Contractual capacity in private international law

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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.