forum.[22] When this is the position, the application of the *lex loci contractus* is not dependant on the fulfilment of certain conditions; it governs capacity in all instances. Fawcett and Carruthers correctly state: "[I]f a Contracting State to the Convention applies the law of the place of contracting to the issue of capacity under its traditional private international law rules, Article 11 will not operate."[23] For example, a matter concerning contractual capacity presents itself before a Slovenian court (where the Rome I Regulation is applicable). The court has to pronounce on whether a contractant lacking capacity in terms of his *lex patriae* but capable according to the *lex loci contractus* should be held liable on a contract concluded with a capable contractant. In Slovenian domestic private international law, a contractant lacking capacity in terms of the *lex patriae* will be regarded as capable if he or she would have capacity under the *lex loci contractus*.[24] The *lex patriae* and the *lex loci contractus* are thus applied to contractual capacity on an equal level.[25] The court should arrive at the conclusion that the contractant incapable under the *lex patriae* is liable on the contract as he possesses the necessary contractual capacity.[26] The provision in Article 13 of the Rome I Regulation, which provides for the additional application of the *lex loci contractus* in limited circumstances, is then, naturally, no longer relevant. Article 13 does not limit the application of the *lex loci contractus* prescribed in the forum's private international law but only limits the degree to which the incapable party may escape the application of the *lex loci contractus*. The same would *mutatis mutandis* apply when the *lex loci contractus* is a primarily applicable legal system in circumstances that are wider than these envisaged by Article 13 (Rome I Regulation).

Fawcett, Harris and Bridge correctly illustrate the operation of Article 11 (Rome Convention) / Article 13 (Rome I Regulation) in the context of a

22 Also see the Giuliano-Lagarde Report (1980: *ad* Article 11). However, the authors, in addition, suggest that countries which utilise the proper law ("the law governing the substance of the contract") as a primarily applicable legal system also do not require the rule in Article 11. It is suggested by the present author that this view is incorrect as the proper law and the *lex loci contractus* do not necessarily (and will often not) coincide. See the example in the next paragraph.

23 Fawcett and Carruthers (2008: 752).

24 Private International Law and Procedural Act (1999: Article 13(2)). Also see the discussion on Slovenian private international law in Chapter 4, paragraph 4.2.18.

25 One may also refer to Article 15, paragraph 2 of the Macedonian Private International Law Act (2007) which provides for the application of the *lex loci contractus* to contractual capacity, supplementing the *lex patria* (the primarily applicable legal system). However, from the available sources it is not clear in which cases the *lex patriae* is so supplemented. See, in general, Šarčević (2008: 441-458).

26 The same would apply in Turkey, should it be admitted as a member of the European Union, as the *lex patriae* and the *lex loci contractus* are also applied to contractual capacity on an equal level (Turkish Private International Law Code, Chapter 2, Article 9(1) and (2)).

case that could be heard in a court in the United Kingdom.[27] An 18-year-old Utopian (domiciled in Utopia) concludes a contract of sale with a Ruritanian (domiciled in Ruritania). The contract is concluded while the parties are in each other's physical presence in Ruritania. In terms of the contract, the Ruritanian seller is to complete delivery in Utopia and the buyer is to effect payment in Utopian currency. In terms of Utopian law, a buyer under 21 years of age lacks contractual capacity. In terms of Ruritanian law, 18 is the age of majority. The court subsequently holds that the proper law of the contract is Utopian law.[28] According to Dicey and Morris' Rule 179(1)[29] (the predecessor of Dicey, Morris and Collins' Rule 228),[30] the buyer would be capable if he has capacity in terms of any of the primary applicable legal systems, namely the *lex domicilii* or the proper law of the contract. Since in both instances the law referred to is that of Utopia, it follows (as default position) that the buyer lacks capacity. The Ruritanian sues the Utopian for specific performance and is met with the latter's defence that he lacked contractual capacity in terms of the common-law rules on capacity. As the requirements in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) are met (the Utopian would have had capacity in terms of the law of the country of the conclusion of the contract and the parties were in each other's presence at the moment of the conclusion of the contract), the *lex loci contractus* applies as an additional legal system. The Utopian must therefore be held to possess capacity and the contract, as a result, is valid. However, the Utopian will be able to invoke his common-law incapacity and successfully defend the action if he can prove that the Ruritanian was aware of the lack of capacity. Even if the Ruritanian was unaware of the incapacity, the Utopian will still be successful if he can prove that the seller was unaware of the Utopian's incapacity due to negligence. Of course, if the Utopian is able to prove fault in this regard, no contract between him or her and the Ruritanian came into existence.

Commentators on the Rome Convention and the Rome I Regulation regard Article 11 (Rome Convention) / Article 13 (Rome I Regulation) as a mechanism of protection. As set out in the Giuliano-Lagarde Report on Article

27 Fawcett, Harris and Bridge (2005: 658-659).

28 In terms of Article 4(1)(a) of the Rome I Regulation, the proper law of the contract would probably be the law of Ruritania as that is the law of the country where the seller has his or her habitual residence, unless the contract is manifestly closer connected to another legal system: see Article 4(3). Whether the law of Utopia or Ruritania would be the proper law of the contract, would depend on the relative weight of the provisions in Article 4(1)(a) and 4(3). A similar legal position prevailed under the Rome Convention. See Fredericks and Neels (2003a: 63-73); Fredericks and Neels (2003b: 207-227); Neels and Fredericks (2008a: 351-363); and Neels and Fredericks (2008b: 529-539).

29 Collins *et al* (eds) (2000: 1271-1272).

30 Collins *et al* (eds) (2012b: 1865).

11[31] and Dicey, Morris and Collins[32] and Hill and Chong[33] on Article 13, as well as Gaudemet-Tallon on both articles,[34] the provision would protect a contractant who in good faith believed that he or she was contracting with an individual of full capacity but, subsequent to the conclusion of the contract, is confronted by the counterpart's incapacity. The *bona fide* contractant, as Fawcett and Carruthers,[35] as well as Fawcett, Harris and Bridge, in their commentary on Article 11[36] submit, would then be protected as the circumstances under which the incapable party's incapacity may be invoked would be limited.[37] However, a *bona fide* contractant will still be liable if he or she was unaware of the counterpart's incapacity due to negligence. Santa-Croce argues that Article 11 favours the validity of the contract, protects the capable party and leads to increased legal certainty.[38] Dutch authors refer in this regard to the protection of the reasonable reliance of the capable contractant on the application of the *lex loci contractus*.[39]

As regards the conditions that must be fulfilled for Article 11 (Rome Convention) / Article 13 (Rome I Regulation) to be applicable, the authors unanimously observe that the contractants must physically have been in the same country at the moment that the contract was concluded.[40] The phrase "a contract concluded between persons who are in the same country", does not, for instance, refer to persons domiciled or resident in the same country. "The same country", according to Reithmann, does not, for example, imply the same city; and the phrase relates to presence in any country, not only the forum state.[41] The articles do not literally refer to the moment of conclu-

31 The Giuliano-Lagarde Report (1980: *ad* Article 11).
32 Collins *et al* (eds) (2012b: 1870).
33 Hill and Chong (2010: 551).
34 Gaudemet-Tallon (2009: Fasc 552-15).
35 Fawcett and Carruthers (2008: 752).
36 Fawcett, Harris and Bridge (2005: 658).
37 See Anton and Beaumont (1990: 335) and Beaumont and McEleavy (2011: 491) who regard the rule in this article as comprehensible and coherent with Lord Salvesen's opinion in *McFeetridge v Stewarts and Lloyds Ltd* 1913 SC 773 at 789 that "[i]n the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights". Also see Gaudemet-Tallon (2009: Fasc 552-15); the Giuliano-Lagarde Report (1980: *ad* Article 11); and MünchKommBGB/Spellenberg (2010: 1040-1041).
38 Santa-Croce (2008: Fasc 552-60).
39 Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).
40 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); and Plender and Wilderspin (2009: 101). The physical presence may have been temporary or fleeting: Asser/Vonken (2013: 128); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992). The parties need not be in each other's physical presence at the conclusion of the contract; they are merely required to be present in the same country: Asser/Vonken (2013: 128); and Vonken (2015: 5992).
41 Reithmann/Martiny/Hausmann (2010: 1913).

sion of the contract, but the authors are in agreement that this is an implied requirement.[42]

The Giuliano-Lagarde Report on Article 11[43] and Dicey, Morris and Collins[44] and Plender and Wilderspin[45] on Article 13 reaffirm that these provisions do not prejudice the protection of a contractant under a disability in terms of his or her personal law where the contract is concluded at a distance, that is: between parties in different countries. This remains the position even if, in terms of the proper law of the contract, the contract is deemed to be concluded in the country where the capable contractant is situated.[46]

Fawcett, Harris and Bridge submit that, in the context of international sales, it will be relatively rare for contractants to be in the same place at the moment of contracting; therefore Article 11 will seldom apply (the same would be true of Article 13).[47] Fawcett and Carruthers further observe that the *locus contractus* would be easily identifiable where both parties are in the same country at the time of the conclusion of the contract.[48]

There is disparity between the authors on whether the provision in Article 11 relates only to natural persons (the same would apply to Article 13). It is clear from the formulation of Article 11 (and Article 13) that the incapable contractant must be a natural person. Reithmann on Article 13 adds that this is the position irrespective of nationality,[49] domicile or residence.[50] Anton and Beaumont submit that Article 11 "applies to natural persons only",[51] implying that the counterparty must also be a natural person. Plender and Wilderspin believe that only one contractant is required to be a natural person, but they are unclear as to which of the parties to the contract they are referring to.[52] Fawcett and Carruthers[53] and Spellenberg[54] correctly point out that there is no requirement that the capable counterpart must be a natural person; it could presumably be a corporation.

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42 MünchKommBGB/Spellenberg (2010: 1052); and Reithmann/Martiny/Hausmann (2010: 1913).
43 The Giuliano-Lagarde Report (1980: *ad* Article 11).
44 Collins *et al* (eds) (2012b: 1870).
45 Plender and Wilderspin (2009: 102).
46 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Collins *et al* (eds) (2012b: 1870).
47 Fawcett, Harris and Bridge (2005: 659).
48 Fawcett and Carruthers (2008: 752).
49 Also see MünchKommBGB/Spellenberg (2010: 1044); and Vonken (2015: 5992).
50 Reithmann/Martiny/Hausmann (2010: 1913). Also see Vonken (2015: 5992).
51 Anton and Beaumont (1990: 335). Also see Beaumont and McEleavy (2011: 490); and Hill (2014: 68). *Cf* the Giuliano-Lagarde Report (1980: *ad* Article 11) ("in the case of natural persons, the question of capacity is not entirely excluded").
52 Plender and Wilderspin (2009: 101).
53 Fawcett and Carruthers (2008: 752).
54 MünchKommBGB/Spellenberg (2010: 1044 and 1045).

In conformity with the Giuliano-Lagarde Report,[55] authors such as Fawcett and Carruthers[56] on Article 11, as well as Hill and Chong,[57] Clarkson and Hill[58] and Dicey, Morris and Collins[59] on Article 13, agree that these provisions will only be applied where there is a conflict of laws. In other words, the content of the law(s) which (according to the otherwise applicable private international law rules of the *lex fori*) govern the capacity of the contractant claiming to be incapable must be different from the content of the *lex loci contractus*. The following may serve as an example: A is domiciled in Botswana and has no contractual capacity in terms of the *lex domicilii*. She concludes a contract in Venezuela. Both A and B are present in Venezuela at the time of the conclusion of the contract. B is domiciled in the United Kingdom. The proper law of the contract is the law of Australia. The case is heard in a court in the United Kingdom. In terms of Australian and Venezuelan law, A would have the relevant capacity to conclude the contract. Assuming that the *lex domicilii* and the (objective) proper law govern contractual capacity in English private international law on an equal level, it will be held that A had contractual capacity at the conclusion of the contract, as she did so in terms of Australian law *qua* proper law. Herein there is no conflict with the law of Venezuela *qua lex loci contractus* and therefore Article 11 (Rome Convention) / Article 13 (Rome I Regulation) will not play a role.[60]

As has been indicated,[61] there is general agreement that the phrase "the law of that country" (the law of presence of the parties) in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) refers to the *lex loci contractus*.[62] Hill and Chong argue in this regard that Article 13 will rarely be relevant in present-day situations because a contractant who concludes a contract abroad will usually be regarded as capable for the purposes of the common-law rules if he has capacity in terms of the *lex loci contractus* - this legal system will frequently also be the objective proper law of the contract.[63] However, this is only true in legal systems where the *lex loci contractus* and the (puta-

55 The Giuliano-Lagarde Report (1980: *ad* Article 11).
56 Fawcett and Carruthers (2008: 752).
57 Hill and Chong (2010: 552).
58 Clarkson and Hill (2011: 251).
59 Collins *et al* (eds) (2012b: 1870).
60 But see the discussion in paragraph 5.4 and Chapter 6, paragraph 6.2.5.
61 See the text at note 16.
62 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 552); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992). *Cf* the Giuliano-Lagarde Report (1980: *ad* Article 9). In exceptional cases, the law of presence of the parties may be different from the *lex loci contractus*. See note 16.
63 Hill and Chong (2010: 552). The latter part of this statement is correct in the context of the Rome Convention and the Rome I Regulation on the assumption that the contract was concluded in the country of the seller.

tive) objective proper law are primarily applicable to contractual capacity. As is clear from Chapter 4, many legal systems do not employ the *lex loci contractus* or the objective proper law as governing legal systems.

Anton and Beaumont suggest that proof of knowledge on the part of the capable contractant, whether actual or imputed,[64] even if the burden is reversed,[65] may present problems and introduce elements of uncertainty in an area where certainty is of paramount importance.[66] "Knowledge" in this context, as indicated by Spellenberg, implies that the capable party knows which law applies to the matter and what the content of that law determines.[67] Lasok and Stone are of the opinion that Article 11 is objectionable in principle because it begs the question of whether a contractant should in any circumstances be required to concern him- or herself with the counterpart's capacity in terms of the latter's personal law.[68] Also, Clarkson and Hill suggest that it is unclear how the negligence test is to be applied.[69] The enquiry, according to them, and as applied to a common factual scenario, is "[i]n what circumstances, if any, would it be negligent for a foreign trader not to know that an English[70] youth of 17 does not have capacity to conclude a commercial contract?"[71] Obviously, however, the outcome of the application of the test for negligence will depend on the specific circumstances of the case.

With regard to the question of which contractant may invoke incapacity, the following observations may be made. In principle, both parties may invoke incapacity in terms of the primarily applicable legal system(s). Fawcett and Carruthers therefore state that the capable party "can raise an incapacity that exists according to the law applied by the traditional private international law rules of the forum even though he or she knew of the incapacity at the time of contracting".[72]

Only the incapable contractant, and not the counterpart, may invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation). The text of these articles indeed

64 Imputed knowledge here refers to the fact that the capable contractant was unaware of the incapacity due to his or her negligence.
65 See the text at notes 76-78 *infra*.
66 Anton and Beaumont (1990: 335). Also see Beaumont and McEleavy (2011: 491).
67 MünchKommBGB/Spellenberg (2010: 1055-1056).
68 Lasok and Stone (1987: 350).
69 Clarkson and Hill (2011: 251); but see MünchKomm/Spellenberg (2010: 1057).
70 The authors probably refer to a minor domiciled in the United Kingdom.
71 Clarkson and Hill (2011: 251).
72 Fawcett and Carruthers (2008: 752-753). Also see Plender and Wilderspin (2009: 102), where they state in respect of a certain example that "[t]he French company … is not prevented by Article13 from pleading the nullity of the contract". This probably refers to the invocation of incapacity in terms of the primarily applicable legal system.

refer to the contractant, who would have capacity in terms of the *lex loci contractus*, invoking his or her incapacity. This is logical as the non-applicability of the *lex loci contractus* in the circumstances referred to in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) is intended to protect the incapable party.[73] The authors support this view. Plender and Wilderspin, for instance, assert that "the incapacity must be invoked by the party who would be rendered incapable if the law of another country [the primary applicable legal system] were applied".[74] Fawcett and Carruthers are similarly of the opinion that the limitation does not prevent "a minor from seeking to uphold a contract, and the other party cannot escape from a contract (valid by the applicable law) by saying that he was unaware that he was contracting with a minor".[75] The same approach is adopted by Fawcett, Harris and Bridge, who submit that Article 11 "does not apply where a person seeks to invoke the common law rules to demonstrate his capacity".[76] This means that only the incapable party can invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation). The authors continue: "Nor does it apply where ... a buyer alleges that the contract is invalid because the seller lacked capacity."[77] This refers to the fact that a capable contractant cannot invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation).

The majority of the authors accept that the incapable contractant bears the burden to prove that his or her counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[78] The Giuliano-Lagarde Report states that the wording of Article 11 "implies that the burden of proof lies on the incapacitated party. It is he who must establish that the other party knew of his incapacity or should have known of it."[79] If the incapable contractant successfully proves knowledge

73 The application of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation) is intended to protect the party who in good faith and without negligence believed him or herself to be contracting with a capable individual and who is confronted by the incapacity of this counterpart after the contract was concluded.

74 Plender and Wilderspin (2009: 101).

75 Fawcett and Carruthers (2008: 753); but see Reithmann/Martiny/Hausmann (2010: 1917).

76 Fawcett, Harris and Bridge (2005: 658).

77 *ibid.*

78 Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5993). Plender and Wilderspin (2009: 102) are unclear on this point; they recognise the significance of proving fault but do not indicate which party bears the onus in this regard. Also see the discussion in Chapter 6, paragraph 6.2.5.

79 The Giuliano-Lagarde Report (1980: *ad* Article 11). Anton and Beaumont (1990: 335), Beaumont and McEleavy (2011: 490-491), Clarkson and Hill (2011: 251), Collins *et al* (eds) (2012b: 1870) and Hill and Chong (2010: 551) all refer to the report in this regard.

on the part of the co-contractant, it will be held that he or she lacked the capacity to contract. On the other hand, if the incapable contractant is unsuccessful, he or she shall be bound to the contract.[80]

5.3.2 CIDIP Conventions

The Inter-American Conference on Private International Law has drafted various conventions that are relevant to contractual capacity in private international law, for instance the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (CIDIP I),[81] the Inter-American Convention on Conflict of Laws Concerning Checks (CIDIP II)[82] and the Inter-American Convention on the Law Applicable to International Contracts (CIDIP V).[83]

Article 1 of CIDIP I contains the provisions relating to contractual capacity in respect of bills of exchange:

> "Capacity to enter into an obligation by means of a bill of exchange shall be governed by the law of the place where the obligation is contracted.
>
> Nevertheless, should the obligation be contracted by a person who is not capable under the aforesaid law, the incapacity may not be relied upon in the territory of any other State Party to this Convention if the obligation is valid under the law of that State."

This article therefore stipulates that the capacity to conclude a contract by means of a bill of exchange shall in general be governed by the *lex loci contractus*. There is, however, an exception which provides that a contractant, incapable in terms of the *lex loci contractus*, may not rely on his or her incapacity if the contract is valid according to the *lex fori* (that is: if the latter contractant would have capacity in terms of the *lex fori*). It thus follows that a contractant may only invoke his or her incapacity if he or she lacks capacity in terms of both the *lex loci contractus* and the *lex fori*.

Article 1 of CIDIP II stipulates that the provisions of CIDIP I shall apply subject to certain modifications. These modifications do not, however, relate to capacity and therefore it may be deduced that the capacity to conclude a cheque contract shall still be governed by both the *lex loci contractus* and the *lex fori* – capacity in terms of any one of these legal systems is sufficient.

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80 Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Hill and Chong (2010: 551).

81 See, in general, Idiarte, Pedrouzo and Pereiro (2007: pars 174-230).

82 The word "cheques" rather than "checks" is globally the more common variant. See, in general, Idiarte *et al* (2007: pars 174-230).

83 Organization of American States, Washington DC Office of Inter-American Law and Programs per http://www.oas.org/dil/CIDIPV_convention_internationalcontracts.htm.

Contractual capacity is expressly excluded from the ambit of CIDIP V, also known as the Mexico City Convention.[84] Article 5 reads:

> "This Convention does not determine the law applicable to:
> a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties...."

The domestic private international law of the member states will therefore have to be applied to the issue of contractual capacity.

5.3.3 Future African instruments

The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg, on more than one occasion, has proposed to the African Union to draft a regional instrument, in the form of a model law, on the law applicable to international contracts of sale and/or, more generally, international commercial contracts.[85] In contrast to the exclusion or only partial regulation of the contractual capacity of natural persons in previous domestic, regional, supranational and international instruments, the current author submits that the African instrument(s) should contain a detailed provision in this regard, along the lines of what will be proposed in Chapter 6.[86]

5.4 Summary

It has been illustrated that contractual capacity is excluded from the scope of the CISG of 1980,[87] the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* of 1955,[88] the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986,[89] the Hague Principles on Choice of Law in International Commercial Contracts (2015)[90] and the Mexico City Convention.[91] Capacity is also excluded from the ambit of both the Rome Convention and the Rome I Regulation through the respective Articles 1(2)(a), except for the provisions of Article 11

84 as it was signed in Mexico City (Mexico) on 17 March 1994.
85 the proposed African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts.
86 This applies also to the proposed African Principles on the Law Applicable to International Commercial Contracts, as it is probably more frequently the case in emerging economies, rather than fully developed economies, that natural persons partake in international commercial transactions.
87 Article 4.
88 Article 5.
89 Article 5.
90 Article 1(3)(a).
91 Article 5.

(Rome Convention) and Article 13 (Rome I Regulation), which may be relevant in certain scenarios.

Articles 11 and 13 provide for the application of the *lex loci contractus* in addition to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, subject to the fulfilment of certain requirements. Articles 11 and 13 therefore have the same effect as the *Lizardi*[92] rule originating in French private international law. Both the *Lizardi* rule and the provisions in the Rome instruments utilise a three step-model in determining the applicability of the *lex loci contractus* (conditional on the existence of fault on the part of the capable party), as identified in Chapter 4, paragraph 4.8. The difference between the arrangements is that, for the *lex loci contractus* to apply as an additional legal system, the parties must have been in the same country at the moment of contracting (Rome Convention and Rome I Regulation) or the contract must have been concluded in the forum state (*Lizardi*).[93]

The rule contained in Articles 11 and 13 will not be relevant when the *lex loci contractus* is in any event a primarily applicable legal system, as capacity will be governed by this legal system in all instances; it will not be dependent on the fulfilment of conditions. This will also be the position where the *lex loci contractus* is primarily applicable in circumstances wider than these envisaged by Articles 11 and 13.

The authors generally regard Article 11 (Rome Convention) / Article 13 (Rome I Regulation) as a mechanism of protection for the *bona fide* and non-negligent capable contractant.[94] The authors have also identified certain conditions that have to be fulfilled for Article 11 / 13 to be applicable, namely:

(i) the contractants must have been present in the same country at the moment of concluding of the contract;[95]

92 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

93 *Lizardi v Chaize* (supra). Also, the capable party having the French nationality may be a possible requirement in French law.

94 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Asser/Kramer/Verhagen (2015: 278-279); Asser/Vonken (2013: 126); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 658); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and Santa-Croce (2008: Fasc 552-60). See further Anton and Beaumont (1990: 335); and Beaumont and McEleavy (2011: 491).

95 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); and Plender and Wilderspin (2009: 101).

(ii) the contractant invoking incapacity must be a natural person;[96]

(iii) a conflict of laws must exist, namely a difference in the relevant substantive provision regarding capacity in the *lex loci contractus* and the primarily applicable legal system(s);[97]

(iv) the contractant invoking incapacity must have capacity according to the *lex loci contractus*; and

(v) the contractant invoking incapacity must be incapable of contracting in terms of the primarily applicable legal system(s).[98]

However, the current author suggests that condition (iii) does not add value as a conflict of laws is already implied in conditions (iv) and (v).[99]

If the conditions are fulfilled, the *lex loci contractus* will apply as an additional applicable legal system. The *lex loci contractus* will nevertheless not be applied as an additional legal system if the capable contractant was aware of the counterpart's incapacity in terms of the primarily applicable legal system(s), or was unaware thereof due to negligence. If the *lex loci contractus* is a primarily applicable legal system, it will be applied irrespective of any fault on the part of the capable party.

The incapable contractant bears the burden of proving that the counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[100]

96 Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); Fawcett and Carruthers (2008: 752); Hill (2014: 68); MünchKommBGB/Spellenberg (2010: 1044 and 1045); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1913); and Vonken (2015: 5992).

97 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); and Hill and Chong (2010: 552).

98 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 552); and Plender and Wilderspin (2009: 101).

99 See the discussion in this regard in Chapter 6, paragraph 6.2.5.

100 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490-491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5993).

Both contractants may in principle invoke an incapacity in terms of any of the primarily applicable legal system(s).[101] However, only the incapable contractant may invoke the non-applicability of the *lex loci contractus* as an additional legal system in terms of Articles 11 or 13, and not the capable counterpart.[102]

The Inter-American Conventions CIDIP I and CIDIP II contain specific provisions relating to contractual capacity. Article 1 of CIDIP I, relating to bills of exchange, also applies within the ambit of CIDIP II, concerning cheques. According to the conventions, therefore, the capacity to conclude a bill of exchange or a cheque contract shall be governed by the *lex loci contractus* and the *lex fori* on an equal level.

Finally, the present author submits that the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts should contain detailed provisions on contractual capacity along the lines of the proposal in Chapter 6.

101 See Fawcett and Carruthers (2008: 752-753), as well as Plender and Wilderspin (2009: 102).

102 Fawcett and Carruthers (2008: 753); Fawcett, Harris and Bridge (2005: 658); and Plender and Wilderspin (2009: 101).

6 Evaluation, Conclusions and Proposals

6.1 Introduction

In this chapter, proposals are made regarding the law that should be applied to the contractual capacity of natural persons in South African private international law. They could also be considered by the courts in neighbouring countries Botswana, Lesotho, Namibia, Swaziland and Zimbabwe (which all share the Roman-Dutch heritage in this regard), as well as in other mixed jurisdictions and common-law countries. In addition, the proposals are intended to be part of national, regional, supranational and international instruments, in particular, the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts. For this purpose, the legal systems applied to contractual capacity in various legal systems are evaluated in paragraph 6.2. The consequences of incapacity are discussed in paragraph 6.3 and the underlying interests and the protection of both parties in paragraph 6.4. In paragraph 6.5, the different forms and the possible application of the proposals are discussed. The final proposals are to be found in paragraph 6.6 (in narrative form) and in paragraph 6.7 (in codified form).

Sometimes it is stated that certain conflicts rules in respect of capacity are designed to protect the incapable party and other rules would favour the counterpart.[1] For instance, application of the personal law would favour the incapable party and application of the *lex loci contractus* would protect the local merchant. However, in a particular case, application of the personal law could well be to the disadvantage of the party invoking incapacity and application of, for instance, the *lex loci contractus* to his or her advantage. An example would be the scenario where a person of 18 years old, capable in terms of the relevant personal law (for instance, the law of domicile, habitual residence and / or nationality), concludes a contract in another country where the age of majority is 21, and then does not want to be bound to the contract. Everything therefore depends on the content of the relevant legal systems.

1 See, for example, Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 491); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 658); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and Santa-Croce (2008: Fasc 552-60).

Nevertheless, some legal systems are, in the abstract, closer connected to the one party than to the other and application thereof can therefore, in this limited sense, be said to be to the advantage of the relevant person. These underlying interests will be integrated into the discussion and the evaluation of the various legal systems that could be considered to be applied to contractual capacity in paragraph 6.2.

The protection of the respective parties, furthermore, depends on the content of the other legal systems simultaneously applicable to capacity under an alternative reference rule as proposed in paragraph 6.6 and 6.7. The underlying interests of the parties are touched upon again in paragraph 6.4. Particular attention will there be given to the interests of the capable and incapable party in the context of such an alternative reference rule, with specific reference to the reasonable expectations of the parties in respect of the law applicable to capacity.

The relevant moment in time for determining contractual capacity is, in principle, the instance of conclusion of the contract.[2] The question must therefore be asked whether the relevant individual had contractual capacity at that specific time and not, for instance, whether he or she has such capacity at the time of the legal proceedings.[3] However, according to generally accepted practice, contractual capacity that was previously acquired will not be affected by a subsequent change in an individual's domicile or habitual residence.[4] The general principles of private international law (including the doctrine of public policy) will determine whether a retrospective change in the content of the applicable law must be taken into account.[5]

6.2 An evaluation of the various legal systems that could be applied to contractual capacity

6.2.1 The *lex domicilii* / the law of domicile

The *lex domicilii* plays a prominent role with regard to contractual capacity in many private international law systems. The application of the law of domicile is, however, also subject to considerable criticism. The majority of the cri-

2 See Article 1(1) and Article 3(6) of the proposal in paragraph 6.7.

3 for example at the time of *litis contestatio* (the close of pleadings).

4 See paragraph 6.2.2 *in fine* and Article 2 of the proposal in paragraph 6.7. This principle is only applicable to varying connecting factors (for instance, domicile and habitual residence) and not to constant connecting factors (as the *locus contractus* and the *lex situs* in respect of immovable). For this terminology see Collins *et al* (eds) (2012a: 66).

5 See, for example, Collins *et al* (eds) (2012a: 68-76); and Forsyth (2012: 127-128). The time element also plays a role in Article 3(1)-(2) of the proposal in paragraph 6.7: knowledge of the incapacity or negligence in this regard must be determined at the time of conclusion of the contract. *Cf* Article 1(3) of the proposal in paragraph 6.7.

tique relates to the unfairness that would arise as a result of its exclusive application. The argument is that it would be unfair to expect a contractant to an international commercial contract to possess knowledge of his or her counterpart's capacity in terms of the latter's *lex domicilii*.[6] It cannot be allowed that a contractant could escape liability simply because of incapacity in terms of the law of domicile, which is unknown to the counterpart.[7] Briggs[8] and Clarkson and Hill[9] correctly submit that there may be no reason for the latter to suppose that the other party is domiciled in a foreign country. Fawcett and Carruthers[10] and Walker[11] add that the application of the *lex domicilii* is incompatible with the fiduciary expectations between contractants to a commercial transaction.

Dicey, Morris and Collins,[12] Forsyth[13] and McClean and Beevers[14] further submit that the application of the *lex domicilii* is also highly inconvenient. The line of argumentation here is that a contractant can surely not be expected to diligently enquire about the domicile of each of his or her co-contractants before concluding an agreement with them.

A number of authors highlight the impracticality of applying the law of domicile. Carter[15] and Fawcett, Harris and Bridge[16] indeed argue that, where an international contract is concluded, it would be impractical if one of the contractants could escape liability on the grounds of incapacity by the domiciliary law. Knowledge of incapacity in terms of the *lex domicilii*, according to Fawcett, Harris and Bridge,[17] also plays a role in this regard if the contract was concluded at a distance by electronic means. It would be impractical, as far as Tilbury, Davis and Opeskin are concerned, if a contractant was expected to know or have regard to an incapacity arising under the domiciliary law of his or her counterpart.[18] Huo submits that ascertaining an individual's domicile to a great extent depends on proof of his or her inten-

6 Collier (2001: 209); Collins *et al* (eds) (2012b: 1867); Fawcett, Harris and Bridge (2005: 657); McClean and Beevers (2009: 385); Schoeman, Roodt and Wethmar-Lemmer (2014: par 114); and Tan (1993: 470). Also see the commentary by Lord Salveson in *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773 at 789.

7 Edwards and Kahn (2003: par 333); and Fawcett and Carruthers (2008: 750). Also see Sykes and Pryles (1991: 344).

8 Briggs (2014: 948).

9 Clarkson and Hill (2011: 250).

10 Fawcett and Carruthers (2008: 750).

11 Walker (2005/2014: § 31.5b).

12 Collins *et al* (eds) (2012b: 1867).

13 Forsyth (2012: 337).

14 McClean and Beevers (2009: 386-387).

15 Carter (1987: 23).

16 Fawcett, Harris and Bridge (2005: 657). Also see Hill and Chong (2010: 550); O'Brien (1999: 318); and Oppong (2012: par 94).

17 Fawcett, Harris and Bridge (2005: 657). Also see Mádl and Vékás (1998: 124).

18 Tilbury, Davis and Opeskin (2002: 770). Also see the commentaries by Morden J in *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario) at 244; and Gray CJ in *Milliken v Pratt* 125 Mass 374 (1878) at 382.

tion.[19] Domicile may indeed often be impossible to establish accurately[20] without recourse to the courts. It would thus be almost impossible for the capable contractant to determine the counterpart's domicile prior to the conclusion of the agreement.[21]

Another contention relates to the fact that the cases in which the English courts applied the *lex domicilii* do not feature in the context of the capacity to conclude a commercial contract; they all concerned the capacity to marry or to conclude a marriage settlement.[22] Briggs[23] and Dicey, Morris and Collins submit in this regard that the capacity to marry certainly depends on the law of the individual's domicile at the conclusion of the marriage, but "there is every ground for distinguishing as a matter of common sense between the ordinary contracts of everyday life and the formal contract of marriage".[24] The authors explain that if a man domiciled in England, for example, marries a woman in, say, France, his capacity to marry shall be governed by English law, but it does not follow that his contractual capacity, should he, for instance, purchase a ring in France, be determined by the same law. On the contrary, as the authors submit, "in accordance with principle and with such authority as there is … it should be governed by French law".[25] Authors such as Collier[26] and Van Rooyen[27] confirm that the *lex domicilii* finds support primarily in decisions that do not concern commercial contracts. Collier's objection to the application of this legal system in a commercial context is based on the fact that "[t]hese [cases] seem to have little relevance to commercial contracts".[28] Van Rooyen holds a corresponding opinion as he states: "Unfortunately there are a number of cases, bearing a relation to matrimonial law, in which it was declared that the *lex domicilii* should, in respect of contractual capacity, be applied to all contracts."[29]

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19 This would certainly be the case in South African law: see Chapter 2, paragraph 2.2.3.

20 See Briggs (2014: 948).

21 Huo (2010: 175).

22 Here reference is made to the prominent English cases *Sottomayor v De Barros (1)* (1877) 3 PD 1; *Cooper v Cooper* (1888) 13 App Cas 88; and *Baindail v Baindail* [1946] P 122. Regard could also be had to the Scottish decisions *De Virte v MacLeod* (1869) 6 SLR 236 and *Obers v Paton's Trustees* (1897) 34 R 719.

23 Briggs (2014: 584, 616, 778 and 948).

24 Collins *et al* (eds) (2012b: 1867). *Cf* Chong (1916: 68).

25 Collins *et al* (eds) (2012b: 1867). Also see Carter (1987: 24 note 98) who believes that *dicta* insinuating that the *lex domicilii per se* governs contractual capacity are unsupportable.

26 Collier (2001: 209).

27 Van Rooyen (1972: 116).

28 Collier (2001: 209) (my insertion).

29 Van Rooyen (1972: 116) (own translation from the Afrikaans: "Ongelukkig is daar in 'n aantal sake, wat met die huweliksreg verband hou, verklaar dat die *lex domicilii* by *alle* kontrakte ten opsigte van handelingsbevoegdheid toegepas moet word"). Also see Diwan and Diwan (1998: 523); McClean and Beevers (2009: 386); Tilbury, Davis and Opeskin (2002: 770); and Walker (2005: § 31.4d); (2006: 517). Diwan and Diwan *op cit* indicate that the *lex domicilii* has been utilised in cases concerning status and applied to commercial contracts by analogy.

Finally, Hickling and Wu,[30] Sychold[31] and the Australian Law Reform Commission[32] regard the *lex domicilii* as an inappropriate connecting factor in ordinary commercial contracts.[33] Sychold, in particular, mentions that the application of the *lex domicilii* may be "inconsistent with the requirements of 'modern commerce'".[34] Huo, in this regard, submits that domicile as a connecting factor may have an inadequate link with a contractant; its application in such a case would be inappropriate.[35]

However, the country of domicile is, after all, legally deemed to be an individual's permanent home[36] or at least for an indefinite period.[37] Further, capacity may be seen as an incident of legal status (which is governed by the *lex domicilii* in common-law systems);[38] therefore there should be a natural connection between an individual's personal law and his or her contractual capacity.[39] In addition, domicile forms a strong connection between the individual and the state in which he or she resides, similar to nationality in traditional civil-law systems. Mádl and Vékás indeed state that domicile may operate as a "decisive element of a rational and justified connecting factor along with or instead of nationality".[40] According to the Restatement (Second), the *lex domicilii* could be utilised to govern capacity as it serves as a protective mechanism.[41] It is also stated that the *lex domicilii* has an enduring relationship to the parties; an individual at all times maintains a close relationship with his or her personal law.[42] Whether the *lex domicilii* will indeed protect the incapable contractant, as suggested in the Restatement (Second), will, of course, depend on that legal system's content; moreover, it depends on the content of the legal systems that are simultaneously applicable under

30 Hickling and Wu (1995: 171).
31 Sychold (2007: par 184).
32 The Australian Law Reform Commission (1992: 100). Also see Diwan and Diwan (1998: 523).
33 See the commentary by Young J in *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 at 8. See the criticism by the Probate Division in *Sottomayer v De Barros (2)* (1879) 5 PD 94 at 100 and the commentary by Ramesam J in *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756 par 24.
34 Sychold (2007: par 184).
35 See Huo (2010: 175).
36 Collins *et al* (eds) (2012a: 132); Forsyth (2012: 131); Huo (2010: 175); and Mádl and Vékás (1998: 123). Also see Cheng (1916: 72-73).
37 In Section 1(2) of the South African Domicile Act 3 of 1992, the common-law definition of "domicile" was changed from residence with the intention to remain permanently to residence with the intention to remain for an indefinite period. See Forsyth (2012: 138).
38 See, for example, Collins *et al* (eds) (2012b: 1866); Forsyth (2012: 337); and Hill and Chong (2010: 550).
39 Collins *et al* (eds) (2012b: 1866); Forsyth (2012: 337); and Hill and Chong (2010: 550).
40 Mádl and Vékás (1998: 123).
41 The American Law Institute (1971: 632). Also see Tan (1993: 471); and Stone (2010: 329).
42 The American Law Institute (1971: 581).

an alternative reference rule.[43] It may, however, safely be accepted that a close connection exists between an individual and his or her law of domicile.

The *lex domicilii* plays a prominent role in many of the jurisdictions with codified rules in this regard, such as Argentina,[44] Brazil,[45] Israel,[46] Lithuania,[47] Mexico,[48] Quebec,[49] Switzerland[50] and Uruguay,[51] where it governs as the primary applicable legal system, as well as in Louisiana,[52] and Venezuela,[53] where it applies on an equal level with the putative proper law of the contract. This is also the proposal in the Puerto Rican *Projet*.[54] The law of domicile also specifically applies to the consequences of incapacity in Uruguay.[55] The *lex domicilii* applies to capacity in terms of § 198(2) of the Restatement (Second) in American private international law.[56] Under this code, the *lex domicilii* is also one of the legal systems applicable to capacity in respect of immovable property.[57]

Common-law authors such as Rodenburg,[58] Paulus Voet,[59] Johannes Voet,[60] Huber[61] and Van der Keessel,[62] applied the *lex domicilii* to status and contractual capacity (as far as movable property is concerned); it applied by virtue of comity. There is also support for this legal system to govern capacity in South African case law.[63]

The argument that English case law, in which the *lex domicilii* featured, did not concern commercial matters, can be challenged. It was indeed favoured by the common-law courts to govern capacity in commercial contracts such

43 See paragraph 6.4.
44 Civil Code of Argentina (1869–1987–1997: Article 6).
45 Introductory Act to the Civil Code of Brazil (1942: Article 7).
46 Legal Capacity and Guardianship Law (1962: §77).
47 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16).
48 Civil Code of Mexico (1928–1988: Article 13(II)).
49 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3083).
50 The Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).
51 Civil Code of Uruguay (1868–1941–1994: Article 2393).
52 Civil Code of Louisiana (1991: Article 3539).
53 Venezuelan Act on Private International Law (1998: Article 16).
54 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
55 Civil Code of Uruguay (1868–1941–1994: Article 2393).
56 The American Law Institute (1971: § 198(2)).
57 The American Law Institute (1971: § 198(1), § 198(2) and § 189).
58 Rodenburg (1653: *De Jure Conjugum* 1.3.1) as referred to by Van Rooyen (1972:15).
59 P Voet (1661: *De Statutis* 4.3.17).
60 J Voet (1829: *Commentarius* 4.1.29, 4.4.8 and 27.10.11).
61 Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41).
62 Van der Keessel (1961: *Praelectiones* 73 (*Th* 27), *Praelectiones* 75 (*Th* 27), *Praelectiones* 98 (*Th* 42), *Praelectiones* 101 (*Th* 42) and *Praelectiones* 102 (*Th* 42)).
63 *Powell v Powell* 1953 (4) SA 380 (W). Also see the *dicta* by Innes J in *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 546-547 and that of Trollip J in *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 33D.

as cession[64] and suretyship.[65] Although these cases concerned spousal consent, the contracts involved were purely of a commercial nature. Finally, in an *obiter dictum* in a recent decision of the Indian Supreme Court, which concerned the acquisition of a company, it was in general suggested that the *lex domicilii* should be applied to contractual capacity.[66]

The points of critique raised against the application of the *lex domicilii* (primarily that it is inconvenient and unfair in the international commercial sphere to expect the counterpart to enquire about an individual's contractual capacity and that it would be impractical if a party could escape liability due to incapacity by the domiciliary law) do not apply in the context of an alternative reference rule where the *lex domicilii* is only one of a number of legal systems that may be utilised to indicate contractual capacity. The capable contractant may, for instance, also invoke the putative objective proper law of the contract to establish capacity. Apart from weighty authority in its favour, the naturally strong connection between an individual and the country of domicile justifies the inclusion of the *lex domicilii* in the proposal in paragraph 6.6 and 6.7.

Carter argues that an individual should always be able to rely for enabling purposes upon his or her capacity under the *lex domicilii*.[67] This suggestion is given shape in Article 1(4) of the proposal in paragraph 6.7.

6.2.2 The law of habitual residence

In as far as the conventions of the Hague Conference on Private International Law are concerned, the law of the country of habitual residence first made its appearance in the Hague Convention on Civil Procedure of 1896.[68] Since then it has gained momentum. A clear progression of thought from the law of nationality to the law of habitual residence is evident.[69] At present, habitual residence has all but replaced nationality as a connecting factor in the Hague Conventions.[70]

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64 *De Virte v MacLeod* (1869) 6 SLR 236.

65 *Union Trust Company v Grosman et al* 245 US 412 (1918). Also see *Polson v Stewart* 45 NE 737 (1897), where the court applied the *lex domicilii* to capacity in respect of a contract for the transfer of immovable property.

66 *Technip Sa v Sms Holding (Pvt) Ltd & Ors* [2005] 60 SCL 249 SC.

67 Carter (1987: 24).

68 Mádl and Vékás (1998: 124).

69 Mádl and Vékás (1998: 125).

70 See, for example, the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989); the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993); the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); the Hague Convention on the International Protection of Adults (2000); and the Hague Protocol on the Law Applicable to Maintenance Obligations (2007).

Authors such as Clarkson and Hill,[71] Dicey, Morris and Collins,[72] Hickling and Wu,[73] Hill and Chong,[74] McClean and Beevers[75] and Tan[76] propose the application of this legal system together with domicile and the putative proper law of the contract in order to establish capacity.[77] The Australian Law Reform Commission[78] and the author Sychold[79] propose that capacity should be governed by either the proper law or the habitual residence of the incapable contractant.

In some of the jurisdictions with codified rules in this regard, such as China,[80] Estonia[81] and Macau,[82] the law of habitual residence applies as the primarily applicable legal system.[83] The law of residence applies alongside the *lex fori* and the proper law of the contract in the private international law of Oregon.[84] However, the law of residence applies exclusively in cases where fault exists on the part of the capable contractant.[85] In Romanian private international law, the law of habitual residence plays a prominent role alongside the *lex patriae* in that a lack of capacity (or limited capacity) in terms of either of these legal systems may not be relied upon where a capable contractant *bona fide* believed that the incapable party had full capacity on the basis of the *lex loci contractus*.[86]

Habitual residence is increasingly employed as a connecting factor in South African private international law, often due to the influence of international conflicts conventions.[87] It already plays a role in respect of the formal valid-

71 Clarkson and Hill (2011: 250).
72 Collins *et al* (eds) (2012b: 1865).
73 Hickling and Wu (1995: 171).
74 Hill and Chong (2010: 550).
75 McClean and Beevers (2009: 388).
76 Tan (1993: 472).
77 Also see Angelo (2012: par 75); Carter (1987: 24); Collier (2001: 209-210); Fawcett, Harris and Bridge (2005: 658); and Sykes and Pryles (1991: 614).
78 The Australian Law Reform Commission (1992: 101).
79 Sychold (2007: par 185).
80 Chinese Private International Law Act (2010: Chapter two, Article 12).
81 Estonian Private International Law Act (2002: § 12(1)).
82 Civil Code of Macau (1999: Chapter III, Articles 24 and 30).
83 In the Netherlands (according to Book 10 of the Dutch Civil Code (2012: Article 40)), the question of whether the one spouse requires the consent of the other spouse when concluding a contract, and what the consequences are if such consent was not acquired, are governed by the law of the country of the habitual residence of the spouse whose consent was to be obtained at the time of contracting. No other country seems to have a similar rule. Also see Asser/Vonken (2012: 99); Strikwerda (2015: 145); Ten Wolde (2013: 144-145); and Vonken (2015: 6052).
84 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1)). The Law refers to "residence" instead of "habitual residence", but the present author submits that the two concepts will usually be interpreted in the same manner.
85 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).
86 Romanian Private International Law Code (1992: Chapter II, Article 17).
87 Neels and Wethmar-Lemmer (2008: 588).

ity of wills[88] and the determination of the proper law of a contract,[89] as well as in the context of the Hague conventions on international child abduction[90] and inter-country adoption,[91] both incorporated in the Children's Act.[92] In a South African context, habitual residence is the concept that is most closely related to that of the more traditional one of domicile. As such, this legal system also represents a close connection between the individual and the country of his or her residence.[93]

Whether application of the law of habitual residence will indeed provide protection to the incapable contractant, will, of course, depend on its content and on the content of the other legal systems forming part of an alternative reference rule. However, it may safely be accepted that an individual has a sufficiently close connection to the country and law of his or her habitual residence.[94] Due to the role played by, as well as the developments in respect of the law of the country of habitual residence, it also features in the proposed alternative reference rule on the law applicable to contractual capacity.

Many civil law codes contain the provision that, once an individual has obtained contractual capacity, subsequent changes in his or her personal law shall not affect this capacity.[95] This rule is sensible since a contractant will

88 Section 3*bis* (ii)1(a)(ii) of the Wills Act 7 of 1953.

89 Fredericks and Neels (2003: 68).

90 Hague Convention on the Civil Aspects of International Child Abduction (1980).

91 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

92 38 of 2005. Also see Forsyth (2012: 219-228) on residence and jurisdiction in international cases. Furthermore, Section 13(1)(b) of the Divorce Act 70 of 1979 refers to ordinary residence in the context of the recognition and enforcement of foreign divorce orders. See Schoeman, Roodt and Wethmar-Lemmer (2014: 37-50) on the difference between habitual and ordinary residence.

93 Also see the American Law Institute (1971: 581).

94 See paragraph 6.4.

95 See the codes of Angola (Civil Code of Angola (1966: Article 29)); Belgium (Belgian Private International Law Code (2004: Chapter II, Article 34 § 1)); Bulgaria (Bulgarian Private International Law Code (2005: Article 51)); Estonia (Estonian Private International Law Act (2002: § 12(2))); Germany (Introductory Act to the Civil Code (1994: § 7(2))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 11[1])); Lithuania (Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(5))); Mozambique (Civil Code of Mozambique (1966: Article 29)); Portugal (Civil Code of Portugal (1966: Article 29)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 15)); Spain (Spanish Civil Code (1889–1981: Article 9(1))); Switzerland (Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35)); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Turkey (Private International Law Code of Turkey (2007: Chapter 2, Article 9(3))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(2))); Uruguay, as in Idiarte *et al* (2007: par 187); and Venezuela (Venezuelan Act on Private International Law (1998: Article 17)). Also see Schwimann (2001: 53-54) on Austrian private international law, as well as Asser/Vonken (2013: 120-122); Ten Wolde (2013: 122); and Vonken (2015: 5990) who confirm that the notion of *semel maior*, *semper maior* is generally accepted in the Netherlands.

be able to rely on his or her newly obtained capacity but not on the previous incapacity.[96] This rule promotes legal certainty which is of the essence in international contracting. As such, it is included in the proposal in paragraphs 6.6 and 6.7, both in respect of domicile and habitual residence.

6.2.3 The law of the place of business

The current author further submits that a rule providing for the substitution of a natural person's law of domicile and habitual residence by the law of his or her place of business be included in the proposed alternative reference rule. This proposal is inspired by Belarusian,[97] Bulgarian,[98] Russian,[99] Ukrainian[100] and Uzbekistani[101] private international law. In all these jurisdictions, the law of the country of registration as an entrepreneur governs capacity as the primary legal system.[102] This will usually be the relevant person's place of business. Different legal systems are applicable in the absence of such a country of registration. In Belarus,[103] Russia,[104] the Ukraine[105] and Uzbekistan,[106] the law of the country where the principle or major entrepreneurial activities are executed shall apply, while in Bulgaria,[107] the law of the country where the core establishment is situated governs. In effect, the natural person's place of business is substituted for the law of domicile and habitual residence. This is in conformity, in respect of habitual residence, with the provision in Article 19(1) of the Rome I Regulation, which, in the context of determining the proper law of a contract, states: "The habitual residence of a natural person acting in the course of his business activity shall be his principle place of business."[108] The current author submits that the law of the principle place of business of a natural person acting in the course and scope of his or her business activities represents a closer connection to the relevant individual in this context rather than his or her personal law; it is definitely also closer connected to the contract itself.

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96 Also see Kegel and Schurig (2000: 493); Kropholler (2006: 318); Reithmann/Martiny/Hausmann (2010: 1877); and Staudinger/Hausmann (2013: 49 and 52-53).
97 Civil Code of the Republic of Belarus (1999: Article 1104).
98 Bulgarian Private International Law Code (2005: Article 52).
99 Civil Code of the Russian Federation (2001: Article 1201).
100 Ukrainian Private International Law Code (2005: Article 19).
101 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
102 Civil Code of the Republic of Belarus (1999: 1104(4)); Bulgarian Private International Law Code (2005: Article 52); Civil Code of the Russian Federation (2001: Article 1201); Ukrainian Private International Law Code (2005: Article 19); and the Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
103 Civil Code of the Republic of Belarus (1999: Article 1104(4)).
104 Civil Code of the Russian Federation (2001: Article 1201).
105 Ukrainian Private International Law Code (2005: Article 19).
106 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
107 Bulgarian Private International Law Code (2005: Article 52).
108 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

6.2.4 The *lex patriae* / the law of nationality

The law of the country of nationality, the *lex patriae*, plays a vital role with regard to contractual capacity in many jurisdictions. The Italian author Ubertazzi, however, expresses critique against application of the *lex patriae* in this regard by raising an argument which stems from a principle established in the Treaty of Maastricht, the founding treaty of the European Union.[109] The current version, in Article 18 of the Treaty on the Functioning of the European Union, reads as follows: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."[110] The author is of the opinion that nationality as a connecting factor in private international law is incompatible with this principle in the context of contractual capacity in international commerce.[111] Countries bound by the Treaty of Maastricht should therefore not be allowed to utilise the connecting factor of nationality in a reference rule.[112] Another possible interpretation of Article 18 in the context of private international law would be that states may not discriminate between people of different nationality but that conflicts rules may nevertheless utilise nationality as a connecting factor in a conflicts rule provided that the same rule applies to all individuals. As this issue entails the interpretation of foundational European law, no attempt is made to solve the matter here.

Ubertazzi further warns that the application of the *lex patriae* in this regard creates the burden for a contractant to determine the nationality of his or her counterpart,[113] which is difficult and inconvenient, especially in the case of long-distance contracts, including those concluded by electronic means. According to the author, policy considerations dictate that the proper law of the contract should be applicable instead of nationality.[114]

Further problems exist with the application of the *lex patriae*. For instance, it would be inappropriate if an individual's capacity were to be determined according to the law of his or her nationality when he or she has been domi-

109 Ubertazzi (2008: 711-736); Art 12 of the Treaty on European Union (Maastricht, 7 February 1992).

110 Consolidated Version of the Treaty on the Functioning of the European Union (26 October 2012) 2012 *Official Journal of the European Union* C 326/49.

111 For a different view, see MünchKommBGB/Birk (2010: 1573-1577).

112 Ubertazzi (2008:733-735). According to the author, application of nationality as a connecting factor would also lead to a distinction made between natural and juristic persons (as only natural persons have a nationality properly so-called) and this is not objectively justifiable.

113 See Staudinger/Hausmann (2013: 20, 601, 603, 605 and 612) who further submit that normal legal interaction and legal certainty demand that the application of the law of nationality be limited.

114 Ubertazzi (2008: 733-735).

ciled and habitually resident in another country for a substantial period of time and has no real connection with the country of citizenship.[115] A law of nationality does not even exist in the case where an individual is stateless.[116] An individual may also have more than one nationality, and this is indeed often the position in many cases today.[117] Further, nationality cannot consistently determine the internal law to which an individual is subject. One may consider the United States of America in this regard, which is a political unit comprising of a variety of legal systems but there is one American citizenship.[118] In India, again, adherents of different religions are subject to different personal-law systems, irrespective of nationality.[119]

Although Section 9(3) of the Constitution of South Africa does not list nationality as a ground for unfair discrimination, the words "on one or more grounds, including ... "[120] leave this possibility open and the courts have made use thereof to declare various types of discrimination unfair on the basis of nationality.[121] This could conceivably include the application of a particular legal system in respect of an individual merely on the basis of his or her nationality.[122]

115 Huo (2010: 174). Also see Forsyth (2012: 3 note 7 and 50-51); and Mádl and Vékás (1998: 122-123).

116 Mádl and Vékás (1998: 122). For a solution, see Article 16(1) of Book 10 of the Dutch Civil Code (2012): the law of habitual residence will apply. Also see Article 17 in respect of stateless individuals.

117 Huo (2010: 175); and Mádl and Vékás (1998: 122). A solution may be to apply the law of the most effective nationality. See, for instance, Article 11(1) of Book 10 of the Dutch Civil Code (2012): if a minor has two nationalities, the law of nationality of the country where he or she has his or her habitual residence must apply to contractual capacity. If the minor does not have habitual residence in either state, the *lex patriae* with which he or she has the closest connection will apply.

118 Huo (2010: 175).

119 See in general Agrawal (2010). For the standard solution in the Hague Conventions, see, for instance, Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961): "For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system." Also see for example Article 15(1) and (3) of Book 10 of the Dutch Civil Code (2012). *Cf* Section 3*bis* (3) of the Wills Act 7 of 1953, discussed by Forsyth (2012: 401) and Neels (1990: 555).

120 Section 9(3) of the Constitution of the Republic of South Africa, 1996 provides: "The state may not unfairly discriminate directly or indirectly against anyone … "

121 See *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *Khosa & Others v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC); and *The Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC). *Cf Baloro v University of Bophuthatswana* 1995 (4) SA 197 (BSC).

122 Also see Ubertazzi (2008: 733-735).

In South African private international law, the *lex patriae* plays a very limited role,[123] namely, in respect of the formal validity of wills,[124] the recognition and enforcement of foreign divorce orders,[125] an application in terms of Section 21(1) of the Matrimonial Property Act[126] and the determination of the proper law of a contract.[127] Globally, however, considerable support does exist for the application of the *lex patriae*. As indicated in Chapter 4, 30 of the 53 jurisdictions discussed (around 57%), apply the *lex patriae* to contractual capacity as the legal system of departure.[128] In Mongolia,[129] the *lex patriae* applies to the capacity of foreigners. In Slovakia it governs capacity in cases where a foreigner concludes a contract outside the forum state.[130] In the latter jurisdiction, and in the Czech Republic,[131] the *lex patriae* also applies to contractual capacity in respect of cheques and bills of exchange.[132] In Ukrainian[133] and Burkinabe private international law,[134] this legal system specifically also applies to the consequences of incapacity.

123 Neels and Wethmar-Lemmer (2008: 588).
124 Section 3*bis* (1)(a)(iii) and 3*bis* (4)(a) of the Wills Act 7 of 1953.
125 Section 13(1)(c) of the Divorce Act 70 of 1979.
126 88 of 1984. See *Ex Parte Senekal* 1989 1 SA 38 (T) 39-40.
127 Fredericks and Neels (2003: 68); and Van Rooyen (1972: 98).
128 Algeria (Civil Code of Algeria (1975: Chapter II, Article 10)); Angola (Civil Code of Angola (1966: Articles 25 and 31(1))); Austria (Austrian Private International Law Act (1978: Chapter 2, § 9)); Belarus (Civil Code of the Republic of Belarus (1999: Article 1104(1))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(1))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Egypt (Civil Code of Egypt (1948: Article 11)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 10[1] and § 11[1])); Iran (Civil Code of Iran (1935: Articles 6 and 962)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(1))); Japan (Act on the General Rules of Application of Laws (2006: Article 4(1))); Mongolia (Civil Code of Mongolia (2002: Article 543(2))); Mozambique (Civil Code of Mozambique (1966: Articles 25 and 31(1))); Portugal (Civil Code of Portugal (1966: Article 25 and 31(1))); Qatar (Civil Code of Qatar (2004: Article 11)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 11)); Russia (Civil Code of the Russian Federation (2001: Chapter 67, Article 1195(1))); Slovakia (Private International Law and International Procedural Law Act (1963: § 3(1))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1))); Spain (Spanish Civil Code (1889–1981: Article 9.1)); Syria (Civil Code of Syria (1949: Article 12(1))); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Thailand (Act on Conflict of Laws (1938: Section 10)); Tunisia (Private International Law Code (1998: Article 40)); the Ukraine (Ukrainian Private International Law Code (2005: Article 17(1))); the United Arab Emirates (Civil Code of the United Arab Emirates (1985: Article 11)); and Vietnam (Civil Code of the Socialist Republic of Vietnam (1996: Article 831(1))).
129 Civil Code of Mongolia (2002: Article 543(2)).
130 Private International Law and International Procedural Law Act § 3(2).
131 Act on Private International Law (2012: Part Four, Title I, § 31(1)).
132 Act Concerning Bills of Exchange and Cheques No 191/1950 Coll, Sections 69 and 91.
133 Ukrainian Private International Law Code, Article 18(2).
134 Code on the Law of Persons and the Family (1989: Chapter II, Article 1017).

It has been submitted that the application of the law of nationality is relatively uncomplicated because nationality is normally easily ascertainable (that is: by a court at the time of the proceedings, not for a contracting party at the time of contracting).[135] It is also stated that nationality often does have a close connection with an individual and is therefore a proper connecting factor for the personal law.[136] Whether the law of nationality indeed provides protection to the incapable party, would, of course, depend on its content, and also on the substance of the laws that are simultaneously applicable under an alternative reference rule.[137]

Some of the critique levelled against application of the *lex patriae* (for instance, that it is impractical and unfair in the international commercial sphere to expect the counterpart to enquire about an individual's nationality) is not convincing in the context of an alternative reference rule, where the law of nationality is only one of a number of systems that may be utilised to indicate contractual capacity.[138] In favour of the *lex patriae* is the fact that nationality, in the context of legal proceedings (*ex post facto*) is often readily determinable. Nevertheless, it was decided not to include the *lex patriae* in the proposal in paragraph 6.6 and 6.7, mainly based on the following considerations:

(1) In the current social realities of cross-border mobility of individuals, nationality often does not indicate a very strong connection to a particular country; in any event much less than domicile and even habitual residence.

(2) The utilisation of nationality as a connecting factor is contrary to South African and common-law traditions.

(3) Application of nationality as a connecting factor in this context may be in conflict with the Constitution.

In the context of the proposed African codifications referred to in paragraph 6.5, it may, nevertheless be necessary to add the *lex patriae* as one of the primary applicable legal systems in order to obtain consensus, as many African legal systems belong to the civil-law family and indeed employ the law of nationality as the primary applicable legal system, where nationality is a prevalent connecting factor in this regard.

135 Huo (2010: 174). Also see North and Fawcett (1992: 133).
136 Forsyth (2012: 50); Huo (2010: 174); Mádl and Vékás (1998: 122); and the American Law Institute (1971: 581).
137 See paragraph 6.4.
138 Compare paragraph 6.2.1 in respect of domicile.

6.2.5 The *lex loci contractus* / the law of the country where the contract was concluded

Globally, the *lex loci contractus* is a prominent legal system in the context of contractual capacity. It found favour among the common-law authors such as Huber,[139] Van der Keessel[140] and Van Bijnkershoek.[141] Huber[142] and Van der Keessel[143] believed that the consequences of status (such as capacity) were to be governed by the *lex loci contractus*, but Van Bijnkershoek applied it as the primarily applicable legal system.[144]

Anton and Beaumont[145] and Forsyth[146] draw a distinction between mercantile and non-mercantile contracts. In the case of the former, the *lex loci contractus* should prevail[147] but in the case of the latter, the *lex domicilii*.[148] Agrawal and Singh submit that the *lex loci contractus* shall apply in Indian private international law as far as commercial contracts are concerned.[149] This legal system also forms part of Kahn's alternative reference rule, together with the proper law of the contract and the *lex domicilii*.[150] The *lex loci contractus* applies, according to Clarence Smith, if the capable contractant could not reasonably be expected to know of his or her counterpart's incapacity in terms of the latter's *lex domicilii*.[151]

139 Huber (1768: *HR* 1.3.44).
140 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
141 Van Bijnkershoek (1926: *Obs Tum* no 71 and 1523).
142 Huber (1687: *HR* 1.3.44).
143 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
144 Van Bijnkershoek (1926: *Obs Tum* no 71 and 1523). Also see Schoeman, Roodt and Wethmar-Lemmer (2014: par 109) in this regard.
145 Anton and Beaumont (1990: 276-279).
146 Forsyth (2012: 341).
147 See Cheng (1916: 73-74) who submits that "for the promotion and facilities of commerce, the adoption of the *lex loci contractus* is so necessary and imperative that the 'blessings' resulting from its adoption outweigh the evils".
148 Cheng's position (1916: 127-128) is that the *lex domicilii* applies in principle but the capacity to "make contracts of a business nature, but not relating to immovables" is to be governed by the *lex loci contractus*.
149 Agrawal and Singh (2010: par 203). Also see Agrawal and Gupta (2003: par 203). Hickling and Wu (1995: 170-171) maintain that the *lex loci contractus* remains a compelling choice in determining capacity. *Cf* Cheng (1916: 71 and 128).
150 Kahn (1991: 128); and Kahn (2000: 876), with whom Sonnekus (2002: 147) concurs. Also see Edwards and Kahn (2003: par 333).
151 Clarence Smith (1952: 470).

The *lex loci contractus* has been applied by the courts in England,[152] India,[153] Scotland,[154] South Africa[155] and the United States of America.[156] Further, it features as the primarily applicable legal system in codified jurisdictions such as Azerbaijan[157] and Uzbekistan,[158] but applies on an equal level with the *lex patriae* in Slovenia[159] and Turkey,[160] and with the law of habitual residence in China.[161]

The application of the *lex loci contractus* as governing legal system is subject to substantial criticism. The *lex loci contractus*, for instance, may be completely fortuitous, contrived or unknown,[162] lacking any real connection with the contractants or the substance of the contract.[163] This is especially evident in the case of cross-border contracting *via* telephone, Skype, letter, fax, email or electronic data interchange.[164]

The *locus contractus* regarding contracts concluded telephonically would in terms of South African law be in the country where the acceptance of the offer is communicated to the offeror (the information / communication theory), while with those concluded through the post, it would be in the country where the letter of acceptance is both written and posted (the expedition theory).[165] In both instances the *locus contractus* could be a country that has no connection with the contractants or with the substance of the

152 *Baindail v Baindail* [1946] P 122; *Male v Roberts* (1800) 3 ESP 163; and *Sottomayer v De Barros (2)* (1879) 5 PD 94. Also see the commentary by Lord Macnaughten in *Cooper v Cooper* (1888) 13 App Cass 88 at 108; and Lord Greene MR in *Baindail v Baindail* (*supra*: 128).

153 *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756.

154 *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773 with particular reference to the commentary by Lord Salvesen at 789.

155 *Kent v Salmon* 1910 TPD 637. Also see *Hulscher v Voorschotkas voor Zuid Afrika* 1908 TS 542 at 546; and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).

156 *Milliken v Pratt* 125 Mass 374 (1878). Gray CJ *in casu* (at 382) was of the opinion that applying the *lex loci contractus* to capacity would be in conformity with the expectations of the contractants.

157 Private International Law Code of Azerbaijan (2000: Article 10(2)).

158 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).

159 Private International Law and Procedural Act (1999: Article 13(1) and (2)).

160 Private International Law Code of Turkey (2007: Chapter 2, Article 9(1) and (2)).

161 Chinese Private International Law Act (2010: Chapter Two, Article 12).

162 Agrawal and Singh (2010: par 203); the American Law Institute (1971: 580); Carter (1987: 25); Collier (2001: 209); Collins *et al* (eds) (2012b: 1868); Diwan and Diwan (1998: 524); Edwards and Kahn (2003: par 333); Fawcett and Carruthers (2008: 751); Forsyth (2012: 340); Kahn (2000: 875); McClean and Beevers (2009: 387); MünchKommBGB/Spellenberg (2010: 1042 and 1052); Schoeman, Roodt and Wethmar-Lemmer (2014: par 114); and Walker (2005: § 31.4.d). This was also the opinion of Morden J in *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario) at 244.

163 The American Law Institute (1971: 580); Forsyth (2012: 332-333); and O'Brien (1999: 318).

164 *Cf* Wunsh J in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) 172 A-B.

165 Van Niekerk and Schulze (2011: 70).

contract. The Electronic Communications and Transaction Act[166] stipulates that the *locus contractus* is the country where the acceptance of the offer is received by the offeror, which is taken to be at the offeror's place of business or residence.[167] When this provision is applicable, there will indeed be a link between the place of contracting and the offeror, but this may not necessarily be a significant connecting factor in South African private international law as far as the contract as a whole is concerned, for instance, if both performances in terms of the contract have to take place in another country.[168]

The *locus contractus* may also be difficult to determine.[169] In respect of telephonic contracts, while a general rule does exist, its application to a particular set of facts may be complicated. During the course of a telephonic discussion between contractants it may be difficult to ascertain which party effected the final offer so as to establish where the acceptance of this offer was communicated to the offeror.[170] Determining the *locus contractus* in contracts concluded *via* fax is even more contentious as there is uncertainty on this issue in South African law. It has been suggested that these contracts be regarded as instantaneous and that the information theory should apply. In other words, the *locus contractus* would be where the acceptance of the offeror's offer is communicated to him or her. This will, however, only be the case where contractants are present at their facsimile machines at the same time and responding to each other's messages as parties would telephonically.[171] This, however, hardly ever happens. Telefax messages are usually received automatically and given due attention by the addressee later; it should thus not be regarded as instantaneous communication. Determining the *locus contractus* with reference to the provisions of the Electronic Communications and Transactions Act[172] would, in contrast to the above, not be difficult, in that it stipulates the manner in which this is to be established.[173]

166 25 of 2002.
167 Sections 22(2) and 23(c). Also see the discussion on the Act in Chapter 2, paragraph 2.2.4.
168 See Chapter 2, paragraph 2.2.
169 See Forsyth (2012: 332-333).
170 Van Niekerk and Schulze (2012: 71).
171 *ibid.*
172 25 of 2002.
173 The difficulties in determining the *lex loci contractus* were circumvented in the context of the formal validity of a contract in Article 9 of the Rome Convention (Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention)) and Article 11 of the Rome I Regulation (note 108) by substituting the law "of either of the countries where either of the parties … is present at the time of conclusion" for the more traditional application of the law of the place where the contract was concluded.

Additional critique may be levelled against the *lex loci contractus*. Agrawal and Singh,[174] Diwan and Diwan[175] and Fawcett and Carruthers[176] submit that the application of the *lex loci contractus* would enable a contractant to evade an incapacity (imposed by, for instance, the law that governs the contract in other respects or the personal law of the incapable individual) by simply concluding the contract in a country where the law is more "favourable". Kahn argues that the parties may select a place of contracting with the intent to evade the otherwise applicable law.[177] O'Brien believes that the application of the *lex loci contractus* could be exploited by the stronger contractant who may intentionally conclude a contract in a country where the protection of the counterpart, whose capacity is in doubt, is the weakest.[178] On the other hand, a party could insist to conclude the contract in a certain location for the purposes of a possible protection on the basis of incapacity, if the deal does no longer seem favourable.

Carter submits that, although the *locus contractus* is considered to be the place in which the last event necessary for the formation of the contract occurred, this cannot justify why the *lex loci contractus* should have preference in governing capacity.[179] In the United Kingdom, the *lex loci contractus* was generally accepted to govern capacity at a time when it was assumed that contracts were subject to the law of the country where they were concluded.[180]

In many legal systems, the *lex loci contractus* will therefore only apply if certain requirements are met. Perhaps the most well-known examples are Article 11 of the Rome Convention[181] and Article 13 of the Rome I Regulation,[182] as inspired by the French *Lizardi* decision.[183] The effect of these articles is that a contractant who transacted with his or her counterpart, while present in the same country, but who is incapable in terms of the law(s) governing capacity according to the *lex fori*'s private international law and neverthe-

174 Agrawal and Singh (2010: par 203).
175 Diwan and Diwan (1998: 524).
176 Fawcett and Carruthers (2008: 751).
177 Kahn (2000: 875).
178 O'Brien (1999: 318).
179 Carter (1987: 25).
180 Briggs (2014: 583 note 215); Clarkson and Hill (2011: 250); O'Brien (1999: 318); Sykes and Pryles (1991: 614); and Tilbury, Davis and Opeskin (2002: 770). Also see Collier (2001: 209); and the commentary by Young J in *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 at 8.
181 note 173.
182 note 108.
183 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193. See the discussion on French law in Chapter 4, paragraph 4.2.7. See further MünchKommBGB/Spellenberg (2010: 1040).

less capable under the *lex loci contractus*,[184] may not rely on this incapacity unless the counterpart was aware of the incapacity at the time of contracting or lacked this knowledge due to negligence.

The *lex loci contractus* therefore applies in addition to the law primarily governing capacity under the *lex fori*'s private international law when certain requirements are complied with, namely: the contractants were present in the same country at the moment of contracting and the party asserting incapacity is capable in terms of the *lex loci contractus* but incapable under the legal system/s otherwise indicated by the *lex fori's* private international law. The *lex loci contractus* nevertheless does not apply if the counterpart was aware of this fact or unaware thereof due to negligence. Article 11 and Article 13 therefore have the same effect as the *Lizardi*[185] rule in French private international law.[186] The similarity between the articles and the *Lizardi* rule is that in both cases provision is made for a fault-related exception to the application of the *lex loci contractus* by way of a three-step model. The difference between them, however, is that the articles in the Rome Convention[187] and the Rome I Regulation[188] require the contractants to have been in the same country at the moment of contracting for the *lex loci contractus* to be applied as an additional legal system, while, in the *Lizardi* case, it is required that the contract must have been concluded in the forum state.

The rule in Article 11 / Article 13 is not relevant when the *lex loci contractus* is in any event a primarily applicable legal system governing capacity in terms of the private international law of the forum.[189] In such a case, the application of this legal system would not be dependent on the compliance

184 The Articles refer to "the law of that country" (see Chapter 5, paragraph 5.3.1) but the Giuliano-Lagarde Report (1980: *ad* Article 11) and all the authors consulted in this regard agree that this is merely another formulation of "the law of the country where the contract was concluded". See Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Gaudemet-Tallon (2009: Fasc 552-15); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); and Vonken (2015: 5992). However, in exceptional circumstances the law of the physical presence of the parties and the *lex loci contractus* will not coincide. *Cf* Santa-Croce (2008: Fasc 552-60). The following example may be provided from the perspective of South African law. Natural person A (habitually resident in country X) concludes a contract with B while both parties are present in country Y. A made the offer and B accepted the offer, both by electronic means. In terms of Article 23 of the South African Electronic Communications and Transactions Act 25 of 2002, the contract is concluded in country X (unless A runs a business, in which case the contract will be held to be concluded in the usual place of business).

185 *Lizardi v Chaize* (*supra*).

186 as discussed in Chapter 4, paragraph 4.2.7.

187 note 173.

188 note 108.

189 See the Giuliano-Lagarde Report (1980: *ad* Article 11).

of conditions; it governs capacity in all instances.[190] The articles do not limit the application of the *lex loci contractus* prescribed by the forum's private international law; it only limits the degree to which the incapable party may escape the application of the *lex loci contractus*.

The rule in Article 11 / Article 13 is described as a mechanism of protection in that it would protect a contractant who in good faith and without negligence believed that he or she was contracting with a capable individual but is subsequently confronted by the latter's incapacity.[191] In effect, the articles prescribe the alternative application of the *lex loci contractus* in respect of capacity in the absence of knowledge or negligence. The capable contractant would then be protected as the circumstances under which the incapable party's incapacity may be invoked, would be limited.[192] Whether or not the capable contractant is indeed protected in a particular case, will, of course, depend on the content of the *lex loci contractus* and the content of the other legal systems simultaneously applicable under an alternative reference rule.[193]

For the application of the rule in Article 11 / Article 13, the contractants must physically have been in the same country at the moment that the contract was concluded.[194] In this context, therefore, the debate on the *locus contractus* (in situations involving the telephone, letters, fax, electronic data inter-

190 See Fawcett and Carruthers (2008: 752). For examples, see the Private International Law and Procedural Act of Slovenia (1999: Article 13(2)); and the Private International Law Code of Turkey (2007: Chapter 2, Article 9(1) and (2)). Also see the Macedonian Private International Law Act (2007: Article 15, paragraph 2).

191 The Giuliano-Lagarde Report (1980: *ad* Article 11); Collins *et al* (eds) (2012b: 1870); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and MünchKommBGB/Spellenberg (2010: 1040-1041). The protection would, in particular, make sense where the incapable party concludes the contract at the business premises of the counterpart. See paragraph 6.4. Also see Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).

192 Fawcett and Carruthers (2008: 752); and Fawcett, Harris and Bridge (2005: 658). Also see Anton and Beaumont (1990: 335) (and Beaumont and McEleavy (2011: 491)) who regard the rule in this article as comprehensible and coherent with Lord Salvesen's opinion in *McFeetridge v Stewarts & Lloyds Ltd* (*supra*: 789) that "[i]n the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights". See further Santa-Croce (2008: Fasc 552-60) who submits that Article 11 favours validity, protects the capable contractant and leads to increased legal certainty. See Asser/Kramer/Verhagen (2015: 278-279) and Asser/Vonken (2013: 126) who refer to the protection of the reasonable reliance of the capable contractant on the application of the *lex loci contractus* in this regard. Also see Gaudemet-Tallon (2009: Fasc 552-15); the Giuliano-Lagarde Report (1980: *ad* Article 11); and MünchKommBGB/Spellenberg (2010: 1040-1041).

193 See paragraph 6.4.

194 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1913); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992).

change and email) is irrelevant. According to Dicey, Morris and Collins[195] and Plender and Wilderspin,[196] this provision does therefore not prejudice the protection of a contractant incapable in terms of his or her personal law where the contract is concluded at a distance between parties in different countries.[197] But, again, the protection, or not, of an incapacitated individual will depend on the content of the legal system(s) referred to by the *lex fori*'s private international law. This remains the position even if, according to the proper law, or, it may be added, the *lex fori*, the contract is deemed to be concluded in the country where the capable contractant is situated.[198]

Of course, both the contracting parties (the incapable and the capable party) are in need of protection. It is the role of private international law to mediate between the interests of both parties. This perspective on the matter is discussed in more detail in paragraph 6.4; it is given content in the proposal made in paragraphs 6.6 – 6.7.

The incapable contractant in terms of Article 11 / Article 13 must be a natural person irrespective of nationality,[199] domicile or residence,[200] but there is no such a requirement with regard to the counterpart. The latter may presumably be a corporation.[201]

It is a requirement for Article 11 / Article 13 to take effect that the incapable contractant, as determined according to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law,[202] must be deemed to have capacity according to the *lex loci contractus*. This is derived from the phrase "the law of that country" in Article 11 / Article 13.[203]

Fault plays the role of an exception in Article 11 / Article 13. The *lex loci contractus* will not apply on the basis of these articles where the capable con-

195 Collins *et al* (eds) (2012b: 1870).
196 Plender and Wilderspin (2009: 102).
197 On contracts concluded at a distance, see MünchKommBGB/Spellenberg (2010: 1052); and Reithmann/Martiny/Hausmann (2010: 1913).
198 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Collins *et al* (eds) (2012b: 1870).
199 Also see MünchKommBGB/Spellenberg (2010: 1044); and Vonken (2015: 5992).
200 Reithmann/Martiny/Hausmann (2010: 1913).
201 Fawcett and Carruthers (2008: 752); and MünchKommBGB/Spellenberg (2010: 1045). Also see Plender and Wilderspin (2009: 101); and Vonken (2015: 5992). *Cf* Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); and Hill (2014: 68).
202 as derived from the phrases "another law" (Article 11) and "the law of another country" (Article 13).
203 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 552); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); Santa-Croce (2008: Fasc 552-60); and Voken (2015: 5992).

tractant had knowledge of his or her counterpart's incapacity in terms of the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, or was unaware thereof due to negligence.

In principle, both parties may invoke incapacity in terms of the primarily applicable legal system(s).[204] But only the incapable contractant, and not the counterpart, may invoke the non-applicability of the *lex loci contractus* in terms of Article 11 and Article 13. Indeed, Article 11 and Article 13 refer to the contractant who would have capacity in terms of the *lex loci contractus* invoking his or her incapacity. This is logical as the non-applicability of the *lex loci contractus* in the circumstances referred to in Article 11 / 13 is intended to protect the incapable party.[205]

The incapable contractant bears the burden to prove that the capable counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[206] The authoritative[207] Giuliano-Lagarde Report[208] states that the formulation of Article 11 implies that the incapable contractant must establish that his or her counterpart had knowledge of the incapacity or should have had such knowledge.[209] If the incapable contractant successfully proves knowledge or negligence on the part of the co-contractant, he or she (the incapable party) lacked the capacity to contract. On the other hand, should this contractant (the incapable party) be unsuccessful, he or she shall be bound to the contract.[210]

There are numerous examples in codified jurisdictions of the application of the *lex loci contractus* in addition to the primarily applicable legal system in particular circumstances. In this regard, the presence of one or more of the following conditions is usually required:

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204 See Fawcett and Carruthers (2008: 752-753). Also see the example by Plender and Wilderspin (2009: 102).

205 The application of the *lex loci contractus* in terms of Article 11 / 13 is intended to protect the party who in good faith and without negligence believed himself to be contracting with a capable individual and is confronted by the incapacity of this counterpart after the contract was concluded. Also see Fawcett and Carruthers (2008: 753); Fawcett, Harris and Bridge (2005: 658); Plender and Wilderspin (2009: 101); and Reithmann/Martiny/Hausmann (2010: 1917). *Cf* Staudinger/Hausmann (2013: 636).

206 Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490-491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-69); and Vonken (2015: 5993). Also see MünchKommBGB/Spellenberg (2010: 1055-1056); and Plender and Wilderspin (2009: 102).

207 Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); and Hill and Chong (2010: 551).

208 The Giuliano-Lagarde Report (1980: *ad* Article 11).

209 *ibid*.

210 Fawcett and Carruthers (2008: 752). Fawcett, Harris and Bridge (2005: 659) and Hill and Chong (2010: 551) agree.

1 the contract in question was concluded in the forum state;
2 the parties to the contract were present in the same country at its conclusion;
3 the forum state is the country where performance is to be effected; and
4 there was no fault on the part of the contract assertor.[211]

In jurisdictions such as Belarus,[212] Iran,[213] Mongolia,[214] Slovakia,[215] Spain,[216] Taiwan[217] and Thailand[218] condition 1 is sufficient for the *lex loci contractus* to apply as an additional legal system. Similarly, in Japanese private international law, this legal system applies in the presence of condition 2.[219]

Condition 4 is here formulated as a requirement (the absence of fault) that must be fulfilled for the *lex loci contractus* to be applied. This was called the two-step model.[220] Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)), namely the *lex patriae* and / or the *lex domicilii* and/or the law of habitual residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3, referred to above (and as prescribed by the *lex fori*'s private international law), are fulfilled *and* fault is absent on the part of the capable contractant. The same result may be reached in formulating the no-fault principle as an exception to the applicability of the *lex loci contractus* where fault exists. This is the three-step model. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)), namely the *lex patriae* and / or the *lex domicilii* and / or the law of habitual residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3, referred to above (and as prescribed by the *lex fori*'s private international law) are present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant.

In Romania, the absence of fault on the part of the capable contractant is the sole requirement for the *lex loci contractus* to be applied (within the context of the two-step model).[221] In Estonian,[222] Lithuanian,[223] Russian[224] and Tuni-

211 On the possible requirement of French nationality, see Chapter 4, paragraph 4.2.7.
212 Civil Code of the Republic of Belarus (1999: Article 1104 (3)).
213 Civil Code of Iran (1935: Article 962).
214 Civil Code of Mongolia (2002: Article 543(5)).
215 Private International Law and International Procedural Law Act (1963: § 3(2)).
216 Spanish Civil Code (1889–1981: Article 10.8).
217 Private International Law Act (2010: Chapter 2, § 10).
218 Act on Conflict of Laws (1938: Section 10).
219 Act on the General Rules of Application of Laws (2006: Article 4(2)).
220 See Chapter 4, paragraph 4.8.
221 Romanian Private International Law Code (1992: Chapter II, Article 17).
222 Estonian Private International Law Act (2002: § 12(3)).
223 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(1)).
224 Civil Code of the Russian Federation (2001: Chapter 67, Article 1197(2)).

sian[225] private international law, the mere presence of fault leads to the non-application of the law of the country where the contract was concluded (in the context of the three-step model).

Jurisdictions such as Angola,[226] Israel,[227] Macau,[228] Mozambique[229] and Portugal[230] require that the contract was concluded in the forum state for the *lex loci contractus* to apply. However, this legal system will not apply if the contract assertor was at fault (three-step model). This arrangement resembles the *Lizardi* rule[231] in French private international law.[232] The *lex loci contractus / lex fori* applies where a contractant incapable in terms of the personal law concluded a contract in the forum state where he or she possesses contractual capacity, unless the capable contractant was or should have been aware of the incapacity at the moment of contracting.

In Bulgaria,[233] Burkina Faso,[234] Germany,[235] Italy,[236] the Netherlands,[237] Quebec,[238] South Korea[239] and Switzerland,[240] the *lex loci contractus* is applied where a contractant, incapable in terms of the relevant personal law, concluded a contract with his or her counterpart while present in the same country (requirement 2 listed above), where the incapable party would have contractual capacity. However, this legal system shall not apply where the capable contractant was or should have been aware of the incapacity at the moment of contracting – the three step model in respect of fault. Clearly, the rule provided in these codifications is in conformity with that in Article 11 of the Rome Convention[241] and Article 13 of the Rome I Regulation.[242]

Vietnamese private international law requires compliance with conditions 1 and 3,[243] listed above, for the *lex loci contractus* to be applicable. The addition-

225 Private International Law Code (1998: Article 40).
226 Civil Code of Angola (1966: Article 28(2)).
227 Legal Capacity and Guardianship Law (1962: § 77).
228 Civil Code of Macau (1999: Chapter III, Article 27(2)).
229 Civil Code of Mozambique (1966: Article 28(2)).
230 Civil Code of Portugal (1996: Article 28(2)).
231 *Lizardi v Chaize* (*supra*).
232 French Civil Code (1804–2004: Article 3).
233 Bulgarian Private International Law Code (2005: Article 50(2)).
234 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
235 Introductory Act to the Civil Code (1994: § 12). Also see Staudinger/Hausmann (2013: 605) on the reasons for preferring the application of the *lex loci contractus* in this context.
236 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).
237 Book 10 of the Dutch Civil Code (2012: Article 11(2)).
238 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086).
239 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1)).
240 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)). But see Siehr (2002: 145).
241 note 173.
242 note 108.
243 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)).

al application of the *lex loci contractus* may also be dependent on the presence of three conditions, as in Algeria,[244] Egypt,[245] Qatar,[246] Syria[247] and the United Arab Emirates,[248] namely conditions 1, 3 and 4 (in the context of the two-step model in respect of the absence of fault).

The *lex loci contractus* is also applied in addition to the default legal system(s) in situations not covered by the conditions as discussed above. In Argentinean[249] private international law, the *lex loci contractus* applies only where contracts are concluded outside the forum state, while in Israel[250] it applies when the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity. In Lithuania, on the other hand, the *lex loci contractus* is utilised when foreign citizens have no domicile.[251] In Hungarian private international law, this legal system only governs capacity when the contract is concluded in the forum state and it relates to essential goods. However, when performance in terms of the contract is to be effected in Hungary and it relates to non-essentials, the *lex fori / lex loci solutionis* is to be applied,[252] and not the *lex loci contractus*.

In some jurisdictions, the *lex loci contractus* as an additional legal system is not applicable to certain types of contracts. In general, this legal system shall not apply as an alternative governing system where contracts involve family law or the law of succession. In Chinese,[253] Slovenian[254] and Thai[255] private international law, the latter is the only limitation to the application of the *lex loci contractus*. In Angola,[256] Burkina Faso,[257] Estonia,[258] Germany,[259] Italy,[260] Macau,[261] Mozambique,[262] Portugal,[263] South Korea[264] and Taiwan[265] the *lex*

244 Civil Code of Algeria (1975: Chapter II, Article 10).
245 Civil Code of Egypt (1948: Article 11).
246 Civil Code Qatar (2004: Article 11).
247 Civil Code of Syria (1949: Article 12(1)).
248 Civil Code of the United Arab Emirates (1985: Article 11).
249 Civil Code of Argentina (1869–1987–1997: Article 7).
250 Legal Capacity and Guardianship Law (1962: § 77).
251 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).
252 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).
253 Chinese Private International Law Act (2010: Chapter two, Article 12).
254 Private International Law and Procedural Act (1999: Article 13(4)).
255 Act on Conflict of Laws (1938: Section 10).
256 Civil Code of Angola (1966: Article 28(2)).
257 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
258 Estonian Private International Law Act (2002: § 12(4)).
259 Introductory Act to the Civil Code (1994: § 12). Also see Reithmann/Martiny/Hausmann (2010: 1914-1915).
260 Italian Statute on Private International Law (1995: Chapter II, Article 23(4)).
261 Civil Code of Macau (1999: Chapter III, Article 27(2)).
262 Civil Code of Mozambique (1966: Article 28(2)).
263 Civil Code of Portugal (1996: Article 28(2)).
264 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(2)).
265 Private International Law Act (2010: Chapter 2, § 10).

loci contractus does not apply where the contract involves immovable property situated abroad. The *lex loci contractus* shall not apply as an additional legal system in Bulgarian,[266] Israeli[267] and Swiss[268] law where the contract relates to real rights in respect of immovable property in general; in Turkey it shall not apply in respect of immovable property situated abroad.[269] In the Lithuanian code the additional limitation concerns contracts involving real rights in general,[270] while in Romania it pertains to the *transfer* of immovable property.[271] In the Japanese code the further limitation concerns contracts relating to immovable property situated in a country where the law regarding immovables differs from that in the *lex loci contractus*,[272] while in Israel, the limitation relates to immovable property in general[273] and cases where the contract caused substantial harm or prejudice to the incapable party.[274]

The current author submits that the exclusive or the unconditional primary application of the *lex loci contractus* is undesirable.[275] As has been indicated, the application of the *lex loci contractus* may be completely fortuitous, contrived or unknown, lacking any necessary connection with the contractants or the substance of the contract. It is also difficult to determine in specific circumstances. The case law in which it was applied is rather dated. Further, an opportunistic contractant may avoid invalidity by contracting in a country where the protection of the incapable party is weakest. The place of contracting could be selected with the intention of evading the law that otherwise would have been applicable. Finally, the *lex loci contractus* should not be granted preference merely because of the importance of the *locus contractus* with regard to the formation of the contract.[276]

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266 Bulgarian Private International Law Code (2005: Article 50(3)).

267 as submitted by Einhorn (2012: par 130).

268 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(2)).

269 Private International Law Code of Turkey (2007: Chapter 2, Article 9(2)). The same provision as that in Turkey exists in Greek private international law, except there (in Greece) the limitation relates to the additional application of the *lex fori* and not the *lex loci contractus*.

270 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(2)).

271 Romanian Private International Law Code (1992: Chapter II, Article 17).

272 Act on the General Rules of Application of Laws (2006: Article 4(3)).

273 See Einhorn (2012: par 130).

274 Legal Capacity and Guardianship Law (1962: § 77).

275 The common-law author Van Bijnkershoek also did not apply the *lex loci contractus* exclusively in all circumstances, as gathered from his commentary on a decision of the *Hoge Raad* (*Obs Tum* no 1523), as referred to by Van Rooyen (1972: 21). The *lex loci contractus* also does not apply exclusively in terms of the Restatement (Second) – see the American Law Institute (1971: 579).

276 In South African private international law, the *lex loci contractus* and probably the proper law of the contract govern the formal validity of a contract. See Forsyth (2012: 343); *Ex Parte Spinazze* 1985 (3) SA at 633 (A) 665H; and *Creutzberg v Commercial Bank of Namibia Ltd* 2006 (4) All SA 327 (SCA).

Nevertheless, the additional application of the *lex loci contractus* is supported in particular circumstances. This will provide a mechanism of protection to the *bona fide* capable contractant, for instance a local merchant, who is confronted by his or her counterpart's incapacity. The capable contractant is protected in that the counterpart's incapacity may only be invoked under limited circumstances.[277] The *locus contractus* remains important since, as Spellenberg and Hausmann put it, the contractants participated in legal interaction in that country. Further, the additional application of this legal system will safeguard confidence in the local law[278] and, in cases where the parties are in each other's presence, it is readily ascertainable which legal system is the *lex loci contractus*.[279] Also, according to Hausmann, the *lex loci contractus* is known *ab initio*, its application is foreseeable and it is geographically the best system to govern capacity.[280]

Article 11 of the Rome Convention[281] and Article 13 of the Rome I Regulation[282] determine that the *lex loci contractus* should apply, in addition to the primary applicable legal systems, only when the contractants were in the same country at the moment of contracting. This legal system shall not apply where the capable contractant was or should have been aware of the incapacity at the time of contracting. This is the rule also applied in codified jurisdictions such as Bulgaria,[283] Burkina Faso,[284] Germany;[285] Italy,[286] the Netherlands,[287] Quebec[288] and South Korea.[289] Limiting the application of the *lex loci contractus* to the scenario where both parties are present in the same country, often avoids dispute over where exactly the contract was concluded.[290] Application of this legal system seems to be justified to a greater extent where a real (and not a mere artificial) link with the *locus contractus* is present. In these circumstances, the application of the law of the country of contracting will probably coincide with the expectations of the parties. The limited application of the *lex loci contractus* also protects the incapable party in distance contracts (for instance, these concluded by telephone or by email), but only if the par-

277 The clash of interests of the capable and incapable party is further discussed in paragraph 6.4.
278 MünchKommBGB/Spellenberg (2010: 1042); and Staudinger/Hausmann (2013: 605).
279 MünchKommBGB/Spellenberg (2010: 1042).
280 Staudinger/Hausmann (2013: 605).
281 note 173.
282 note 108.
283 Bulgarian Private International Law Code (2005: Article 50(2)).
284 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
285 Introductory Act to the Civil Code (1994: § 12).
286 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).
287 Book 10 of the Dutch Civil Code (2012: Articles 11(2)).
288 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086).
289 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1)).
290 This is not necessarily the case, for instance where Section 22(2) and Section 23(c) of the South African Electronic Communications and Transactions Act 25 of 2002 are applicable: the contract is concluded at a party's place of business (or residence) irrespective of his or her physical presence.

ties were in different countries at the time of the conclusion of the contract; it does not provide sufficient protection in respect of distance contracts where the parties were in the same country at the specific time. The current author therefore suggests, as Siehr[291] and Einhorn,[292] that the contractants should have been in each other's presence for the *lex loci contractus* to be applicable. The capable contractant should not be protected by the additional application of this legal system if the contract was concluded at a distance; the incapable party should enjoy greater protection in these cases. The proposed condition for the application of the *lex loci contractus* as an additional legal system will therefore have a somewhat narrower scope than the one found in the Rome I Regulation[293] and countries with similar arrangements. Of course, where the protection of the parties is mentioned in this paragraph, one should remember that their abstract interests are referred to. In a specific case, the protection of a particular party depends on the content of the various legal systems.[294]

If the capable party is a juristic person, the parties must be deemed to be in each other's presence when, for instance, the contract was concluded at the business premises of the first mentioned party. It will also be stipulated in the proposed rule that the incapable contractant must be a natural person (irrespective of nationality, domicile or habitual residence); the co-contractant could be a corporation.

The proposed rule will have an effect similar to that of *Lizardi*,[295] which is applied in jurisdictions with codified rules in this regard such as Angola,[296] France,[297] Israel,[298] Macau,[299] Mozambique[300] and Portugal,[301] but the requirement in these systems that the contract must have been concluded in the forum state is to be disregarded. This is an arbitrary distinction which limits the protection afforded by the rule to a more limited scenario. The requirement of the conclusion of the contract in the forum state, practically leads to the application of the *lex fori* instead of the *lex loci contractus*. Such a *lex fori* orientation, originating from a somewhat parochial approach to private international law, cannot be supported. Moreover, it appears that, in practice and in theory, the application of the *Lizardi* rule is in any event extended to contracts that are concluded abroad.[302]

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291 Siehr (2002: 145).
292 Einhorn (2012: par 128).
293 note 108.
294 See paragraph 6.4.
295 *Lizardi v Chaize* (*supra*).
296 Civil Code of Angola (1966: Article 28(2)).
297 French Civil Code (1804–2004: Article 3).
298 Legal Capacity and Guardianship Law (1962: § 77).
299 Civil Code of Macau (1999: Chapter III, Article 27(2)).
300 Civil Code of Mozambique (1966: Article 28(2)).
301 Civil Code of Portugal (1996: Article 28(2)).
302 Van Rooyen (1972: 114). Also see Lipp (1999: 107); Mayer and Heuzé (2010: 395-396); Niboyet and de Geouffre (2009: 179-180); and Santa-Croce (2008: Fasc 552-60).

Sometimes it is stated that the provisions of Article 11 and Article 13 will only apply when there is a conflict of laws.[303] In other words, the content of the law(s) which, according to the otherwise applicable private international law rules of the *lex fori*, govern(s) the capacity of the contractant claiming to be incapable must be different from that of the *lex loci contractus*.[304] Of course, the additional application of the *lex loci contractus* only becomes relevant where there is a conflict of laws in the particular case. In a sense this applies to the whole norm complex of private international law.[305] Nevertheless, it should, in principle, be determined from the outset which legal system(s) govern(s) capacity. The proposed rule does therefore not refer to the existence of a conflict of laws.

An implied requirement in terms of Article 11 / Article 13 exists that the contractant lacking capacity in terms of the primary applicable legal system(s) according to the *lex fori*'s private international law, would have had capacity according to the *lex loci contractus*.[306] This does not feature as such in the proposed rule. Of course, the additional application of the *lex loci contractus* only becomes relevant when the otherwise incapable contractant has capacity according to the *lex loci contractus*. However, listing it as a requirement would be superfluous.

In the rule proposed, the existence of fault will, in conformity with the approaches in the Rome instruments[307] and numerous jurisdictions of the civil-law tradition,[308] play the role of an exception in that the *lex loci contractus*

303 Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); and Hill and Chong (2010: 552).

304 See Clarkson and Hill (2011: 251) with particular reference to the Giuliano-Lagarde Report (1980: *ad* Article 11) for an explanation of this requirement.

305 Somehow it became tradition to make this pertinent statement specifically in the current context and in respect of the incidental question. See for example Collins *et al* (eds) (2012a: 55-56). Also see the discussion in Chapter 5, paragraph 5.4.

306 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 552); and Plender and Wilderspin (2009: 101).

307 Article 11 of the Rome Convention (note 173) and Article 13 of the Rome I Regulation (note 108).

308 For example, Angola (Civil Code of Angola (1966: Article 28(2))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(2))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1018)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 12)); Israel (Legal Capacity and Guardianship Law (1962: § 77)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(2))); Macau (Civil Code of Macau (1999: Chapter III, Article 27(2))); Mozambique (Civil Code of Mozambique (1966: Article 28(2))); the Netherlands (Book 10 of the Dutch Civil Code (2012: Article 11(2))); Portugal (Civil Code of Portugal (1996: Article 28(2))); Quebec (Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086)); South Korea (Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1))); and Switzerland (Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1))).

will not apply where the capable contractant had knowledge of his or her counterpart's incapacity according to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, or was unaware thereof due to negligence. The generally accepted three-step model[309] is preferred as it implies the *ab initio* application of the *lex loci contractus* and is perhaps more in line with the proposed arrangement in respect of the onus of proof.[310]

Presence of fault is a necessary exception in this regard as it provides protection for both parties to the contract.[311] Where fault is present on the part of the contract assertor, the incapable party may rely on his or her incapacity in terms of the primarily applicable legal system(s) and avoid liability since no valid contract came into existence. Where fault is absent, on the other hand, the capable party (the contract assertor) will be protected in that he or she may duly insist upon the enforcement of the contract if the otherwise incapable party would have had capacity in terms of the *lex loci contractus*. The current author submits that the adoption of the *lex loci contractus*, together with the exception, constitutes a *via media* between the (abstract) interests of the incapacitated party and the capable contractant.[312]

It is suggested by the current author that the determination of negligence will have to take place in terms of the substantive law of the *lex fori* as this concept forms part of the private international law rule of the forum.[313] If the rule forms part of a regional, supranational or international instrument, substantiation of the negligence test may have to take place in an autonomous manner specifically tailored for the particular instrument.[314] This may involve taking into consideration the content of the negligence test in other member countries. In any event, whether a person was negligent will depend on all the circumstances of the case, for instance, the type of transaction and the amount involved (purchasing a book or a bicycle *versus* selling

309 See the text at notes 186-187 and 220-221.
310 See the text at notes 317-318.
311 See Van Rooyen (1972: 123).
312 See paragraph 6.4.
313 In South Africa, the criterion is the "reasonable person" test as formulated in *Jones NO v Santam Bpk* 1965 (2) SA 542 (A). See Knobel (ed) (2010: 131-133). But see Forsyth (2012: 340 note 145), suggesting the *lex domicilii* governs the content of negligence if it were to play a role. *Cf* Marques dos Santos (2000: 144) on Article 44(2) of the Civil Code of Macau, which has the forseeability of damages as a requirement for a certain legal system to be applicable. According to the author, it is unclear in terms of which legal system foreseeability must be determined. Staudinger/Hausmann (2013: 633) submit that the content of negligence as referred to in § 12 of the EGBGB should be determined by German law. But see Staudinger/Hausmann (2013: 602) arguing in favour of a European-orientated interpretation of the mentioned paragraph. *Cf* MünchKommBGB/Spellenberg (2010: 1041).
314 See Gaudemet-Tallon (2009: Fasc 552-15), Mayer and Heuzé (2010: 395-396), MünchKommBGB/Spellenberg (2010: 1917), Reithmann/Martiny/Hausmann (2010: 1915), Santa-Croce (2008: Fasc 552-60) and Vignal (2008: Fasc 545) on Article 11 / Article 13 as a substantive rule of private international law. *Cf* MünchKommBGB/Spellenberg (2010: 1041).

immovable property or 51% of the shares of a company)[315] and the characteristics of the natural or juristic person involved (an auditor or a bank *versus* an inexperienced individual).[316]

As was indicated above,[317] many legal systems automatically exclude the additional application of the *lex loci contractus* in respect of certain contracts involving immovable property and family or succession law. The effect of these provisions is similar to the scenario where the capable party is negligent in not knowing about the incapacity of the other party – in both cases the *lex loci contractus* is not a governing law.

In terms of the proposed rule, the contractant invoking his or her incapacity is the individual who would have capacity in terms of the *lex loci contractus*. It thus follows that only the incapable contractant, and not his or her counterpart, may invoke the non-applicability of the *lex loci contractus*. Of course, this limitation shall not prevent an incapable party from seeking to uphold a contract, nor shall it entitle a capable contractant from escaping contractual liability by asserting that he or she was unaware of the counterpart's incapacity. The incapable contractant shall bear the burden to prove that the capable contractant was aware of the incapacity at the moment of contracting or was unaware thereof as a result of negligence. Should the incapable contractant successfully prove knowledge on the part of the co-contractant, it will be found that he or she lacked the capacity to contract. Should this contractant be unsuccessful, he or she will be bound to the contract (if that is indeed the context of the *lex loci contractus*).

In conformity with the custom in codified jurisdictions, it is preferable that the application of *lex loci contractus* in the manner described be limited in specific circumstances. It is therefore proposed that this legal system should not apply when the incapacity in question relates to contracts involving family or succession law or to agreements concerning immovable property. This is a sensible limitation because in these types of transactions, there would

315 See Asser/Kramer/Verhagen (2015: 281-282); Asser/Vonken (2013: 126 and 129); Asser/Vonken (2012: 101-102); MünchKommBGB/Spellenberg (2010: 1057); Ten Wolde (2013: 123-124); and Vonken (2015: 5993). *Cf* Siehr (2002: 145); and Einhorn (2012: par 130). Also see Batiffol and Lagarde (1983: 491); Mayer and Heuzé (2010: par 525); Santa-Croce (2008: Fasc 552-60); and Vignal (2008: Fasc 545).

316 The onus to prove negligence is on the incapable contractant but it will be easier to prove negligence in the case of, for instance, immovable property or when the capable contractant is a bank. See Asser/Vonken (2013: 129); Asser/Vonken (2012: 101-102); MünchKommBGB/Spellenberg (2010: 1057); Reithmann/Martiny/Hausmann (2010: 1880 and 1915); Staudinger/Hausmann (2013: 27, 604 and 634); Ten Wolde (2013: 123-124); and Vonken (2015: 5993). Also see the decision of the *Bundesgerichtshof* in BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; www.unalex.eu which concerned the contractual capacity of a German company to conclude a transnational contract.

317 See the text at notes 253-274.

be the opportunity for, and therefore the duty of, a proper investigation in respect of capacity.

It is also proposed that the *lex loci contractus* should apply to capacity as an alternative legal system when contractants conclude an agreement of a recurrent nature in respect of reasonably essential items.[318] The inclusion of such a rule in respect of contractual capacity is clearly tenable as it would exclude the unrealistic and impractical onus[319] on merchants selling everyday goods from determining the personal law of a purchaser in all cases. Policy considerations would indicate more protection for such merchants than those selling expensive items such as jewellery or motor vehicles. The fault exception, in general applicable to the *lex loci contractus*, would therefore not apply in these circumstances. Indeed in Hungarian private international law, the *lex loci contractus* will apply irrespective of fault when the contract concerns essential items.[320]

6.2.6 The *lex causae* / the proper law of the contract

As a contract does not come into existence without the necessary capacity,[321] reference in this context should always be made to the putative proper law of the contract, that is: the legal system that would have been the proper law if the contractants indeed had contractual capacity. Authority for the proper law as an applicable legal system in the context of contractual capacity may be found with many authors, as well as in decisions and codifications.

The Italian author Ubertazzi expresses support for the application of the proper law to contractual capacity in general.[322] She states that the application of the proper law would allow various aspects of a contract to be governed by the same law and that it overcomes the traditional dichotomy between nationality and domicile states and therefore the differences between civil-law and common-law systems. As such, it would promote international harmony and legal certainty.[323] If all the aspects of a contract are governed by the same law, the burden of the contractants to inform themselves on the different laws applicable to the various elements of the agreement would be alleviated. The application of the proper law broadens the scope of the law that governs most aspects in respect of contracts (that

318 See Schwenzer, Hachem and Kee (2012: 206-207) on "the necessities of life". *Cf* Asser/Vonken (2013: 126 and 129).
319 See Mádl and Vékás (1998: 132-135).
320 However, in Hungarian law the contract must have been concluded in the forum state. See the Hungarian Private International Law Code (1979: Chapter II, § 15[2]).
321 *Cf* Symeonides (2014: 130-131) on the so-called "bootstrapping problem".
322 Ubertazzi (2008: 729-734).
323 In this regard, see Ubertazzi (2008: 734) where she asserts that subjecting capacity to the proper law in the case of choice of jurisdiction agreements also assists to ensure the predictability of the competent court.

is the proper law) and reduces the scope of the exceptions (as would be the case if contractual capacity were not governed by the proper law).[324]

Critique is, nevertheless, levelled against both the subjectively and objectively determined proper law. The most prominent critique against the subjectively determined proper law (the proper law indicated by a choice of law of the parties, either expressly or tacitly) is that it would allow parties to confer capacity upon themselves by simply selecting a governing law under which they would have capacity.[325] Hill and Chong[326] assert that, if this were allowed, the protective effect of the individual's personal law would be eliminated.[327] According to Crawford and Carruthers[328] and Fawcett and Carruthers,[329] it is unacceptable for parties to choose a legal system in this context because it may be unrelated to the parties or the contract.

Oppong views the subjective proper law as less important in comparison to the objectively determined proper law. He submits that, while courts should take cognisance of a choice of law clause within a contract in this regard, it should not be given priority (over the objective proper law) or be allowed exclusive application to issues of contractual capacity. Granting the subjective proper law priority would enable contractants to evade limitations imposed on them by national laws.[330] The author also submits that "[t]he policy reasons that inform national laws on legal competence should not be sacrificed in favour of party autonomy".[331]

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324 In support of the proper law, Ubertazzi also submits that, where the private international law rule applies the proper law to maximise the protection of the more vulnerable contractant, the corresponding rules on contractual capacity in international commerce also subject the contractant's capacity to the law that provides the weaker party the most protection. This argument is, however, not convincing because it would depend on the content of all relevant legal systems which system provides the most protection to the contractant asserting incapacity. See paragraph 6.4 in this regard.

325 Carter (1987: 24); Clarkson and Hill (2011: 250); Collier (2001: 210); Collins *et al* (eds) (2012b: 1869); Crawford and Carruthers (2006: 437); Diwan and Diwan (1998: 524); Fawcett and Carruthers (2008: 751); Hill and Chong (2010: 551); McClean and Beevers (2009: 386); and Schoeman, Roodt and Wethmar-Lemmer (2014: par 107). The current author agrees with Kahn (1991: 128) who (with reference to a remark by Innes CJ in *Hulscher v Voorschotkas voor Zuid Africa* 1908 (TS) 542 at 546) submits that the application of the subjective proper law leads to the incorrect assumption that the contractants are capable of exercising a choice of law. Also see the view of Bristowe J in *Ferraz v d'Inhaca* 1904 TH 137 at 143.

326 Hill and Chong (2010: 551).

327 See Van Rooyen (1972: 126). Also see paragraph 6.4.

328 Crawford and Carruthers (2006: 437).

329 Fawcett and Carruthers (2008: 751).

330 Oppong (2012: par 94); and Oppong (2013: 144). Also see the American Law Institute (1971: 565).

331 Oppong (2013: 144).

However, some support does exist for the application of the subjectively determined proper law to capacity. The Australian Law Reform Commission[332] and Sykes and Pryles[333] submit that there should be no difference in this context between capacity and essential validity: contractants are indeed allowed to intentionally select the law of a country that upholds the validity of the contract. Where the law of a connected country is selected, there is no reason why the provision should be effective for essential validity but denied such effectivity with regard to capacity. The problems in respect of the scope of party autonomy in respect of essential validity and capacity are similar. Therefore, the same rule should be applied to both issues.[334] Sychold argues that, in Australian private international law, there is no authority for the assertion that "the proper law" refers only to this legal system objectively ascertained.[335] Young J in *Homestake Gold of Australia v Peninsula Pty Ltd*[336] (authority for the application of the proper law) did not decide on the matter, nor was it dealt with in the Canadian decision of *Charron v Montreal Trust Co*,[337] the prime basis for the judge's decision. Young J only indirectly touched on the issue by referring to a passage from Cheshire and North.[338] Sychold believes that the prominent Australian authorities[339] would prefer the application of both the subjectively and objectively determined proper law to contractual capacity.[340]

A choice of law (the subjective proper law) may be taken into consideration, Collier suggests, as long as it was not chosen to confer capacity which would not have existed otherwise.[341] Although the author's statement seems to suggest a limited freedom of choice in respect of capacity, in effect it only allows a choice of the *prima facie* applicable legal system(s) (for instance, the law of domicile) or the objective proper law of the contract. These are the systems that would have applied in the absence of a choice of law in this regard.

Pitel and Rafferty prefer an approach whereby the putative proper law, including any express choice of law (the subjective proper law), is applied to capacity. Of course, the choice of law should be made "*bona fide*, legal and in accordance with public policy".[342] The authors believe that such an

332 The Australian Law Reform Commission (1992: 101).
333 Sykes and Pryles (1991: 614).
334 The Australian Law Reform Commission (1992: 101); and Sykes and Pryles (1991: 614).
335 Sychold (2007: par 185).
336 *Homestake Gold of Australia v Peninsula Pty Ltd* (1996) 20 ACSR 67.
337 (1958) 15 DLR (2d) 240 (Ontario).
338 North and Fawcett (1992: 511).
339 Sykes and Pryles (1991: 614).
340 Sychold (2007: par 185).
341 Collier (2001: 210).
342 Pitel and Rafferty (2010: 281).

approach would be more adaptable to the various circumstances.[343] According to Ubertazzi, one of the advantages of applying the subjective proper law is that it provides maximum space for individual autonomy, as a contractant would be able to choose a legal system to govern contractual capacity.[344] Also, Stone argues that incapacitating rules are a "tiresome nuisance";[345] it should be possible to avoid such by the choice of a validating law. This would facilitate international trade.[346] According to Briggs, the proper law should include a choice of law by the contractants as the chosen law may just as well invalidate a contract or could even have a higher degree of majority.[347] A chosen law could, however, be excluded on the basis of public policy.[348]

According to the American Law Institute, application of the subjective proper law promotes the protection of the justified expectations of contractants and the possibility of accurately predicting contractual rights and duties;[349] it therefore secures certainty and predictability. Although the subjective proper law would enable contractants to evade prohibitions that exist in the state that would otherwise be the proper law of the contract, the demands of certainty, predictability and convenience enjoy priority.[350] Parties should therefore have the power to choose the applicable law.

As stated above, the objectively ascertained proper law as the applicable law in this context, is also not free from criticism. Anton and Beaumont are of the opinion that the exclusive application of the objective proper law will lead to uncertainty in respect of ordinary business contracts.[351] Fawcett, Harris and Bridge maintain that determining the objective proper law may lead to excessive uncertainty because "the common law rules on the objective proper law will have to be used, rather than those found under Article 4 of the Rome Convention,[352] for determining the applicable law in the absence of choice".[353] However, the present author submits that the provisions of the Rome Convention[354] / Rome I Regulation[355] should be utilised in determining the proper law applicable to contractual capacity.[356] The authors seem to confuse the exclusion of capacity under the Rome Convention[357] / Rome I

343 *ibid*.
344 Ubertazzi (2008: 730).
345 Stone (2010: 329).
346 *ibid*.
347 Briggs (2014: 949).
348 Briggs (2014: 583, 615-616 and 949).
349 The American Law Institute (1971: 565). Also see Stone (2010: 329).
350 See the American Law Institute (1971: 565).
351 Anton and Beaumont (1990: 278).
352 note 173. This would also apply in respect of Article 4 of the Rome I Regulation (note 108).
353 Fawcett, Harris and Bridge (2005: 658).
354 note 173.
355 note 108.
356 Also see Briggs (2014: 595; *cf* 948).
357 note 173.

Regulation[358] with the non-applicability thereof in determining the proper law for the purposes of capacity. There seems to be no reason in logic or authority for the discontinued common-law rules on the determination of the proper law of contract to suddenly be revived to determine the proper law test for capacity.

Forsyth submits that determining the objective proper law is an unpredictable task and that certainty is a principal feature in commercial contracts. The outcome in a particular case would not be more predictable, he continues, even if it is accepted[359] that the objective proper law and the *lex domicilii* apply to capacity.[360] The present author submits that the uncertainty argument depends on the jurisdiction in question. In a European context it would not be convincing, as the Rome I Regulation[361] provides a high degree of certainty in the determination of the proper law. In a South African context, where the determination of the proper law is less certain, it may be of some persuasive value. However, steps should be taken to remedy the uncertainty in South African law in this regard.[362] Sonnekus views the exclusive application of the objective proper law to capacity as a rigid approach and unsatisfactory; it would clearly yield unfair results.[363]

However, the majority of authors support the objectively ascertained proper law of contract to govern contractual capacity. The most prominent argument in its favour is that the objective proper law of the contract is the system of law with which the contract is most closely connected, rather than any one of the respective parties.[364] Application of the objective proper law, as Fawcett, Harris and Bridge put it, ensures a strong connection between capacity and the contract itself.[365] Oppong views this legal system as the most appropriate because a governing law is determined by taking all connecting factors into consideration.[366] According to Diwan and Diwan, the application of the objectively ascertained proper law is correct in principle and would be in accordance with justice and convenience.[367] O'Brien submits that, although this legal system does not ensure the protection of the weaker contractant as a reference to his or her personal law might,[368] it is

358 note 108. Article 1(2)(a) of the Rome Convention (note 173); and Article 1(2)(a) of the Rome I Regulation.
359 Reference is here made to the exceptions proposed by Van Rooyen (1972: 126).
360 Forsyth (2012: 340). Also see Schoeman, Roodt and Wethmar-Lemmer (2014: par 107).
361 note 108.
362 See Chapter 2, paragraph 2.2.5.
363 Sonnekus (2002: 147).
364 Clarkson and Hill (2011: 250); Collier (2001: 210); Collins *et al* (eds) (2012b: 1869); and Fawcett and Carruthers (2008: 751).
365 Fawcett, Harris and Bridge (2005: 658).
366 Oppong (2012: par 94); and Oppong (2013: 145).
367 Diwan and Diwan (1998: 524).
368 See paragraph 6.4.

nevertheless preferred as it "avoids both accident and machination".[369] According to Oppong and the American Law Institute, application of the objective proper law promotes the protection of the justified expectations of contractants.[370]

A number of authors support the application of the objective proper law without offering any further explanations.[371] It may also be mentioned that this legal system has been applied by the courts in Australia,[372] Canada,[373] England[374] and South Africa.[375]

The objective proper law features in Dicey, Morris and Collins' alternative reference rule, together with the *lex domicilii* and the law of habitual residence.[376] Many authors support precisely this approach to determining capacity.[377] The Australian Law Reform Commission[378] and Sychold[379] favour the application of the proper law (subjectively or objectively determined) together with the law of habitual residence, while Crawford and Carruthers argue for the application of the objective proper law alongside the *lex domicilii*.[380] The objective proper law also features in Kahn's approach, as supported by Sonnekus. According to this approach, a contractant shall have contractual capacity if he or she is capable in terms of the *lex domicilii*, the *lex loci contractus*, the objective proper law and, where the relevant contract involves immovable property, the *lex situs*.[381] Also, the objective proper law

369 O'Brien (1999: 319) here probably refers to the *lex domicilii*. Also see Mortensen (2006: 403-404); and Pitel and Rafferty (2010: 281).

370 Oppong (2012: par 94); Oppong (2013: 145); and the American Law Institute (1971: 577).

371 Carter (1987: 23-24); Davies, Bell and Brereton (2010: 406-407); McClean and Beevers (2009: 386-387); Tilbury, Davis and Opeskin (2002: 768 and 771); and Walker (2005/2014: 31.5b). See Agbede (2004: par 74), who favours the proper law to govern capacity in a Nigerian context, but it is assumed that he is in fact referring to the objectively ascertained proper law. Also see Angelo (2012: par 75) who believes that the objectively determined proper law may possibly govern capacity in New Zealand private international law.

372 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*).

373 *Charron v Montreal Trust Co* (*supra*).

374 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680.

375 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W). *Cf Powell v Powell* 1953 (4) SA 380 (W); and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).

376 Rule 228 in Collins *et al* (eds) (2012b: 1865).

377 Clarkson and Hill (2011: 250); Hickling and Wu (1995: 171); Hill and Chong (2010: 550); McClean and Beevers (2009: 388); and Tan (1993: 472). Some authors view the approach as commendable: Angelo (2012: par 75); Carter (1987: 24); Collier (2001: 210); Fawcett, Harris and Bridge (2005: 658); and Sykes and Pryles (1991: 614). Also see the critique against this approach by Fawcett, Harris and Bridge (2005: 258).

378 The Australian Law Reform Commission (1992: 101).

379 Sychold (2007: par 185).

380 Crawford and Carruthers (2006: 437).

381 Kahn (1991: 128); Kahn (2000: 876); and Sonnekus (2002: 147-148). Also see Edwards and Kahn (2003: par 333), Forsyth (2012: 341) and Schoeman, Roodt and Wethmar-Lemmer (2014: par 115) who mention this approach but do not express clear support for it.

applies alongside the law of domicile according to Van Rooyen's alternative reference rule.[382]

The proper law plays a significant role in the private international law of a number of codified jurisdictions. In terms of the Belgian private international law, the proper law applies as the primarily applicable legal system.[383] In Oregon, capacity is governed by the law of habitual residence and the proper law of the contract.[384] According to the Civil Code of Louisiana,[385] the Puerto Rican *Projet*[386] and the Venezuelan private international law code,[387] capacity is governed by both the *lex domicilii* and the proper law of the contract.

From the discussion above, it follows that the putative proper law of the contract should feature as one of the legal systems to govern capacity. The advantages of the putative proper law may be summarised as follows. The putative proper law allows various aspects of a contract to be governed by the same law. The contractants' burden of obtaining knowledge of the legal systems governing the various elements of the contract would thus be reduced. Application of the proper law would promote international harmony of decision, in that it would overcome the traditional dichotomy between nationality and domicile states and, as such, the difference between civil-law and common-law systems. Applying this legal system broadens the scope of the law that governs most aspects of contracts and reduces the possibility of exceptions.

The putative proper law should be objectively ascertained. This is the system of law with which the contract is most closely connected; it ensures a strong connection between capacity and the contract itself, rather than one of the parties. In finding this legal system, all connecting factors are taken into consideration, thereby promoting fairness, certainty and convenience. The results yielded through its application are generally consistent with the expectations of the parties. Courts in Australia,[388] Canada,[389] England[390] and South Africa[391] have also applied this legal system to capacity.

382 Van Rooyen (1972: 126).
383 Belgian Private International Law Code (2004: Chapter II, Article 34 § 2).
384 Oregon's Conflict Law Applicable to Contracts (2001: Section 5).
385 Civil Code of Louisiana (1991: Article 3539).
386 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
387 Venezuelan Act on Private International Law (1998: Article 16).
388 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*).
389 *Charron v Montreal Trust Co* (*supra*).
390 *The Bodley Head Ltd v Flegon* (*supra*).
391 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*). *Cf Powell v Powell* (*supra*); and *Guggenheim v Rosenbaum (2)* (*supra*).

The subjectively ascertained proper law of the contract should clearly not be taken into consideration as contractants should not be allowed to confer capacity upon themselves by simply selecting a governing law under which they would be capable. Such an extensive space for party autonomy should be discouraged as this may eliminate the (abstract) protective effect of the personal law.[392] Parties should not be able to evade the limitations imposed by the personal law by a mere choice of law.

Although the putative objective proper law should not exclusively govern capacity, it should apply as a primarily applicable legal system. It should, however, not apply where the capable contractant, the contract assertor, was aware or should have been aware of the incapacity in terms of the law of domicile or habitual residence at the time of contracting. Application of the proper law provides a mechanism of protection to the *bona fide* and non-negligent contract assertor who is confronted by his or her counterpart's incapacity. The latter contractant is again protected by the proposed exception in that the counterpart's incapacity may only be invoked under limited circumstances. Of course, the protection of a party in a particular case in effect depends on the content of the various legal systems.[393]

According to the proposed rule, there are no requirements that have to be complied with for the application of the putative objective proper law. Applying this legal system in any event comes down to the application of the law most closely connected to the contract and the parties. The existence of fault on the part of the capable contractant, however, will result in the non-application of this legal system. The existence of fault, in this context, therefore plays the role of an exception to the application of the putative proper law (the three-step model). The present author submits that the adoption of the putative objective proper law, together with the exception, constitutes a *via media* between the abstract interests of the incapacitated party and the capable contractant.[394] Examples of similar exclusions of the proper law in the manner described may be found in the contract conflicts code of Oregon[395] and in the Puerto Rican *Projet*.[396] Van Rooyen's approach follows the same methodology.[397] In all three cases, the proper law is one of the primarily applicable legal systems. In Oregon, it applies alongside the law

392 See paragraph 6.4.
393 *ibid*.
394 This perspective on the matter is discussed in more detail in paragraph 6.4.
395 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1) and (2)).
396 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
397 Van Rooyen (1972: 126).

of habitual residence,[398] while according to the *Projet*[399] and Van Rooyen,[400] the *lex domicilii* serves as the other primary applicable legal system. In all the examples, the proper law of the contract shall not apply if the capable contractant knew or should have known of his or her counterpart's incapacity at the time of contracting. When this situation arises, the law of habitual residence (Oregon) or the *lex domicilii* (the *Projet* and Van Rooyen) shall govern capacity. The effect of the proposed rule is that, where fault is present on the part of the capable contractant, the incapable party may rely on his or her incapacity and avoid liability; no valid contract came into existence. Where fault is absent, the contract assertor will be protected in that he may duly insist upon the enforcement of the contract.

Only the incapable contractant and not the counterpart should be able to invoke the non-applicability of the putative objective proper law as the non-applicability of this legal system in the circumstances mentioned is intended to protect the incapable contractant. As was suggested in respect of the *lex loci contractus*, this arrangement should not prevent an incapable party from seeking to uphold a contract, nor shall it entitle a capable contractant from escaping contractual liability by asserting that he or she was unaware of the counterpart's incapacity.

In terms of the proposed rule, the incapable contractant bears the burden of proving that the capable contractant (contract assertor) was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence. Obviously, if knowledge or negligence is proven, the incapable contractant will avoid liability; if not, he or she will be bound to the contract.

Similar to what was argued in respect of the *lex loci contractus*, it is proposed that the putative objective proper law should not apply when the incapacity in question involves contracts relating to family or succession law, or to agreements concerning immovable property. The line of argumentation here is that there would in these circumstances be opportunity for, and therefore the duty of, a proper investigation in respect of capacity.[401]

398 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1)).

399 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 36).

400 Van Rooyen (1972: 126).

401 See the text at note 253-274. However, in many cases the *lex situs* will also be the proper law of the contract. See Article 4(1)(c) of the Rome I Regulation (note 108); and Forsyth (2012: 370).

6.2.7 The *lex rei sitae* / the *lex situs* / the law of the country where the immovable property is situated

The *lex rei sitae* or *lex situs* is most commonly associated with governing capacity in respect of immovable property. Common-law authors such as Johannes Voet,[402] Huber[403] and Van der Keessel[404] indeed applied this legal system to capacity in respect of contracts involving immovables. This is also the approach among many contemporary authors such as Agbede,[405] Agrawal and Singh,[406] Anton and Beaumont,[407] Briggs,[408] Clarence Smith,[409] Clarkson and Hill,[410] Collier,[411] Davies, Bell and Brereton,[412] Dicey, Morris and Collins,[413] Diwan and Diwan,[414] Forsyth,[415] Hahlo and Kahn,[416] Kahn,[417] Mortensen,[418] O'Brien,[419] Pitel and Rafferty,[420] Schoeman, Roodt and Wethmar-Lemmer,[421] Van Rooyen[422] and Walker.[423] There are also Australian,[424] English,[425] Indian[426] and South African[427] decisions where it was held that the *lex situs* should govern capacity in respect of immovable property.

The *lex situs* also plays a role in respect of capacity in a number of codified jurisdictions where the relevant contract involves immovable property. For example, the *lex rei sitae* governs capacity relating to immovables situated in the forum state in Argentina[428] and Iran,[429] while in Thailand it applies to immovable property situated in the forum state or abroad.[430] In Macau,

402 J Voet (1829: *Commentarius* 4.4.8).
403 Huber (1768: *HR* 1.3.45) but see Huber (1768: *HR* 1.3.40).
404 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).
405 Agbede (2004: par 75).
406 Agrawal and Singh (2010: par 201).
407 Anton and Beaumont (1990: 604); and Beaumont and McEleavy (2011: 940-942).
408 Briggs (2014: 583).
409 Clarence Smith (1952: 471).
410 Clarkson and Hill (2011: 474).
411 Collier (2001: 267).
412 Davies, Bell and Brereton (2010: 669).
413 Collins *et al* (eds) (2012b: 1332).
414 Diwan and Diwan (1998: 407).
415 Forsyth (2012: 338).
416 Hahlo and Kahn (1975: 624-625).
417 Kahn (1991: 128). Also see Edwards and Kahn (2003: par 333).
418 Mortensen (2006: 460).
419 O'Brien (1999: 551).
420 Pitel and Rafferty (2010: 326).
421 Schoeman, Roodt and Wethmar-Lemmer (2014: par 114).
422 Van Rooyen (1972: 126).
423 Walker (2011: 618); Walker (2005: § 31.4d); and see Walker (2006: 517).
424 *Gregg v Perpetual Trustee Company* (1918) 18 SR (NSW) 252.
425 *Bank of Africa, Limited v Cohen* [1909] 2 Ch 129.
426 *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.
427 *Ferraz v d'Inhaca* 1904 TH 137.
428 Civil Code of Argentina (1869–1987–1997: Article 10).
429 Civil Code of Iran (1935: Article 8).
430 Act on Conflict of Laws (1938: Section 10).

capacity in respect of immovable property is governed by the *lex situs* if that law so stipulates; otherwise, the law of habitual residence shall apply.[431]

In some codified jurisdictions, the application of the *lex rei sitae* is merely implied. In Angola,[432] Mozambique,[433] Portugal,[434] Spain[435] and Taiwan,[436] the *lex loci contractus* is applied to capacity, in addition to the personal law, in circumstances where, *inter alia*, the relevant contract was concluded in the forum state. The *lex loci contractus* would not apply, however, where the relevant contract involves immovable property situated abroad. Therefore, the personal law and (if the relevant requirements are met) the *lex loci contractus* shall apply to capacity where the immovable property is situated in the forum state. As the *lex loci contractus* would also be the *lex fori / lex situs*, contractual capacity in respect of immovable property situated in the forum state is governed by the personal law and the *lex loci contractus / lex fori / lex situs*. If the requirements for the application of the *lex loci contractus* are not met, only the personal law applies.

In many jurisdictions, the *lex situs* plays no role at all. In Bulgaria,[437] Greece,[438] Israel,[439] Romania[440] and Switzerland,[441] the personal law governs the capacity to conclude a contract involving immovable property. This is the case as the legal system that applies in addition to the personal law shall not apply when the relevant contract involves immovables. In Bulgaria,[442] Israel,[443] Romania[444] and Switzerland,[445] the extra legal system is the *lex loci contractus* but in Greek private international law the *lex fori* plays this role.[446]

In Burkina Faso,[447] Italy[448] and South Korea,[449] the *lex loci contractus* applies in conjunction with the personal law where, *inter alia*, the relevant contract was concluded between parties who were in the same country at the moment

431 Civil Code of Macau (1999: Chapter III, Article 46).
432 Civil Code of Angola (1966: Articles 25, 31(1), 28(1) and 28(2)).
433 Civil Code of Mozambique (1966: Articles 25, 31(1), 28(1) and 28(2)).
434 Civil Code of Portugal (1996: Articles 25, 31(1), 28(1) and 28(2)).
435 Spanish Civil Code (1889–1981: Article 9.1 and 10.8).
436 Private International Law Act (2010: Chapter 2, § 10).
437 Bulgarian Private International Law Code (2005: Article 50(3)).
438 Greek Civil Code (1940: Article 9).
439 Legal Capacity and Guardianship Law (1962).
440 Romanian Private International Law Code (1992: Chapter II, Article 17).
441 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(2)).
442 Bulgarian Private International Law Code (2005: Article 50(2)).
443 Legal Capacity and Guardianship Law (1962). See discussion by Einhorn (2012: pars 128-129).
444 Romanian Private International Law Code (1992: Chapter II, Article 17).
445 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)).
446 Greek Civil Code (1940: Article 9).
447 Code on the Law of Persons and the Family (1989: Chapter II, Articles 1017 and 1018).
448 Italian Statute on Private International Law (1995: Chapter II, Article 23(1), (2) and (4)).
449 Conflicts of Laws Act of the Republic of Korea (2001: Articles 13(1), (2), 15(1) and (2)).

of contracting. This legal system is excluded where the relevant contract involves immovables situated outside of the *locus contractus*. Consequently, if the contract concerns immovable property within the *locus contractus* and the requirements for the application of the *lex loci contractus* are met, the personal law and the *lex loci contractus* will apply. If these requirements are not met, only the personal law applies. Also, if the contract deals with immovables outside of the *locus contractus*, the personal law will apply.

In Turkey,[450] the *lex loci contractus* and the personal law apply on an equal level. The *lex loci contractus* shall not apply where the relevant contract concerns immovable property abroad. The personal law and the *lex loci contractus* shall therefore apply where the contract involves immovables within Turkey. Where the immovable property is situated abroad, the personal law applies.

In Estonian[451] private international law, the *lex loci contractus* applies in addition to the personal law only where there is no fault on the part of the capable contractant. The *lex loci contractus* will not apply where the contract relates to immovable property situated abroad. Contractual capacity in respect of immovable property in Estonia will therefore be governed by the personal law and the *lex loci contractus*, if no fault was present on the part of the contract assertor. If such fault was present, only the personal law applies. The personal law will also govern exclusively in respect of immovable property situated abroad.

A unique rule exists in Japanese private international law: the *lex patriae* and the *lex loci contractus* apply to capacity involving immovable property, except when this property is situated in a country where the law is dissimilar to that of the *lex loci contractus*. In that case, only the *lex patriae* will apply.[452]

The *lex situs* plays a prominent role under the Restatement (Second). The capacity of parties to conclude contracts involving immovable property is in principle governed by § 198 of the Restatement (Second).[453] This rule is applied in conjunction with § 189 which states that the validity of a contract to transfer interests in immovables shall, in the absence of a choice of law by the parties, be governed by the *lex situs*.[454] Therefore, § 198 ((1) and (2)) should be read with § 187 in as far as immovable property is concerned. Where the contractants elected the law applicable to their contract, as envis-

450 Private International Law Code of Turkey (2007: Chapter 2, Article 9(1), (2) and (3)).
451 Estonian Private International Law Act (2002: § 12(1), (3) and (4)).
452 Act on the General Rules of Application of Laws (2006: Article 4(3)).
453 See the American Law Institute (1971: 634) for commentary on this paragraph.
454 See McDougal, Felix and Whitten (2001: 579). "Validity" has a broader scope – see the American Law Institute (1971: 587).

aged in § 187,[455] this legal system will govern. However, where they have not done so, the *lex situs* shall apply and not the objectively determined proper law. The latter legal system may nevertheless be applicable where, for example, the contract would be invalid according to the *lex situs* but valid in terms of the objectively determined proper law.[456] The proper law shall not apply, however, where the value of protecting the parties' expectations is outweighed by the interest of the *situs* state in applying its invalidating rule. Also, if a state other than that indicated by the objectively determined proper law or the *lex situs* has a substantial interest in having its law applied, then the law of this state shall govern.[457]

The application of the *lex situs* has been subject to considerable criticism. Authors such as Clarkson and Hill[458] and O'Brien,[459] with reference to capacity to conclude contracts involving *foreign* immovable property, submit that there is no justification for applying a different rule for capacity to conclude a contract relating to immovables than that applied in respect of any other contract. Consequently, the objective proper law should determine capacity in respect of (foreign) immovable property instead of the *lex situs*.[460] Sykes and Pryles hold the view that the proper law of the contract (subjectively or objectively determined) should govern capacity in this regard.[461] According to Pitel and Rafferty, the capacity to conclude a contract involving foreign immovable property should be governed by the proper law of the contract rather than the *lex situs*, since the latter legal system is not always the proper law of the contract in respect of immovables.[462]

The current author submits that the positive aspects of the application of the *lex situs* outweigh the critique that it is sometimes subjected to. As the property is immovable, the state where the property is situated has a natural interest in contracts concerning such property.[463] Also, because immovable property is the subject matter of the contract, the parties would reasonably expect the *lex situs* to govern several issues arising from the contract. Application of the *lex rei sitae* promotes the choice-of-law values of certainty, predictability, uniformity of decision and simplicity in determining the applicable law.[464]

455 The American Law Institute (1971: 561).
456 The American Law Institute (1971: 588).
457 *ibid.*
458 Clarkson and Hill (2011: 474-476).
459 O'Brien (1999: 551-553).
460 with particular reference to *Bank of Africa, Limited v Cohen* (*supra*: 135 and 143). *Cf* Cheng (1916: 75, 78-79 and 81).
461 Sykes and Pryles (1991: 618), with particular reference to *Bank of Africa, Limited v Cohen* (*supra*: 135 and 143).
462 Pitel and Rafferty (2010: 327).
463 The American Law Institute (1971: 588). Also see Cheng (1916: 78) and Hill (2014: 143).
464 *ibid.*

The *lex situs* is therefore retained in the proposal below as an applicable legal system to govern capacity in contracts involving immovables.

The *lex situs* should not be applied exclusively, as this may be impractical. This may be illustrated in the situation where a capable Scottish domiciliary of 16 years of age[465] enters into a contract of sale in respect of immovable property situated in South Africa. In terms of South African law, he would lack capacity as he is not yet 18 years of age.[466] If one is obliged to apply the *lex rei sitae*, the law of South Africa, in respect of this scenario, the contract would be invalid merely because of a lack of capacity in that country. There is, however, no reason why the *lex domicilii*[467] (and the law of habitual residence) should not also be taken into consideration in this regard. The present author therefore submits that the *lex rei sitae* should not apply to capacity in respect of immovable property exclusively but should be included in the alternative reference rule as proposed below.

6.2.8 The *lex fori* / the law of the forum

The *lex fori* features as the sole primarily applicable legal system in the Philippines,[468] while in Greece, it governs capacity on an equal level with the *lex patriae*.[469] The *lex fori* also plays a role in Dutch private international law. Whether partner A under a registered partnership requires the consent of partner B for concluding a contract, and what the consequences are if consent of B was not acquired, are governed by Dutch law (the *lex fori*) if partner B was habitually resident in the Netherlands at the time of the conclusion of the contract.[470]

465 See http://en.wikipedia.org/wiki/age_of_majority.
466 Section 17 of the Children's Act 38 of 2005, which entered into force on 1 July 2007.
467 See Cheng (1916: 81 and 82). The author in fact states (1916: 128): "Capacity to make contracts relating to immovables is, according to popular opinion, to be determined by the *lex situs*; but on the examination of the authorities, it may, and, in principle, it should, be governed by the *lex domicilii* without any exception."
468 Civil Code of the Philippines (1949: Article 15).
469 Greek Civil Code (1940: Articles 7 and 9).
470 Book 10 of the Dutch Civil Code (2012: Article 68).

In Algeria,[471] Angola,[472] Belarus,[473] Egypt,[474] France,[475] Iran,[476] Israel,[477] Macau,[478] Mongolia,[479] Mozambique,[480] Portugal,[481] Qatar,[482] Slovakia,[483] Spain,[484] Syria,[485] Taiwan,[486] Thailand,[487] the United Arab Emirates[488] and Vietnam,[489] the *lex loci contractus* is applied to capacity when the contract in question is concluded in the forum state. Applying the *lex loci contractus* in this context comes down to the application of the *lex fori*. Something similar applies in Hungary both in respect of contracts relating to essentials and non-essential goods.[490] Where a transaction is concluded in Hungary and relates to essential goods (the necessities of everyday life), the *lex fori / lex loci contractus* governs contractual capacity.[491] Where a transaction relates to non-essentials and the performances in terms of the agreement are effected in Hungary, the *lex fori / lex loci solutionis* shall govern.[492]

Application of the *lex fori* may be fortuitous, lacking any necessary connection with the contractants[493] or the substance of the contract. It is therefore not supported by any of the common-law authors on the subject and there is no case law from the common-law world that suggests its application. Indeed, the application of the *lex fori* may be the result of a narrow focus on national law and a parochial approach to private international law. The *lex fori* will therefore not feature as an applicable legal system to govern capacity in the proposals to be made below.

471 Civil Code of Algeria (1975: Chapter II, Article 10).
472 Civil Code of Angola (1966: Article 28(1)).
473 Civil Code of the Republic of Belarus (1999: Chapter II, Article 34).
474 Civil Code of Egypt (1948: Article 11).
475 French Civil Code (1804–2004: Article 3).
476 Civil Code of Iran (1935: Article 962).
477 Legal Capacity and Guardianship Law (1962: § 77). See Einhorn (2012: par 128).
478 Civil Code of Macau (1999: Chapter III, Article 27(1)).
479 Civil Code of Mongolia (2002: Article 543(5)).
480 Civil Code of Mozambique (1966: Article 28(1)).
481 Civil Code of Portugal (1996: Article 28(1)).
482 Civil Code of Qatar (2004: Article 11).
483 Private International Law and International Procedural Law Act, § 3(2).
484 Spanish Civil Code (1889–1981: Article 10.8).
485 Civil Code of Syria (1949: Article 12(1)).
486 Private International Law Act (2010: Chapter 2, § 10).
487 Act on Conflict of Laws (1938: Section 10).
488 Civil Code of the United Arab Emirates (1985: Article 11).
489 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)).
490 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).
491 Hungarian Private International Law Code (1979: Chapter II, § 15[2]). Also see Mádl and Vékás (1998: 132-135).
492 Hungarian Private International Law Code (1979: Chapter II, § 15[3]).
493 However, also see paragraph 6.4.

6.3 Consequences of incapacity

According to Batiffol and Lagarde, the law applicable to the consequences of contractual incapacity in French law, for example, the invalidity of a contract, must be governed by the *lex patriae*.[494] The position in German private international law, however, remains unclear. There is authority for the application of the *lex patriae*[495] and the putative proper law of the contract[496] in this regard. Reithmann believes that the *in favorem negotii* principle applies in this context as well. If, for instance, a contract is void in terms of the *lex patriae*[497] but voidable according to the *lex loci contractus*, the contract must be deemed to be voidable.[498] According to the Puerto Rican *Projet*,[499] where an individual lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the latter governs the consequences of incapacity. However, where an individual is able to rely on his or her incapacity in terms of the *lex domicilii* (due to the fault of the capable party), the consequences of this incapacity shall be governed by the *lex domicilii* of the incapable contractant.[500] In Oregon,[501] if the capable party can rely on the law of residence, due to the counterpart's fault, the consequences of the incapacity are governed by the law of residence. No specific rule is provided for other cases.

Most legal systems do not specifically identify a legal system to govern the consequences of incapacity.[502] The idea is probably that the legal system governing capacity in general would also apply in this context. However, capac-

494 Batiffol and Lagarde (1983: par 490).

495 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu; Kegel and Schurig (2000: 492); Kropholler (2006: 318); Staudinger/Hausmann (2013: 43-45). *Contra* MünchKommBGB/Birk (2010: 1565-1566).

496 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755. But see BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; www.openjur.de/u/344496.html. For the Netherlands, see Asser/Kramer/Verhagen (2015: 601-602); and Asser/Vonken (2013: 123).

497 as the primarily applicable legal system in German private international law – see Chapter 4, paragraph 4.2.8.

498 Reithmann/Martiny/Hausmann (2010: 1918). It may be deduced that the contract would also be deemed voidable where it is void in terms of the *lex loci contractus* but merely voidable according to the *lex patriae*. It follows that the contract would be deemed as void or voidable where it is such in terms of both legal systems.

499 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).

500 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 39).

501 Oregon's Conflict Laws Applicable to Contracts (2001: Section 5(2)).

502 *Cf* Article 5(a) of the 1986 Hague Convention which excludes "the consequences of nullity or invalidity of the contract resulting from the incapacity of a party". The distinction made by Huber and Van der Keessel between status and the consequences of status (including the applicability of rules relating to capacity which are linked to that status) (see Chapter 2, paragraph 2.3) is not relevant here. That distinction is employed to determine the validity of the contract. In the current paragraph, the search is for the legal system to govern the consequences of the contract being invalid (for instance, restitution).

ity may be governed by two or more systems. If an individual is incapable in terms of two or more of the relevant legal systems, the question must be answered as to which one of these would determine the consequences of the incapacity, for instance whether the parties must effect restitution of performances made in terms of the void or voidable contract.[503]

The personal law of the incapable contractant is closely connected to the relevant party. It will depend on the specific system which of the personal laws should be seen as the primary system in this context (often the *lex domicilii* in common-law countries and the *lex patriae* in civil-law jurisdictions). The putative objective proper law of the contract, again, is closely connected to the would-be contract and the situation as a whole; on the other hand, no contract in actual fact came into existence. A possible *via media* in this regard would be the proposal in the Puerto Rico *Projet*.

However, restitution, as probably the most important consequence of incapacity, is seen either as a contractual matter or an issue of enrichment in the context of contracts (whether valid, void or voidable) and both are governed by the (putative) proper law of the contract.[504] In the context of incapacity, the reference should naturally be to the *putative* objective proper law.[505] It will therefore be submitted in paragraphs 6.6 and 6.7 that the consequences of incapacity must be governed by the putative objective proper law of the contract.[506]

503 Article 1(4) of the proposal in paragraph 6.7 will influence the question of whether the contract is void or merely voidable. Schwenzer, Hachem and Kee (2012: 206-209) distinguish between the following consequences of incapacity: the contract may be voidable, valid only with ratification, unenforceable or void.

504 See Collins *et al* (eds) (2012b: 2307-2308 and 2316-2318); and Forsyth (2012: 315-365). See, in general, Panagopoulos (2000). *Cf* Article 10(1) of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II).

505 See paragraph 6.2.6.

506 Although the capacity of natural persons is excluded from the ambit of the Hague Principles on Choice of Law in International Commercial Contracts (2015) (see Article 1(3)(a)) it may be noted that Article 9(1)(e) of the Principles determine that the law chosen by the parties shall also govern the consequences of the invalidity of a contract. Also see paragraph 9.9-9.10 of the Commentary to the Draft Hague Principles on Choice of Law in International Commercial Contracts of September 2014. *Cf* Article 12(1)(e) of the Rome I Regulation (note 108); Article 10(1) of the Rome II Regulation (note 504); and Article 14(*e*) of the Inter-American Convention on the Law Applicable to International Contracts (CIDIP V) (Mexico City Convention).

6.4 Underlying interests and the protection of both parties in the proposal

As indicated above, it may be said that certain conflicts rules are designed to protect the incapable contractant while others would benefit the counterpart.[507] The application of, for example, the personal law (*lex patriae*, the law of habitual residence and the *lex domicilii*) would favour the incapable party and application of the *lex loci contractus* would protect the local merchant. This is, however, not always the case as the application of the personal law may be disadvantageous to the contractant invoking incapacity and the *lex loci contractus*, indeed to his or her advantage. All depends on the content of the relevant legal system.

Be that as it may, some legal systems are, in the abstract, closer connected to the one contractant than to the other and application thereof can therefore in that particular and limited sense be said to be to the advantage of the relevant person. The most obvious example would be the personal law of the incapable person, which is clearly most closely connected to that party.

In the scenario that the incapable party buys goods at the establishment of the creditor, the *lex loci contractus* is closer connected to the capable party. However, the *lex loci contractus* is not necessarily closer connected to the capable party; all depends on the particular facts on the case. For instance, two natural persons, or a representative of a juristic person[508] and a natural person, may conclude a contract in a third country, to which neither of them has a close connection.

Application of the putative subjective proper law is potentially in conflict with the interests of incapable parties as they might bestow or inflict capacity on themselves, merely by agreeing to a choice of law in a contract, which they would not otherwise possess.

Application of the putative objective proper law of the contract cannot be said to be closer connected to any of the parties and therefore, in the abstract, to their advantage; it is the legal system that could be said to be closest connected to the contract itself rather than to any one of the parties.

The *lex fori*, again, is obviously most closely connected to the country where the relevant court with jurisdiction is situated. In many cases, this will be the country of residence or domicile of one of the parties. As this could be either party, the application cannot in the abstract be linked to the interests of one of them. The same applies in respect of the *lex situs*, which is clearly closely

507 See paragraph 6.1.

508 With regard to agency, see MünchKommBGB/Spellenberg (2010: 1053-1054); and Reithmann/Martiny/Hausmann (2010: 1913-1914).

linked to the relevant property, but not necessarily closer to, for instance, the buyer or the seller of immovable property.

The reasonable expectations of the parties, as one aspect of their abstract interests, would probably indicate, in respect of both parties, the *lex loci contractus* (that is, if the parties were physically present in the country of the conclusion of the contract)[509] and, in the case of immovable property, the *lex situs*. The subjective proper law is not referred to here as any expectation of the parties that this legal system governs capacity would be unreasonable. The incapable party may perhaps expect the personal law to apply. Probably neither party would have the objective proper law or the *lex fori* in mind in this regard.

In the context of an alternative reference rule, the abstract advantage of having a system with a close connection to a particular party applied is furthermore reduced by the simultaneous application of other legal systems. The abstract protective effect of the application of one system may be neutralised by the alternative application of another.

The proposal in paragraphs 6.6 and 6.7 indeed entails a rather extensive alternative reference rule employing, at least in certain circumstances, three (in the case of immovable property) or four (in all other cases) different legal systems.[510] If the natural person invoking his or her incapacity has contractual capacity in terms of any one of these legal systems, he or she must be held to possess such capacity. The rule is result-oriented or outcome-based in that it favours the existence of capacity in respect of the contract in question; it is based on an underlying policy favouring the validity of contracts (*favor negotii*),[511] capacity being a prerequisite of validity. The rule is therefore based on the principle of preferential treatment or the *Günstigkeitsprinzip*.[512] This principle has been employed in particular in respect of formalities in private international law of contract[513] but also in international family and succession law.[514] As is clear from the discussion in previous chapters, the vast majority of legal systems employ some form of alternative reference rule

509 *Cf* Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).

510 In the context of a regional instrument, the *lex patriae* might have to be added to the list (see paragraph 6.2.4); then there would be four or five alternatively applicable legal systems.

511 See MünchKommBGB/Spellenberg (2010: 1040).

512 See Neels (2001: 704-709); Schröder (1996); Symeonides (2000: 25-29, 38 and 48-60); and Symeonides (2014: 245-289).

513 Article 13 of the Mexico City Convention (CIDIP V); Article 11 of the Rome I Regulation (note 108); Act on the General Rules of Application of Laws (2006: Article 10) (Japan); Article 3109 of the Civil Code of Quebec of 1991; Conflict of Laws Act of the Republic of Korea (2001: Article 17) (South Korea); Neels (2014: 259); Symeonides (2000: 38 and 50-52); and Symeonides (2014: 135-136; 175-176; 232-234; 256-259).

514 See Neels (2001: 704-709); Symeonides (2000: 56-60); and Symeonides (2014: 245-289).

in respect of the contractual capacity of natural persons.[515] The starting point is justified by the aim of the facilitation of international contracting, which may be seen as a prerequisite for inclusive economic growth and therefore the alleviation of poverty, particularly so in an emerging jurisdiction.

The employment of an alternative reference rule favours a finding that capacity existed and, as such, is to the advantage of the capable party where he or she seeks to uphold the contract.[516] The premise underlying this rule must therefore be balanced or mitigated by converse considerations concerned with the protection of the incapable individual. The proposal in paragraphs 6.6 and 6.7 attempts to balance the respective abstract interests of both parties.

The starting point of utilising an alternative reference rule in this context is counterbalanced by a safety net in the protection of the party invoking incapacity with the following features:

(1) The putative proper law subjectively determined is not part of the legal systems listed in the rule.
(2) The application of the systems other than the personal law are restricted, namely:
    (a) the *lex loci contractus* only applies where the contract was concluded by the parties in each other's physical presence or is of a recurrent nature in respect of reasonably essential goods;
    (b) the *lex loci contractus* and the putative objective proper law are not applicable if the capable contractant was aware of the counterpart's incapacity in terms of the personal law or was unaware thereof as a result of negligence; [517] and
    (c) the *lex loci contractus* and the putative objective proper law do not apply to contracts relating to family law or the law of succession or to contracts in respect of immovable property (although the *lex situs* would apply in respect of immovable property in addition to the relevant personal laws).

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515 Only jurisdicitions such as the Ukraine (Ukrainian Private International Law Code (2005: Article 17 and 18(2)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Brazil (Introductory Act to the Civil Code of Brazil (1942: Article 7)); Mexico (Civil Code of Mexico (1928–1988: Article 13(II))); Uruguay (Civil Code of Uruguay (1868–1941–1994: Article 2393)); Azerbaijan (Private International Law Code of Azerbaijan (2000: Article 10(2))); and Uzbekistan (Civil Code of Uzbekistan (1997: Chapter 71, Article 1169)) apply one legal system in this regard (the *lex patriae*, the *lex domicilii* and the *lex loci contractus* respectively). Also see Symeonides (2014: 259-260 and 285-286).

516 See Cheng (1916: 70); and MünchKommBGB/Spellenberg (2010: 1040). *Cf* Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)) who appears to have advocated a cumulative reference rule (discussed in Chapter 2, paragraph 2.3).

517 The exception in (b) does not apply to contracts of a recurrent nature in respect of reasonable essential goods.

(3) Only the contractant lacking capacity in terms of any of the applicable legal systems may invoke incapacity.[518]

It is therefore suggested that the proposed rule follows a balanced approach, a *via media* between the abstract interests of the capable party, on the one hand, and the party invoking incapacity, on the other.

6.5 Forms and application of the proposal

The proposals for an arrangement regarding the applicable law in respect of the contractual capacity of a natural person is provided in a twofold form. The proposal appears in narrative form in paragraph 6.6; it may be utilised by the courts in South Africa in terms of the Constitution, which states that the High Courts "have the inherent power to ... develop the common law, taking into account the interests of justice".[519] The proposals could also be considered by courts in the other Roman-Dutch jurisdictions[520] and courts in mixed and common-law jurisdictions in the interpretation, supplementation and development of the rules of private international law.[521] The proposal is provided in codified form in paragraph 6.7. This could be considered by the legislature in South Africa or any other national jurisdiction. It could also be considered for the purposes of regional, supranational or international instruments. More specifically, it is intended to form part of the proposed African Principles on the Law Applicable to International Contracts of Sale and of the African Principles on the Law Applicable to International Commercial Contracts. The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg is in the process of drafting the proposed sets of African Principles. Of course, in that context it may be necessary to make changes to the proposed model so as to obtain wide consensus on its content. One could think here of adding the *lex patriae* to the primary applicable legal systems,[522] as many states in Africa belong to the family of civil-law systems,[523] where the law of nationality often plays an important role in this regard.

518 See paragraphs 6.2.5 and 6.2.6 above. This is the position under Art 11 of the Rome Convention (note 173) and Art 13 of the Rome I Regulation (note 108) in respect of the non-application of the *lex loci contractus* in specific circumstances. See the text at note 205.

519 Constitution of the Republic of South Africa, 1996, Section 173. Also see Sections 8(3)(a) and 39(2) of the Constitution of the Republic of South Africa.

520 Botswana; Lesotho; Namibia; Sri Lanka; Swaziland and Zimbabwe. See Forsyth (2002: 68). Also see Amerasinghe (2002: 287-340).

521 *Cf* the preamble to the Hague Principles on Choice of Law in International Commercial Contracts (2015).

522 However, this may be unconstitutional in South Africa. See paragraph 6.2.4.

523 Sweigert and Kötz (1998: 66-67 and 112-113); and Wood (2007: 451-455).

6.6 Proposal in narrative form

A natural person should be deemed to have had contractual capacity if he or she was competent at the time of conclusion of the contract in terms of the *lex domicilii* or the law of the country of habitual residence. In addition, an individual capable in terms of the *lex loci contractus* would also have contractual capacity but only if (a) he or she and the counterpart were in each other's physical presence at the time of the conclusion of the contract or (b) the contract was of a recurrent nature in respect of reasonably essential goods. A natural person should also be regarded as having had contractual capacity if he was capable according to the putative objective proper law of the contract, that is, the legal system that would be applicable to the contract if he or she and the co-contractant had the relevant capacity at the time of the conclusion of the contract, not taking any express or tacit choice of law into account.

A contractant, deemed to have contractual capacity in terms of the *lex loci contractus* or the putative objective proper law of the contract, yet incapable according to the *lex domicilii* and the law of habitual residence at the time of the conclusion of the contract, may nevertheless rely on such incapacity if the capable counterpart was aware of the incapacity, or was unaware thereof as a result of negligence. This exception does not apply to contracts of a recurrent nature in respect of reasonably essential goods. The incapable contractant under the legal systems mentioned bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity or was unaware thereof as a result of negligence. Whether or not a contractant was negligent in this regard, should be determined by the law of the forum or, if the rule forms part of a regional, supranational or international instrument, in an autonomous manner.

The *lex loci contractus* and the putative objective proper law do not apply where the contract in question concerns family law or the law of succession. As a further exception, in as far as immovable property is concerned, a natural person should be deemed to have had contractual capacity if he or she was competent at the time of concluding the contract in terms of the *lex domicilii*, the law of habitual residence or the *lex rei sitae*.

Where a natural person acts in the course of his or her business activities, the law of domicile and habitual residence shall be the law of his or her principal place of business. The contractual capacity of a natural person that has previously been acquired shall not be affected by a subsequent change in the individual's domicile or habitual residence.

Only the contractant lacking capacity in terms of any of the legal systems referred to shall be entitled to invoke such incapacity. The consequences of

an individual's incapacity shall be governed by the putative objective proper law of the contract.

6.7 Proposal in codified form

Contractual capacity of natural persons

1. Primary rules

(1) A natural person must be deemed to have had contractual capacity if he or she, at the time of concluding the contract, had such capacity in terms of at least one of the following legal systems –
   (a) the law of domicile;
   (b) the law of habitual residence;
   (c) the law of the country where the contract was concluded, provided that:
      (i) the parties to the contract were in each other's physical presence at the time of the conclusion of the contract; or
      (ii) the contract was of a recurrent nature in respect of reasonably essential goods; or
   (d) the putative objective proper law of the contract.

(2) The law of domicile and habitual residence of a natural person acting in the course of his or her business activities shall be the law of his or her principal place of business.

(3) For the purposes of Article 1(1)(d) and Article 4, the putative objective proper law refers to the legal system that would be applicable to a contract if the parties had the relevant capacity at the time of the conclusion of the contract, not taking any express or tacit choice of law into consideration.

(4) Only the party lacking capacity in terms of any of the applicable legal systems may invoke such incapacity.

2. Previously acquired capacity

The contractual capacity of a natural person that has previously been acquired shall not be affected by a subsequent change in the individual's domicile or habitual residence.

3. Exceptions

(1) If the capable contractant was aware of his or her counterpart's incapacity in terms of the legal systems referred to under Article 1(1)(a) or (b) at

the time of the conclusion of the contract, or was unaware thereof as a result of negligence, the legal systems referred to in Article 1(1)(c) and (d) do not apply.

(2) The incapable contractant in terms of the legal systems referred to under Article 1(1)(a) or (b) bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity, or was unaware thereof as a result of negligence.

(3) The exception contained in Article 3(1) does not apply to contracts of a recurrent nature in respect of reasonably essential goods.

(4) Whether a contractant was negligent for the purposes of Article 3, must be determined by the law of the forum.[524]

(5) The legal systems referred to in Article 1(1)(c) and (d) do not apply to contracts relating to family law or the law of succession.

(6) Notwithstanding Article 1(1), a natural person must be deemed to have had contractual capacity in respect of contracts relating to immovable property only if he or she, at the time of concluding the contract, had such capacity in terms of at least one of the following legal systems –
(a) the law of domicile;
(b) the law of habitual residence; or
(c) the law of the country where the immovable property is situated.

(7) Articles 1(2), 1(3), 1(4), 2 and 4 are also applicable in the context of contracts relating to family law, the law of succession or immovable property.

4. Consequences of incapacity

The consequences of incapacity shall be governed by the putative objective proper law of the contract.

524 If the rule forms part of a regional, supranational or international instrument, negligence must be determined in an autonomous manner. Article 3(4) should then be deleted. The relevant instrument should contain a provision similar to Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG): "In the application of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application…." *Cf* Article 1.6(1) of the UNIDROIT Principles of International Commercial Contracts (2010).

Summary in English

Contractual Capacity in Private International Law

This study investigates contractual capacity in private international law, in other words: the law applicable to the competence of a natural person to create rights and duties by concluding a contract with another (natural or juristic) person or other persons. In many common-law and mixed jurisdictions this is an issue that is remarkably unclear; it is nevertheless, as is shown, of significant practical importance.

The object of the study (as set out in Chapter 1) is the formulation of conflicts rules in respect of contractual capacity that can be employed in the development of the law in South Africa and other mixed jurisdictions, as well as in common-law countries. The proposed rules may also be considered in future national, regional, supranational and international instruments, including the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts, both projects of the Research Centre for Private International Law in Emerging Countries at the University of Johannesburg.

To assist in the formulation of the rules, a wide comparative study is undertaken of 65 legal systems in total from the civil-law, the common-law and the mixed civil/common-law tradition, as well as all relevant regional, supranational and international instruments. Legal systems were chosen from the following regions: Africa; Australasia; Europe; the Far East; the Middle East; North America; and South America. Considerations for inclusion in this regard revolved around the availability of information; language (with a preference for materials available in English); the importance of countries from a cultural, economic or social perspective; and the modern character and originality of the relevant rules.

Chapter 2 discusses the position in Roman-Dutch and South African law. The common-law authors employed the *lex situs* (the law of the country where the property is situated) in respect of immovable property; in respect of other contracts, the *lex domicilii* (the law of the country of domicile) and the *lex loci contractus* (the law of the country where the contract was concluded) were utilised with some flexibility, taking into account the need for an equitable outcome in the particular case.

These views are all reflected in South African case law. Two decisions, both relying on English authors, may be referred to as support, at least to a certain degree, for the application of the putative objective proper law of the con-

tract, that is the legal system that would be applicable to the contract if both parties had the relevant capacity at the time of the conclusion of the contract, not taking any (purported) express or tacit choice of law into account. There is no decision of the Supreme Court of Appeal (or the Constitutional Court) in this regard yet and therefore no binding authority.

The South African authors are in favour of the application of the *lex situs* in respect of immovable property; with regard to other contracts, some of the scholars distinguish between mercantile and non-mercantile contracts, while others propose various forms of an alternative reference rule, involving varying combinations of the *lex domicilii,* the *lex loci contractus* and/or the (putative objective) proper law of the contract. One author is of the opinion that the *lex domicilii* and the (putative) objective proper law should apply in the alternative; but the latter should not be employed where the contract-assertor knew, or reasonably should have known, of his counterpart's incapacity under the *lex domicilii*.

Chapter 3 canvasses other jurisdictions without codified rules in respect of contractual capacity in private international law. All of these are common-law jurisdictions, with the exception of Scotland, a mixed jurisdiction. The discussion focuses on five regions: Europe (the United Kingdom: England and Wales, and Scotland); Australasia (Australia; and New Zealand); North America (the common-law provinces of Canada; and the United States of America); the Far East (India; Malaysia; and Singapore); and Africa (Ghana; and Nigeria).

In general, contractual capacity is excluded from the scope of the Rome I Regulation, which is binding law in the United Kingdom. Member states therefore apply their domestic private international law rules to the issue of contractual capacity, subject to the provision in Article 13 of the Regulation (which is discussed in Chapter 5). The content of the Restatement (Second), the most important conflicts approach in the United States of America, is discussed in Chapter 3 as this codification only constitutes persuasive authority. (The position in Louisiana and Oregon and the Puerto Rican *Projet* are discussed in Chapter 4.)

The common-law courts apply the *lex domicilii*, the *lex loci contractus* or, in more recent decisions, the (putative objective) proper law of the contract; the *lex situs* is usually applied in respect of immovable property.

Various contemporary authors favour the sole application of the (putative objective) proper law to contractual capacity but the majority would apply the proper law as part of an alternative reference rule. Particularly influential with common-law authors worldwide is the proposal by Dicey, Morris and Collins (and their predecessors) that an individual must be deemed to have contractual capacity if he or she has such capacity in terms of the

(putative objective) proper law of the contract, the law of domicile or the law of residence (in respect of immovable property, the *lex situs* must apply). A substantial minority of authors argue in favour of the application of the (putative) proper law of the contract, either subjectively or objectively determined, thereby recognising choice of law in the context of capacity. This is also the position under the Restatement (Second), in terms of which an individual must be deemed to possess capacity if he or she is capable in terms of the (putative) subjective proper law of the contract, the (putative) objective proper law of the contract (if there was no purported choice of law) or the *lex domicilli* (in respect of immovable property the *lex situs* must be added to the list).

Chapter 4 is devoted to jurisdictions with codified rules in respect of contractual capacity in private international law. Most of these are civil-law jurisdictions (from Europe; the Middle East; the Far East; North America; and Africa), but some common-law (Israel; and Oregon) and mixed systems (Louisiana; Puerto Rico; and Quebec) are included.

The majority of the jurisdictions canvassed in this chapter apply the *lex patriae* (the law of the country of nationality) to contractual capacity as the legal system of departure. Other legal systems utilise the *lex domicilii*, the law of (habitual) residence, the law of the place of business of an individual, the *lex loci contractus*, the (putative) proper law of the contract, the *lex fori* (the law of the country of the forum) or a combination of these, as the default applicable law.

Many jurisdictions which in principle apply the *lex patriae*, the *lex domicilii* and/or the law of (habitual) residence to contractual capacity, employ the *lex loci contractus* as an alternatively applicable legal system, but only if one or more of the following conditions are present: (a) the contract in question was concluded in the forum state; (b) the parties to the contract were present in the same country at its conclusion; (c) the forum state is the country where performance is to be effected; and (d) the absence of fault on the part of the capable contractant (the additional application of the *lex loci contractus* in the absence of fault is generally referred to as the *Lizardi* rule, after a decision of the French *Cour de cassation* in the 19th century).

Fault (referred to in condition (d)) plays differentiated roles in the context of the additional application of the *lex loci contractus*. First, the *presence* of fault may function as an exception to the applicability of the *lex loci contractus*. The line of argumentation in these cases entails three steps. Step 1: the application of the law or legal systems applied in principle (the default legal system(s)), namely, the *lex patriae* and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions (a) – (c) referred to above (and as prescribed by the *lex fori's* private international law) are present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on

the part of the capable contractant. Fault exists where the latter contractant was aware of the counterpart's incapacity (in terms of the latter's personal law) at the conclusion of the contract, or was not aware thereof as a result of negligence. The existence of fault therefore leads to the non-application of the *lex loci contractus*. This method of argumentation is referred to by the author as the three-step model.

Secondly, the *absence* of fault may play the role of a requirement which must be fulfilled for the *lex loci contractus* to be applied. The line of argumentation here entails only two steps. Step 1: the application of the law or legal systems applied in principle (the default legal system(s)), namely, the *lex patriae*, and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions (a) – (c) referred to above (and as prescribed by the *lex fori*'s private international law) are fulfilled *and* fault is absent on the part of the capable contractant. Fault is absent where the contract assertor, at the time of the conclusion of the contract, was not aware of the incapacity of the other party and the non-existence of the knowledge of the incapacity was not due to negligence. Fault is therefore absent when two requirements are met: (i) the contract assertor must have believed *bona fide* that the incapacitated contractant indeed had full capacity to contract; and (ii) a reasonable person in the position of the contract assertor would not have known of the incapacity, for instance, where a contractant's incapacity is not reasonably ascertainable (where the incapacity is concealed). The absence of fault therefore leads to the application of the *lex loci contractus*. This method of argumentation is referred to as the two-step model.

Irrespective of the model chosen, the presence of fault on the part of the contract-assertor leads to the non-application of the *lex loci contractus*. The absence of fault may (depending on the fulfilment of the other requirements) indicate application of the *lex loci contractus*.

The chapter contains a detailed discussion of the position in all the relevant jurisdictions as to which one or more of the listed conditions (a) – (d) are required for the alternative application of the *lex loci contractus* to contractual capacity; it is also indicated whether the absence-of-fault requirement (where applicable) features within the context of the two-step or the three-step model.

Attention is also given to a-typical conflicts rules in this context, for instance special rules in respect of essential goods and the entrepreneurial activities of individuals and exceptions in respect of contracts involving family or succession law or immovable property. In addition, the following issues are discussed: the subsequent change in an individual's personal law; the legal system applicable to the consequences of contractual incapacity; and the role of public policy.

Chapter 5 investigates the conflicts rules in respect of contractual capacity in international, supranational and regional instruments. Contractual capacity is excluded from international substantive-law instruments as the United Nations Convention on Contracts for the International Sale of Goods (1980) and the UNIDROIT Principles of International Commercial Contracts (2010); it is also excluded from international conflicts-law instruments as the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (1955), the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) and the Hague Principles on Choice of Law in International Commercial Contracts (2015), as well as the regional Mexico City Convention on the Law Applicable to International Contracts (1994).

Furthermore, capacity is excluded from the ambit of both the regional Rome Convention on the Law Applicable to Contractual Obligations (1980) and the Rome I Regulation on the Law Applicable to Contractual Obligations (2008) (a supranational European instrument), through the respective Articles 1(2)(a), except for the provisions of Article 11 (Rome Convention) and Article 13 (Rome I Regulation). Articles 11 and 13 provide for the application of the *lex loci contractus* in addition to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, subject to the fulfilment of certain requirements, which are discussed in some detail.

For the purposes of making the proposals as envisaged in Chapter 1, the first part of Chapter 6 contains an evaluation of the various legal systems that govern or have been proposed to govern the contractual capacity of natural persons, either on their own or together with others. The *lex domicilii*, the law of (habitual) residence, the law of the place of business, the *lex patriae*, the *lex loci contractus*, the putative proper law of the contract (whether only objectively or also subjectively determined), the *lex situs* and the *lex fori* are all considered for inclusion in the proposed rule, whether as primary applicable legal system or only under certain conditions.

The second part of Chapter 6 discusses in more detail the underlying interests and the protection of both parties in the potentially available legal systems. Of course, the protection of the respective parties in a particular case will depend on the content of the relevant legal system(s). However, some legal systems are, in the abstract, more closely connected to either the capable or the incapable party, although the effect thereof may be neutralised by the alternative application of another system or other systems.

The final proposal made entails a rather extensive result-oriented reference rule, fashioned after the three-step model and based on an underlying principle favouring the validity of contracts (*favor negotii*), as counter-balanced by converse considerations leading to the following arrangements in the protection of vulnerable individuals:

(a) The putative proper law subjectively determined is not part of the legal systems listed in the alternative reference rule.

(b) The application of legal systems other than the personal law are restricted, namely as follows: (i) the *lex loci contractus* only applies where the contract was concluded by the parties in each other's physical presence or where the contract is of a recurrent nature in respect of reasonably essential goods; (ii) the *lex loci contractus* and the putative objective proper law are not applicable where the capable contractant was aware of the counterpart's incapacity in terms of the personal law or was unaware thereof as a result of negligence; and (iii) the *lex loci contractus* and the putative objective proper law do not apply to contracts relating to family law or the law of succession or to contracts in respect of immovable property (although the *lex situs* will apply in respect of immovable property in addition to the relevant personal laws).

(c) Only the contractant lacking capacity in terms of any of the applicable legal systems may invoke incapacity.

The proposal for an arrangement regarding the applicable law in respect of the contractual capacity of a natural person is provided in both a narrative and a codified form. The narrative form is intended for use by the courts in the interpretation, supplementation and development of their rules of private international law. The codified form is meant to be considered for the purposes of national, regional, supranational and international instruments.

For the purposes of this summary, the final proposal is provided in its narrative form as follows. A natural person should be deemed to have had contractual capacity if he or she was competent at the time of conclusion of the contract in terms of the *lex domicilii* or the law of the country of habitual residence. In addition, an individual capable in terms of the *lex loci contractus* would also have contractual capacity but only if (a) he or she and the counterpart were in each other's physical presence at the time of the conclusion of the contract or (b) the contract was of a recurrent nature in respect of reasonably essential goods. A natural person should also be regarded as having had contractual capacity if he was capable according to the putative objective proper law of the contract. A contractant, deemed to have contractual capacity in terms of the *lex loci contractus* or the putative objective proper law of the contract, yet incapable according to the *lex domicilii* and the law of habitual residence at the time of the conclusion of the contract, may nevertheless rely on such incapacity if the capable counterpart was aware of the incapacity, or was unaware thereof as a result of negligence. This exception does not apply to contracts of a recurrent nature in respect of reasonably essential goods. The incapable contractant under the legal systems mentioned bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity or was unaware

thereof as a result of negligence. Whether or not a contractant was negligent in this regard, should be determined by the law of the forum or, if the rule forms part of a regional, supranational or international instrument, in an autonomous manner. The *lex loci contractus* and the putative objective proper law do not apply where the contract in question concerns family law or the law of succession. As a further exception, in as far as immovable property is concerned, a natural person should be deemed to have had contractual capacity if he or she was competent at the time of concluding the contract in terms of the *lex domicilii*, the law of habitual residence or the *lex situs*. Where a natural person acts in the course of his or her business activities, the law of domicile and habitual residence shall be the law of his or her principal place of business. The contractual capacity of a natural person that was previously acquired shall not be affected by a subsequent change in the individual's domicile or habitual residence. Only the contractant lacking capacity in terms of any of the legal systems referred to shall be entitled to invoke such incapacity. The consequences of an individual's incapacity shall be governed by the putative objective proper law of the contract.

Summary in Dutch

Contractuele handelingsbekwaamheid en handelingsbevoegdheid in het internationaal privaatrecht

Deze studie behelst een onderzoek naar de contractuele handelingsbekwaamheid en handelingsbevoegdheid in het internationaal privaatrecht, met andere woorden: het recht dat van toepassing is op de handelingsbekwaamheid en handelingsbevoegdheid van een natuurlijk persoon om contractueel rechten en plichten aan te gaan *vis-à-vis* een ander (natuurlijk of rechts-)persoon of met andere personen. In veel *common-law* en gemengde *civil-law/common-law* rechtsstelsels is dit een kwestie die onduidelijk is. Het is desondanks, zoals wordt aangetoond, van groot praktisch belang. (In navolging van de Nederlandse weergave van artikel 13 van de Rome I-Verordening wordt in deze samenvatting steeds het begrippenpaar "handelingsbekwaamheid en handelingsbevoegdheid" gebruikt (*cf* artikel 1(2)(a): "bevoegdheid"). In de Engelse weergave van artikel 13 wordt alleen het woord "capacity" gebezigd (*cf* artikel 1(2)(a): "legal capacity").)

Het doel van deze studie (zoals uiteengezet in Hoofdstuk 1) is het formuleren van conflictregels met betrekking tot de contractuele handelingsbekwaamheid en handelingsbevoegdheid, die toegepast kunnen worden bij de ontwikkeling van het recht in Zuid-Afrika en andere gemengde rechtsstelsels, alsmede in landen waar de *common law* geldt. De in deze studie voorgestelde conflictregels kunnen eveneens dienen als voorbeeld voor toekomstige nationale, regionale, supranationale en internationale regelingen, inclusief de voorziene *African Principles on the Law Applicable to International Contracts of Sale* en de *African Principles on the Law Applicable to International Commercial Contracts*, beide projecten van het *Research Centre for Private International Law in Emerging Countries* van de Universiteit van Johannesburg.

Gelet op het doel om bij het formuleren van conflictregels behulpzaam te zijn, is een brede vergelijkende studie opgezet van in totaal 65 rechtsstelsels, uit de *civil-law*, de *common-law* en de gemengde *civil-law/common-law* traditie, alsook van alle relevante regionale, supranationale en internationale regelingen. Rechtsstelsels werden geselecteerd uit Afrika, Austraal-Azië, Europa, het Midden-Oosten, Noord-Amerika, het Verre Oosten en Zuid-Amerika, zulks op basis van met name beschikbaarheid van informatie, taal (met voorkeur voor materiaal in het Engels), de importantie van landen vanuit cultureel, economisch of sociaal perspectief en het moderne karakter en de originaliteit van de relevante rechtsregels.

In Hoofdstuk 2 wordt de stand van zaken in het Romeins-Hollandse en Zuid-Afrikaanse recht behandeld. De gemeenrechtelijke schrijvers pasten de *lex situs* (het recht van het land waar de goederen gelegen zijn) met betrek-

king tot onroerend goed toe. Met betrekking tot overige contracten werd met enige flexibiliteit de *lex domicilii* (het recht van het land van de domicilie) en de *lex loci contractus* (het recht van het land van contractsluiting) toegepast, daarbij rekening houdend met de behoefte aan een billijk resultaat in het specifieke geval.

Deze zienswijzen worden alle teruggevonden in de Zuid-Afrikaanse jurisprudentie. Twee uitspraken, beide steunend op Engelse auteurs, kunnen worden geïnterpreteerd, althans tot op zekere hoogte, als steun voor de toepassing van het *putative objective proper law* van het contract, dat wil zeggen, het rechtsstelsel dat toepasselijk zou zijn op het contract als beide contractanten de relevante bekwaamheid en bevoegdheid hadden ten tijde van de sluiting van het contract, daarbij niet in aanmerking nemend enige (schijnbaar) uitdrukkelijke of stilzwijgende rechtskeuze. Er is tot op heden geen uitspraak van de Zuid-Afrikaanse *Supreme Court of Appeal* (of de *Constitutional Court*) in dit opzicht en bijgevolg is er geen bindende autoriteit.

De Zuid-Afrikaanse auteurs staan welwillend tegenover de *lex situs* wat betreft onroerend goed. Wat betreft andere contracten, maken sommige schrijvers onderscheid tussen handels- en niet-handelscontracten, terwijl anderen diverse vormen van een alternatieve verwijzingsregel voorstellen, die uiteenlopende combinaties van de *lex domicilii*, de *lex loci contractus* en/of het (*putative objective*) *proper law* impliceren. Eén auteur is van mening dat de *lex domicilii* en het (*putative*) *objective proper law* alternatief van toepassing moeten zijn, maar het laatste zou niet moeten worden toegepast daar waar de bekwame en bevoegde partij wist, of redelijkerwijs zou hebben moeten weten, van de onbekwaamheid of onbevoegdheid van zijn wederpartij onder de *lex domicilii*.

Hoofdstuk 3 behelst een onderzoek naar andere rechtsstelsels zonder gecodificeerde regels met betrekking tot contractuele bekwaamheid en bevoegdheid in het internationaal privaatrecht. Dit zijn allemaal *common-law* rechtsstelsels, met uitzondering van Schotland, een gemengd rechtsstelsel. Het hoofdstuk richt zich op vijf gebieden: Europa (het Verenigd Koninkrijk: Engeland en Wales, en Schotland), Austraal-Azië (Australië en Nieuw-Zeeland), Noord-Amerika (de *common-law* provincies van Canada, en de Verenigde Staten van Amerika), het Verre Oosten (India, Maleisië en Singapore) en Afrika (Ghana en Nigeria).

Contractuele bekwaamheid en bevoegdheid vallen in het algemeen buiten het bestek van de Rome I-Verordening, die ook de bindende regelgeving in het Verenigd Koninkrijk is. Lidstaten passen dus de conflictregels van hun eigen land toe op de kwestie van contractuele bekwaamheid en bevoegdheid, onderworpen aan de bepaling in artikel 13 van de Verordening (die besproken wordt in Hoofdstuk 5). De inhoud van het *Restatement (Second)*, de belangrijkste conflictenrechtelijke benadering in de Verenigde Staten van

Amerika, wordt behandeld in Hoofdstuk 3, omdat deze codificatie alleen *persuasive authority* heeft. (De stand van zaken in Louisiana en Oregon en het Puerto-Ricaanse *Projet* worden behandeld in Hoofdstuk 4.)

De rechters in de *common-law* landen passen de *lex domicilii*, de *lex loci contractus*, of, in meer recente uitspraken, het (*putative objective*) *proper law* van het contract toe. De *lex situs* wordt in de regel toegepast op onroerend goed.

Verschillende hedendaagse auteurs hebben een voorkeur voor exclusieve toepassing van het (*putative objective*) *proper law* op de contractuele bekwaamheid en bevoegdheid, maar de meerderheid zou het recht van het contract liever toepassen als onderdeel van een alternatieve verwijzingsregel. Bij uitstek gezaghebbend onder auteurs uit de *common-law* rechtsstelsels wereldwijd is het voorstel door Dicey, Morris en Collins (en hun voorgangers), dat een individu geacht moet worden contractuele bekwaamheid en bevoegdheid te bezitten, als hij of zij deze bekwaamheid en bevoegdheid heeft in termen van het (*putative objective*) *proper law* van het contract, het recht van domicilie of het recht van (de gewone) verblijfplaats. Met betrekking tot onroerend goed, moet de *lex situs* gelden. Een substantiële minderheid van auteurs bepleit de toepassing van het (*putative*) *proper law* van het contract, hetzij subjectief, hetzij objectief vastgesteld, daarmee rechtskeuze in verband met contractuele bekwaamheid en bevoegdheid erkennend. Dit is eveneens de stand van zaken onder het *Restatement (Second)* in termen waarvan een individu geacht moet worden contractuele bekwaamheid en bevoegdheid te bezitten indien hij of zij bekwaam en bevoegd is uitgaande van het (*putative*) *subjective proper law*, het (*putative*) *objective proper law* (als er geen vermeende rechtskeuze plaats had) of de *lex domicilii*. Met betrekking tot onroerend goed moet de *lex situs* aan de lijst worden toegevoegd.

Hoofdstuk 4 is gewijd aan rechtsstelsels met gecodificeerde voorschriften met betrekking tot contractuele bekwaamheid en bevoegdheid in het internationaal privaatrecht. De meeste hiervan zijn *civil-law* rechtsstelsels (uit Europa, het Midden-Oosten, het Verre Oosten, Noord-Amerika en Afrika), maar sommige *common-law* rechtsstelsels (Israel en Oregon) en gemengde rechtsstelsels (Louisiana, Puerto Rico en Quebec) worden hier ook besproken.

De meerderheid van de rechtsstelsels die in dit hoofdstuk onderzocht zijn, neemt de *lex patriae* (het recht van het land van de nationaliteit) als uitgangspunt van toepassing op contractuele bekwaamheid en bevoegdheid. Andere rechtsstelsels maken gebruik van de *lex domicilii*, het recht van (de gewone) verblijfplaats, het recht van de vestigingsplaats van de onderneming van een individu, de *lex loci contractus*, het (*putative*) *proper law* van het contract, de *lex fori* (het recht van het land van het forum) of een combinatie hiervan, als standaard toepasselijk recht.

Veel rechtsstelsels, die in beginsel de *lex patriae*, de *lex domicilii* en/of het recht van (de gewone) verblijfplaats toepassen op contractuele bekwaamheid en bevoegdheid, maken gebruik van de *lex loci contractus* als een alternatief toepasselijk rechtsstelsel, maar alleen als één of meer van de volgende voorwaarden aanwezig zijn: (a) het contract in kwestie was tot stand gebracht in de forumstaat, (b) de partijen bij het contract waren aanwezig in hetzelfde land bij de totstandkoming daarvan, (c) de forumstaat is het land waar de tenuitvoerbrenging plaats moet vinden en (d) de afwezigheid van schuld vanwege de bevoegde contractant. De aanvullende toepassing van de *lex loci contractus* bij afwezigheid van schuld staat bekend als de *Lizardi*-regel, genoemd naar een uitspraak van de Franse *Cour de cassation* in de 19de eeuw.

Schuld (waarnaar verwezen in voorwaarde (d)) speelt op verschillende vlakken een rol in de context van de aanvullende toepassing van de *lex loci contractus*. In de eerste plaats, kan de *aanwezigheid* van schuld functioneren als uitzondering op de toepassing van de *lex loci contractus*. Alsdan is sprake van drie stappen. Stap 1: toepassing van het standaard-rechtsstelsel of de standaard-rechtsstelsels, namelijk de *lex patriae* en/of de *lex domicilii* en/of het recht van (de gewone) verblijfplaats. Stap 2: de aanvullende toepassing van de *lex loci contractus* daar waar één of meer van de voorwaarden (a) – (c), waarnaar hierboven verwezen is (en zoals voorgeschreven door het internationaal privaatrecht van de *lex fori*) aanwezig zijn. Stap 3: de uitsluiting van de toepassing van de *lex loci contractus* waar schuld bestaat aan de zijde van de bevoegde contractant. Schuld komt voor daar waar laatstgenoemde contractant zich bewust was van de onbekwaamheid of onbevoegdheid van de wederpartij (in termen van het persoonlijke recht van laatstgenoemde) bij de sluiting van het contract, of zich daarvan niet bewust was als gevolg van nalatigheid. Het bestaan van schuld leidt bijgevolg tot het niet-toepassen van de *lex loci contractus*. Deze wijze van argumenteren wordt in de onderhavige studie het driestappenmodel genoemd.

In de tweede plaats kan de *afwezigheid* van schuld de rol spelen van een vereiste waaraan voldaan moet worden om de *lex loci contractus* toe te passen. Alsdan is sprake van slechts twee stappen. Stap 1: de toepassing van het standaard-rechtsstelsel of de standaard-rechtsstelsels, namelijk de *lex patriae* en/of de *lex domicilii* en/of het recht van de gewone verblijfplaats. Stap 2: de aanvullende toepassing van de *lex loci contractus* daar waar één of meer van de voorwaarden (a) – (c), waarnaar hierboven verwezen is (en zoals voorgeschreven door het internationaal privaatrecht van de *lex fori*) aan voldaan zijn en schuld afwezig is vanwege de bevoegde contractant. Schuld is afwezig daar waar de bekwame en bevoegde partij, ten tijde van de sluiting van het contract, zich niet bewust was van de onbekwaamheid of onbevoegdheid van de andere partij en de afwezigheid van kennis van de onbekwaamheid of onbevoegheid niet te wijten was aan nalatigheid. Schuld is bijgevolg afwezig wanneer aan twee vereisten is voldaan: (i) de bekwame en bevoegde partij moet *bona fide* geloofd hebben dat de onbekwame of onbevoegde

contractant daadwerkelijk de volledige bekwaamheid en bevoegdheid had om een contract te sluiten en (ii) een redelijk persoon in de positie van de bekwame en bevoegde partij geen kennis gehad kon hebben van de onbekwaamheid of onbevoegdheid van de wederpartij, bijvoorbeeld, daar waar de onbekwaamheid of onbevoegdheid van de laatstgenoemde contractant niet redelijk achterhaalbaar is (daar waar de onbekwaamheid of onbevoegdheid verborgen is). De afwezigheid van schuld leidt dan tot de toepassing van de *lex loci contractus*. Deze wijze van argumenteren wordt in de onderhavige studie het tweestappenmodel genoemd.

Ongeacht het gekozen model leidt de aanwezigheid van schuld vanwege de bekwame en bevoegde partij tot het niet-toepassen van de *lex loci contractus*. De afwezigheid van schuld kan (afhankelijk van de vervulling van de andere vereisten) leiden tot toepassing van de *lex loci contractus*.

Het hoofdstuk bevat een uitvoerige bespreking van de stand van zaken in alle relevante rechtsstelsels, betreffende welke van de – één of meer – geïnventariseerde voorwaarden (a)-(d) zijn vereist voor de alternatieve toepassing van de *lex loci contractus* op contractuele bekwaamheid en bevoegdheid. Er wordt eveneens aangegeven of het vereiste van afwezigheid van schuld (waar van toepassing) figureert binnen de context van het twee- of het driestappenmodel.

Er wordt ook aandacht besteed aan atypische conflictregels in deze context, bijvoorbeeld bijzondere regels met betrekking tot essentiële goederen en de ondernemersactiviteiten van individuen en uitzonderingen met betrekking tot contracten die het familie- of erfrecht of onroerend goed aangaan. Daarnaast wordt ook aandacht besteed aan latere wijziging in het persoonlijke recht van een individu en het rechtsstelsel dat van toepassing is op de consequenties van contractuele onbekwaamheid of onbevoegdheid, alsmede de rol van het *ordre public*.

Hoofdstuk 5 bevat een onderzoek naar de conflictregels wat betreft contractuele bekwaamheid en bevoegdheid in internationale, supranationale en regionale regelingen. Contractuele bekwaamheid en bevoegdheid zijn uitgesloten van internationale materieelrechtelijke regelingen zoals het Weense Koopverdrag (1980) en de *UNIDROIT Principles of International Commercial Contracts* (2010). Zij zijn bovendien uitgesloten van internationale conflictenrechtelijke regelingen zoals de *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (1955), de *Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* (1986) en de *Hague Principles on Choice of Law in International Commercial Contracts* (2015), alsook van de regionale *Mexico City Convention on the Law Applicable to International Contracts* (1994).

Contractuele bekwaamheid en bevoegdheid zijn eveneens uitgesloten van het domein van zowel het regionale EVO-Verdrag (1980) als de Rome I-Verordening (2008) (een supranationaal Europees instrument), via de respectieve artikelen 1(2)(a), uitgezonderd de bepalingen van artikel 11 (EVO-Verdrag) en artikel 13 (Rome I-Verordening). Artikelen 11 en 13 schrijven de toepassing van de *lex loci contractus* voor in aanvulling op het in beginsel toepasselijke rechtsstelsel, of de in beginsel toepasselijke rechsstelsels, in termen van het internationaal privaatrecht van de *lex fori*, onder de vervulling van bepaalde vereisten die in detail besproken worden.

Ten behoeve van het formuleren van voorstellen als bedoeld in Hoofdstuk 1, bevat het eerste deel van Hoofdstuk 6 een evaluatie van de verschillende rechtsstelsels die de contractuele bekwaamheid en bevoegdheid van natuurlijke personen regelen, of zijn voorgesteld om te regelen, hetzij op zichzelf of samen met anderen. De *lex domicilii*, het recht van (de gewone) verblijfplaats, het recht van de vestigingsplaats van de onderneming, de *lex patriae*, de *lex loci contractus*, het *putative proper law* van het contract (hetzij alleen objectief, hetzij ook subjectief vastgesteld), de *lex situs* en de *lex fori* worden daarbij alle in aanmerking genomen, hetzij als primair toepasselijk rechtsstelsel, hetzij slechts onder bepaalde voorwaarden.

Het tweede deel van Hoofdstuk 6 bespreekt in meer detail de onderliggende belangen en de bescherming van beide partijen in de potentieel beschikbare rechtsstelsels. Vanzelfsprekend zal de bescherming van de respectieve partijen in een bijzonder geval afhangen van de inhoud van de relevante rechtsstelsels. Sommige rechtsstelsels zijn echter, in het abstracte, nauwer verbonden aan hetzij de bekwame en bevoegde, hetzij de onbekwame en onbevoegde partij, hoewel het effect daarvan geneutraliseerd kan worden door de alternatieve toepassing van een ander rechtsstelsel of andere rechtsstelsels.

Het eindvoorstel houdt een tamelijk ruime resultaatgerichte verwijzingsregel in, gebaseerd op het driestappenmodel en het beginsel van *favor negotii*, dat de rechtsgeldigheid van contracten voorop stelt. Ter bescherming van kwetsbare individuen wordt dit uitgangspunt door de volgende regelingen in evenwicht gebracht:

(a) Het *putative proper law* van het contract, zoals subjectief vastgesteld, vormt geen deel van de voorgestelde alternatieve verwijzingsregel.

(b) De toepassing van rechtsstelsels anders dan het persoonlijke recht is beperkt, namelijk als volgt: (i) de *lex loci contractus* is slechts van toepassing daar waar het contract gesloten was door partijen in elkaars fysieke aanwezigheid, of daar waar het contract een herhalend karakter heeft met betrekking tot redelijkerwijs essentiële goederen; (ii) de *lex loci contractus* en het *putative objective proper law* van het contract zijn niet van toepas-

sing daar waar de bekwame en bevoegde contractant zich bewust was van de onbekwaamheid of onbevoegdheid van de wederpartij in termen van het persoonlijke recht, of zich daarvan niet bewust was als gevolg van nalatigheid; en (iii) de *lex loci contractus* en het *putative objective proper law* van het contract zijn niet van toepassing op contracten die betrekking hebben op het familie- of erfrecht of op onroerend goed (hoewel de *lex situs* van toepassing is wat betreft onroerend goed in aanvulling op het relevante persoonlijke recht).

(c) Slechts de contractant die de bekwaamheid of bevoegdheid mist in termen van welke van de toepasselijke rechtsregels ook, mag een beroep doen op onbekwaamheid of onbevoegdheid.

Het voorstel voor een regeling betreffende het recht van toepassing op de contractuele bekwaamheid en bevoegdheid van een natuurlijk persoon wordt gegeven in een verhalende en in een gecodificeerde vorm. De verhalende vorm is bedoeld voor gebruik door rechters ten behoeve van de interpretatie, aanvulling en ontwikkeling van hun internationaal privaatrecht. De gecodificeerde vorm is bedoeld om in beschouwing genomen te worden voor doeleinden van nationale, regionale, supranationale en internationale regelingen.

Het eindvoorstel kan als volgt worden samengevat. Een natuurlijk persoon moet geacht worden contractuele bekwaamheid en bevoegdheid te hebben gehad als hij of zij bekwaam en bevoegd was ten tijde van de sluiting van het contract in termen van de *lex domicilii* ofwel het recht van het land van de gewone verblijfplaats. Bovendien zou een individu, dat, uitgaande van de *lex loci contractus*, bekwaam en bevoegd is, eveneens contractuele bekwaamheid en bevoegdheid hebben, maar alleen als (a) hij of zij en de wederpartij zich in elkaars fysieke aanwezigheid bevonden ten tijde van de sluiting van het contract, of (b) het contract een herhalend karakter had wat betreft redelijkerwijs essentiële goederen. Een natuurlijk persoon moet eveneens geacht worden contractuele bekwaamheid en bevoegdheid gehad te hebben als hij of zij bekwaam en bevoegd was in overeenstemming met het *putative objective proper law* van het contract. Een contractant, die geacht wordt contractuele bekwaamheid en bevoegdheid te hebben uitgaande van de *lex loci contractus* of het *putative objective proper law* van het contract, echter onbekwaam of onbevoegd volgens de *lex domicilii* en het recht van de gewone verblijfplaats ten tijde van de sluiting van het contract, kan zich desondanks verlaten op zulke onbekwaamheid of onbevoegdheid als de bekwame en bevoegde wederpartij zich daarvan bewust was, of onbewust was als gevolg van nalatigheid. Deze uitzondering is niet van toepassing op contracten van herhalend karakter wat betreft redelijkerwijs essentiële goederen. De onbekwame of onbevoegde contractant onder de genoemde rechtsregels draagt de bewijslast om aan te tonen dat, ten tijde van de sluiting van het contract, de bekwame en bevoegde partij zich bewust was van de onbekwaamheid

of onbevoegdheid van de wederpartij, of zich daarvan onbewust was als gevolg van nalatigheid. Of een contractant in dit opzicht nu nalatig was of niet, moet vastgesteld worden door het recht van de forumstaat of, als de bepaling deel uitmaakt van een regionale, supranationale of internationale regeling, op een autonome manier. De *lex loci contractus* en het *putative objective proper law* van het contract zijn niet van toepassing waar het contract in kwestie het familierecht of het erfrecht aangaat. Als een nadere uitzondering, in zoverre het onroerend goed betreft, moet een natuurlijk persoon geacht worden contractuele bekwaamheid en bevoegdheid te hebben gehad, als hij of zij dusdanige bekwaamheid en bevoegdheid had ten tijde van sluiting van het contract in termen van de *lex domicilii*, het recht van de gewone verblijfplaats of de *lex situs*. Waar een natuurlijk persoon handelt in het kader van zijn of haar bedrijfsactiviteiten zal het recht van domicilie en de gewone verblijfplaats het recht zijn van de hoofdzetel van onderneming. De contractuele bekwaamheid of bevoegdheid van een natuurlijk persoon, die voorafgaand verkregen was, zal niet beïnvloed worden door een erop volgende verandering in de domicilie of gewone verblijfplaats van het individu. Alleen de contractant, die de bekwaamheid of bevoegdheid mist ingevolge enig rechtsstelsel waarnaar verwezen is, zal gerechtigd zijn om zich te beroepen op zulk een onbekwaamheid of onbevoegdheid. De consequenties van de contractuele onbekwaamheid en onbevoegdheid van een individu zullen geregeld worden door het *putative objective proper law* van het contract.

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Curriculum Vitae

Eesa Allie Fredericks was born in Johannesburg (South Africa) on 18 July 1976 to Imam Achmad-Allie and Rabia Fredericks. He matriculated from Coronationville Senior Secondary School in 1994 and obtained the BA (Law) and LLB degrees at the Rand Afrikaans University in 1998 and 2000 respectively. In 2001 he obtained the LLM degree *cum laude* from the same university with a dissertation titled *The Conflict of Laws in Respect of Documentary Letters of Credit in International Trade Financing*. During 2002 he was admitted as Advocate of the High Court of South Africa.

In 2002, Adv Fredericks was appointed as lecturer in the Department of Mercantile Law at the University of South Africa. In 2010, he joined the University of Johannesburg and is currently a senior lecturer at this institution. He taught in various LLB and LLM modules, including Banking Law, International Trade Law and the Law of Contract.

Adv Fredericks is the author or co-author of 13 articles, published in the *De Jure*, *Juta's Business Law*, the *South African Mercantile Law Journal*, the *Tydskrif vir Hedendaagse Romeins-Hollandse Reg / Journal of Contemporary Roman-Dutch Law*, the *Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law*, *Obiter* and the *Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal (EUREDIA)*.

Adv Fredericks spoke at international seminars and conferences at the University of Johannesburg, the University of Pretoria, the University of South Africa, the headquarters of Nedbank and the South African Reserve Bank. He arranged international seminars and conferences at the University of South Africa and the University of Johannesburg. He obtained research funding from the University of Johannesburg (University Research Council) and the National Research Foundation.

Adv Fredericks has been the Head of the Department of Practical Business Law (Soweto and Bunting Road campuses) and the deputy director of the Research Centre for Private International Law in Emerging Countries since 2013 and 2014 respectively. Research for the doctoral thesis was mainly carried out at this centre at the University of Johannesburg. He was a correspondent for the Global Sale Law Project of the University of Basel (2009-2010) and represented South Africa during 2013 at a Working Group of the Judgments Project of the Hague Conference on Private International Law. He was an observer for South Africa at the meeting of the Governing Council of UNIDROIT in May 2015.

Eesa is married to Feroza. They have two children, Achmad and Zahra.

In the range of books published by the Meijers Research Institute and Graduate School of Leiden Law School, Leiden University, the following titles were published in 2015 and 2016:

MI-246 C. Vernooij, *Levenslang en de strafrechter. Een onderzoek naar de invloed van het Nederlandse gratiebeleid op de oplegging van de levenslange gevangenisstraf door de strafrechter* (Jongbloed scriptieprijs 2014), Den Haag: Jongbloed 2015, ISBN 979 70 9001 563 2

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For the complete list of titles (in Dutch), see: www.law.leidenuniv.nl/onderzoek/publiceren