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Contractual capacity in private international law

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

3.1 INTRODUCTION

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

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

3.2 EUROPE

3.2.1 United Kingdom

In the United Kingdom, the provisions of the Rome Convention¹ and the Rome I Regulation² govern the law applicable to contractual obligations. In general, the status or legal capacity of natural persons is excluded from the scope of the Convention and the Regulation,³ perhaps because it could be seen to form part of the law of persons and not of obligations.⁴ Member states therefore apply their domestic private international law rules to the issue of contractual capacity.⁵ This is, however, subject to the provisions of Article 11 of the Convention and Article 13 of the Regulation, which both contain a case-specific rule directed at protecting innocent parties who have

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

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

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

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

5 Fawcett and Carruthers (2008: 750).

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

3.2.1.1 *England and Wales*

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

3.2.1.1.1 *The courts*

3.2.1.1.1.1 *Introduction*

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

3.2.1.1.1.2 *Sottomayor v De Barros (1)*¹²

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

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

7 (1877) 3 PD 1.

8 (1888) 13 App Cas 88.

9 [1946] P 122.

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

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

12 (1877) 3 PD 1.

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

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

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

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

3.2.1.1.1.3 *Cooper v Cooper*¹⁹

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

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

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

16 *ibid.*

17 *ibid.*

18 *ibid.*

19 (1888) 13 App Cas 88.

terce²⁰ and *jus relictæ*.²¹ Upon Mr Cooper's death, she instituted action for the setting aside of this contract on the grounds that she was a minor at the time of concluding it and that, in terms of Irish law, she lacked capacity to enter into an antenuptial contract.

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

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

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

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

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

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

23 *ibid.*

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

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

3.2.1.1.1.4 *Baindail v Baindail*²⁵

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

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

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

25 [1946] P 122.

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

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

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

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

3.2.1.1.1.5 *Male v Roberts*³⁰

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

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

3.2.1.1.1.6 *Sottomayer v De Barros (2)*³³

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

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

30 (1800) 3 ESP 163.

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

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

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

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

35 See the discussion at par 3.2.1.1.1.2.

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

3.2.1.1.1.7 *Republica De Guatemala v Nunez*⁴⁵

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

36 *Sottomayer v De Barros* (2) (*supra*: 99).

37 as stated in *Sottomayer v De Barros* (1) (*supra*: 5).

38 *Sottomayer v De Barros* (2) (*supra*: 100).

39 *ibid.*

40 *ibid.*

41 (1800) 3 ESP 163.

42 2 Cons 412.

43 *Simonin v Mallac* 2 Sw & Tr 67; 29 LJ (P M & A) 77.

44 *Sottomayer v De Barros* (2) (*supra*: 100).

45 [1927] 1 KB 669 (CA).

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

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

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

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

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

47 Collier (2001: 255).

48 Collier (2001: 256).

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

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

3.2.1.1.1.8 *The Bodley Head Ltd v Flegon*⁵²

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

With regard to the issue of the invalidity of the contract of agency in Russian law, Brightman J held that this was the position not as a consequence of a lack of capacity, but because it was unlawful for a Russian citizen to conduct international trade for his or her own account. He stated, “in Russia there is a state monopoly of foreign trade under article 14 of the Russian constitution; the carrying on of business by a Russian author would also offend article 9 of the constitution”.⁵³ In other words, it was a rule of material validity rather than capacity that the court had to deal with. The judge indicated that the contract of agency was more closely connected to Switzerland⁵⁴ than

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

51 O’Brien (1999: 573).

52 [1972] 1 WLR 680.

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

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

Russia⁵⁵ and consequently that Swiss law was applicable to the contract. The proper law of the contract (Swiss law) was applied to the issue of material validity and the contract of international agency was therefore valid. Brightman J indicated that, even if the issue was classified as pertaining to contractual capacity, the proper law of the contract would still be applicable. Solzhenitsyn possessed the relevant capacity in terms of Swiss law, the proper law of the contract. The judge stated: "I have not been referred to any reported case which prevents my holding that, in such circumstances, the author's capacity should be tested by Swiss law. There is no evidence of the author's incapacity under that law."⁵⁶

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

3.2.1.1.1.9 *Bank of Africa, Limited v Cohen*⁵⁸

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

55 *The Bodley Head Ltd v Flegon* (*supra*: 689): "the agency contract has no relevant connection with Russia".

56 *The Bodley Head Ltd v Flegon* (*supra*: 689).

57 Hill and Chong (2010: 551).

58 [1909] 2 Ch 129.

59 *Bank of Africa, Limited v Cohen* (*supra*: 145).

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

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

This decision is, however, subject to considerable criticism. Clarkson and Hill⁶¹ submit that there are no apparent reasons for applying a different rule for capacity to conclude a contract relating to immovables than the rule applied in respect of any other contract. According to the authors, the contract was most closely connected to the law of England,⁶² which should have been applied *in casu* as the proper law of the contract instead of the *lex situs*. If the proper law was applied, Mrs Cohen would have had the capacity to conclude the contract of suretyship.⁶³

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

60 *Bank of Africa, Limited v Cohen* (*supra*: 146).

61 Clarkson and Hill (2011: 476).

62 the country where the defendant was both domiciled and resident.

63 Clarkson and Hill (2011: 476).

64 Collier (2001: 267).

65 The author refers to Article 3 of the Rome Convention (note 1). See, for today, Article 3 of the Rome I Regulation (note 2).

66 The author refers to Article 4(3) of the Rome Convention (note 1). See, for today, Article 4(1)(c) of the Rome I Regulation (note 2).

67 Collier (2001: 267).

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

- (a) The court was not dealing with a mortgage but a contract to create one. It was generally accepted that contracts involving immovable property were governed by their proper law, usually, but not necessarily, the *lex situs*. However, the court made no attempt to determine the proper law of the contract.⁶⁸
- (b) The court omitted to ascertain the rules applicable in the Transvaal or how the Transvaal courts would have addressed the matter. It may for instance have discovered that the law of the Transvaal did not apply to a contract concluded in England by a woman domiciled there. In that case, the court should have applied domestic English law, the law which the *lex situs* would have applied.⁶⁹ The authors seem to suggest that the court should have considered the application of *renvoi* in this context.

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

- (a) the decision serves as authority for the faulty proposition that the capacity to conclude a contract involving foreign immovables and the capacity to transfer are governed by the *lex situs*;
- (b) the case actually concerned contractual obligations and not conveyance (read: the creation of a limited real right *per se*),⁷⁰ therefore the relevant legal system should have been the proper law of the contract;
- (c) the decision was based on statements in an older edition of Dicey,⁷¹ which was criticised by Westlake⁷² as failing to draw a clear distinction between capacity to contract and the capacity to transfer;
- (d) with regard to American law, the authorities were moving toward applying the *lex loci contractus* to capacity in respect of contracts involving foreign immovable property;
- (e) Transvaal law probably had no interest in protecting a married woman not domiciled there;
- (f) an action for damages should nevertheless have succeeded despite Transvaal law hindering an order for specific performance;
- (g) there should have been a clear distinction between contractual rights and proprietary rights *in casu*;

68 Collins *et al* (eds) (2012b: 1333).

69 *ibid.*

70 *Contra* Collier (2001: 267). *Cf* Cheng (1916: 77).

71 The author probably refers to Dicey (1908).

72 The author probably refers to Westlake (1905).

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

3.2.1.1.1.10 Summary

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

3.2.1.1.2 The authors

3.2.1.1.2.1 Briggs

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

73 O'Brien (1999: 552-553). The author also submits that the decision was lacking parity with the earlier case of *Re Courteney ex P Pollard* (1840) Mont & Ch 239, which did not concern incapacity.

74 [1909] 2 Ch 129.

75 (1877) 3 PD 1.

76 (1888) 13 App Cas 88.

77 [1946] P 122.

78 See the text at notes 7-10 as to why these cases are discussed, although they do not concern commercial contracts.

79 (1879) 5 PD 94 the remittance of *Sottomayor v De Barros (1)* (1877) 3 PD 1 from the Court of Appeal.

80 (1800) 3 ESP 163.

81 [1927] 1 KB 669 (CA).

82 [1972] 1 WLR 680.

83 Briggs (2014: 583 and 596). Cf Briggs (2008: 165) and Briggs (2014: 615-616 and 948-949). According to the author (Briggs: 2014 583 note 215), the law governing the contract was previously the law of the place where the contract was made.

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

The author is in favour of the application of the law governing the contract⁸⁶ rather than the law of domicile. There may be no “reason or opportunity to know that the other may be domiciled in a state according to the law of which he has an unsuspected incapacity”.⁸⁷ In addition, someone’s domicile cannot always readily be determined as “the detailed rules of the common law of domicile are far from being transparent in their application”.⁸⁸ However, the law of domicile should govern the capacity to conclude a matrimonial contract⁸⁹ as “the personal law is obviously more appropriate” in this context.⁹⁰ The proper law of the contract should today be determined in accordance with the Rome I Regulation.⁹¹

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

3.2.1.1.2.2 Carter

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

84 Briggs (2014: 583): “Where, however, the contract is for the disposition of land, the capacity rules of the *lex situs* may not be easily avoided.”

85 Briggs (2014: 584, 616, 778 and 948).

86 Briggs (2014: 583, 615-616 and 948-949; cf 596).

87 Briggs (2014: 948).

88 *ibid.*

89 Briggs (2014: 584, 616, 778 and 948).

90 Briggs (2014: 616).

91 note 2. Briggs (2014: 596; cf 948).

92 Briggs (2014: 583, 596, 615-616 and 948-949).

93 Briggs (2014: 949).

94 Briggs (2014: 583, 615-616 and 949). Cf Briggs (2014: 596): “In some cases the proposition that a would-be contracting party has found a path to the conclusion that he has contractual capacity is unobjectionable; in others, the allegation that he has ‘conferred capacity upon himself’ betrays a respectable objection. A uniform solution to the problem may never be found, but it is certainly not to hand at the moment.”

95 Carter (1986: 24).

96 *ibid.*

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

The author clearly doubts the applicability of the *lex domicilii* on its own. In fact, in respect of the latter, he submits: "Sweeping *dicta* to the effect that the law of a party's domicile *per se* governs contractual capacity are unworkable."⁹⁸ A foreign contractant should not be allowed to rely on incapacity according to the *lex domicilii* to avoid liability. It does not follow, however, that a contractant who is capable in terms of the *lex domicilii* should be able to avoid liability because of incapacity according to the proper law of the contract. Therefore, any contractant may for enabling purposes be allowed to rely on the capacity of the other party in terms of the *lex domicilii*.⁹⁹ This legal system is accepted to be the governing law in England in terms of Rule 182 of Dicey and Morris¹⁰⁰ (the predecessor of Rule 228(1) of Dicey, Morris and Collins),¹⁰¹ at least if domicile is coupled with residence.¹⁰² In effect, Carter's view comes down to support for the alternative application of the proper law of the contract and the *lex domicilii*.

3.2.1.1.2.3 Clarence Smith

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

97 Carter (1986: 25).

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

99 Carter (1986: 24).

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

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

102 Carter (1986: 24).

103 Clarence Smith (1952: 470).

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

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

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

3.2.1.1.2.4 Clarkson and Hill

The authors support Rule 209 of Dicey, Morris and Collins¹⁰⁹ to the effect that a contractant to an international contract should be regarded as having capacity if he has such by either the personal law or the objective proper law. In their opinion, therefore, a contractant incapable in terms of the proper law of the contract should nevertheless be liable if he or she has capacity according to (for instance)¹¹⁰ the *lex domicilii*.¹¹¹ The rule, so they aver, is based on the protection of the incapable party and the law of the country of which this individual is a domiciliary¹¹² is most suited to establish whether he or she requires such protection. It follows that an individual who possesses capacity in terms of the *lex domicilii* should not be able to avoid liability by referring to another legal system.¹¹³ If a contractant were to be allowed to rely on incapacity in terms of the *lex domicilii*, it would be unfair to the counterpart who may have no reason to assume that the former has a foreign domicile, let alone possess knowledge of that country's capacity rules. In the same way, where contractants have capacity according to the proper law, it would be unreasonable for one of them to escape liability by relying on incapacity in terms of the personal law.¹¹⁴

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

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

¹⁰⁸ Clarence Smith (1952: 471).

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

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

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

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

¹¹³ Clarkson and Hill (2011: 250).

¹¹⁴ *ibid.*

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

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

3.2.1.1.2.5 Collier

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

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

115 *ibid.*

116 Clarkson and Hill (2011: 474).

117 with specific reference to *Bank of Africa, Limited v Cohen* [1909] 2 Ch 129.

118 Clarkson and Hill (2011: 475-476).

119 Collier (2001: 208-209). The author explains that fewer minors will be incapable especially since the age of majority in terms of Section 1 of the Family Law Reform Act of 1969 has been reduced from twenty-one to eighteen.

120 Collier (2001: 209).

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

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

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

3.2.1.1.2.6 *Dicey, Morris and Collins*

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

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

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

122 Collier (2001: 209-210).

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

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

125 [1909] 2 Ch 129.

126 Collier (2001: 267).

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

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

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

Clause (2) is intended to give effect to Article 13 of the Rome I Regulation (Article 11 of the Rome Convention) on the assumption that clause (1) correctly sets out the position in English law.¹³¹ This clause therefore means that a contractant incapable in terms of the proper law of the contract or the personal law shall not be able to rely on this incapacity if the contract was concluded between the contractants in the same country, unless the counterpart knew or should have known about the incapacity. Clause (2) implies that the *lex loci contractus* applies as an additional legal system if the parties were in the same country at the conclusion of the contract. Article 11 of the Rome Convention and Article 13 of the Rome I Regulation are discussed in detail in Chapter 5 below.¹³² Here it must be indicated that the authors follow the system which will be named the three-step model in respect of fault in Chapter 4.¹³³ Step 1: the *prima facie* applicable legal systems are the objective proper law and the personal law. Step 2: the *lex loci contractus* is added to these legal systems if the parties were present in the same country at the time of the conclusion of the contract. Step 3: the *lex loci contractus* is not applicable

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

129 in terms of Rule 228(1).

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

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

132 Paragraph 5.3.1.

133 Paragraph 4.8.

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

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

The *lex loci contractus*, the authors continue, plays a prominent role in civil law countries (in addition to the personal law) in respect of contractual capacity.¹³⁶ While this legal system has gained some support in England,¹³⁷ Scotland,¹³⁸ South Africa¹³⁹ and Canada (Saskatchewan),¹⁴⁰ objections may be raised against it. The place where the contract is made could be entirely fortuitous, especially in matters involving letters, telex, fax or telephone (one could add: electronic communications).¹⁴¹ The law under which, and not the place at which, the contract was made¹⁴² should be decisive. The proper law is therefore included in the list of alternatively applicable legal systems but the *lex loci contractus* only for the scenario that the parties are in the same country at the moment of conclusion of the contract – and then only by implication.

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

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

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

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

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

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

139 *Kent v Salmon* 1910 TPD 637.

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

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

142 *ibid.*

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

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

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

3.2.1.1.2.7 *Fawcett and Carruthers*

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

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

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

144 Collins *et al* (eds) (2012b: 1332).

145 *ibid.*

146 Collins *et al* (eds) (2012b: 1333).

147 See Stone (2010: 329) who supports this proposal by implication.

148 Fawcett and Carruthers (2008: 750). The authors believe that in civil-law systems a contractant may not rely on incapacity in terms of his personal law if he or she has such according to the *lex loci contractus*. The discussion in Chapter 4 explains why this statement is inaccurate on various levels.

149 Fawcett and Carruthers (2008: 751).

150 (1958) 15 DLR (2d) 240 (Ontario).

151 [1927] 1 KB 669 (CA).

152 Fawcett and Carruthers (2008: 751).

3.2.1.1.2.8 *Fawcett, Harris and Bridge*

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

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

However, the law of the closest connection may again, according to the authors, be difficult to determine and may lead to excessive uncertainty because the common law rules will have to be utilised to ascertain the applicable law rather than the provisions of Article 4 of the Rome Convention¹⁵⁵ (today Article 4 of the Rome I Regulation).¹⁵⁶

The current author submits, however, that the provisions of the Rome Convention / Rome I Regulation should be utilised in determining the proper law applicable to contractual capacity.¹⁵⁷ The authors seem to confuse the exclusion of capacity under the Rome Convention / Rome I Regulation¹⁵⁸ with the non-applicability thereof in determining the proper law for the purposes of capacity. There seems to be no reason in logic or authority for the discontinued common-law rules on the determination of the proper law of contract to now suddenly be revived to determine the proper law in the context of capacity.

The authors are of the opinion that Rule 179(1) of Dicey and Morris¹⁵⁹ (the predecessor of Rule 228(1) of Dicey, Morris and Collins)¹⁶⁰ is commendable as it is inclined to uphold the contract; an individual need only have capacity by either the proper law or the personal law. However, the connecting factors (proper law, domicile, residence) are unfortunately, inherently uncertain and

153 Fawcett, Harris and Bridge (2005: 657).

154 Fawcett, Harris and Bridge (2005: 658).

155 note 1.

156 note 2.

157 Also see Briggs (2014: 595; cf 948).

158 Article 1(2)(a) of the Rome Convention (note 1); Article 1(2)(a) of the Rome I Regulation (note 2).

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

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

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

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

3.2.1.1.2.9 *Hill and Chong*

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

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

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

3.2.1.1.2.10 *McClellan and Beevers*

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

161 Fawcett, Harris and Bridge (2005: 658).

162 Collins *et al* (eds) (2006b: 1621).

163 Hill and Chong (2010: 550).

164 Hill and Chong (2010: 550). Of course, the *lex loci contractus* will play a role in terms of Article 11 of the Rome Convention (note 1) and Article 13 of the Rome I Regulation (note 2).

165 Hill and Chong (2010: 550).

166 Hill and Chong (2010: 550), with particular reference to *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67.

167 Also see the discussion of *The Bodley Head Ltd v Flagon* [1972] 1 WLR 6680 in par 3.2.1.1.1.8 where, according to the authors, the court accepted that the putative proper law should be determined by reference to the law which the parties expressly or tacitly chose.

168 Hill and Chong (2010: 551).

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

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

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

169 McClean and Beevers (2009: 386).

170 *ibid.*

171 *ibid.*

172 *ibid.*

173 See Article 4(2) of the Rome Convention (note 1) and Article 4(1)(a) of the Rome I Regulation (note 2).

174 *Sottomayor v De Barros (1)* (1877) 3 PD 1 and *Cooper v Cooper* (1888) 13 App Cass 88. The authors imply that these cases concerned the capacity to marry and not contractual capacity and are therefore not genuine authority (McClean and Beevers (2009: 387 note 177)).

175 *Male v Roberts* (1800) 3 ESP 163 and *Baindail v Baindail* [1946] P 122. But this legal system, the authors concede, may be fortuitous and is therefore of little importance (McClean and Beevers (2009: 387)).

176 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680. See McClean and Beevers (2009: 387). Also see the discussion of the *dicta* in *The Bodley Head Ltd v Flegon* (*supra*: 689) in par 3.2.1.1.1.8.

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

3.2.1.1.2.11 O'Brien

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

The putative proper law may also find application. The author describes this legal system as "that which would be the applicable law of the contract if the capacity issue is determined affirmatively"¹⁸¹ or "that which would be the applicable law if the contract was not affected by the incapacity".¹⁸² The proper law can, however, be chosen by the parties. This would enable the stronger contractant to specify a law which may remove the protection which the vulnerable counterpart might have enjoyed. The most viable option, the author continues, is the putative proper law in the objective sense, notwithstanding its shortcoming,¹⁸³ as it avoids both accident¹⁸⁴ and machination.¹⁸⁵

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

177 McClean and Beevers (2009: 388). This view is similar to Dicey, Morris and Collins' Rule 209 (Collins *et al* (eds) (2006b)), but the authors do not refer to this source.

178 as in *Male v Roberts* (1800) 3 ESP 163, according to the author.

179 O'Brien (1999: 318).

180 O'Brien (1999: 319).

181 O'Brien (1999: 318).

182 O'Brien (1999: 319).

183 Namely, that it does not ensure the protection of the vulnerable contractant as a reference to his or her personal law might have.

184 Here the author probably refers to the application of the *lex loci contractus*.

185 O'Brien (1999: 319). Here the author probably refers to the application of the *lex domicilii*.

186 O'Brien (1999: 551).

187 [1909] 2 Ch 129. See the text at notes 70-73.

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

3.2.1.1.2.12 Summary

In summary, some English authors expressly reject the general application of the *lex domicilii* to contractual capacity¹⁸⁹ while others reject its exclusive application.¹⁹⁰ Authors such as Carter,¹⁹¹ Collier,¹⁹² Dicey, Morris and Collins,¹⁹³ Hill and Chong,¹⁹⁴ McClean and Beevers¹⁹⁵ and O'Brien¹⁹⁶ reject the application of the *lex loci contractus* in general. Fawcett and Carruthers,¹⁹⁷ on the other hand, only reject the exclusive application of this legal system. Dicey, Morris and Collins¹⁹⁸ add the *lex loci contractus* to the objective proper law and the personal law (law of domicile and habitual residence), for the scenario that the parties were present in the same country at the time of the conclusion of the contract. However, the *lex loci contractus* is not applicable if fault was present on the part of the contract assessor in that he or she was aware of the incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence.¹⁹⁹ Clarence Smith²⁰⁰ is of the opinion that the *lex loci contractus* should only be applicable (that is: in addition to the *lex domicilii*) if no fault was present on the part of the contract assessor in that he or she did not know and could not reasonably be expected to know that the counterpart was incapable according to his or her *lex domicilii*.²⁰¹

In as far as the proper law of contract plays a role in contractual capacity, a number of authors reject the application of this legal system subjectively ascertained.²⁰² Collier²⁰³ would consider the subjective proper law,²⁰⁴ provided that it is not chosen in order to confer capacity. There is some support

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

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

191 Carter (1987: 25).

192 Collier (2001: 209).

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

194 Hill and Chong (2010: 550).

195 McClean and Beevers (2009: 386).

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

197 Fawcett and Carruthers (2008: 751).

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

199 *ibid.*

200 Clarence Smith (1952: 470).

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

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

203 Collier (2001: 209-210).

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

for the proper law of contract objectively ascertained.²⁰⁵ Most of the authors, however, refer to the more technically correct putative objective proper law of the contract.²⁰⁶ Fawcett, Harris and Bridge²⁰⁷ expressly reject the exclusive application of the proper law in general while O'Brien²⁰⁸ rejects the application of the putative proper law subjectively determined.

In respect of these English authors that indeed support a specific proposal with regard to contractual capacity in private international law,²⁰⁹ the majority seems in favour of the alternative reference rule advocated by Dicey, Morris and Collins. According to the authors, contractual capacity should be governed by the objective proper law of the contract or the *lex domicilii* and the law of residence.²¹⁰ Authors such as Clarkson and Hill,²¹¹ Hill and Chong²¹² and McClean and Beevers²¹³ clearly support this proposal while Carter,²¹⁴ Collier²¹⁵ and Fawcett, Harris and Bridge²¹⁶ acknowledge its tenability but refrain from expressing support.

In respect of contractual capacity in as far as immovable property is concerned, Briggs,²¹⁷ Clarence Smith,²¹⁸ Collier,²¹⁹ and Dicey, Morris and Collins²²⁰ express support for the application of the *lex situs*.²²¹ Clarkson and Hill²²² and O'Brien²²³ agree with this view only in respect of local immovable

205 Carter (1987: 24); Clarkson and Hill (2011: 250); and Collins *et al* (eds) (2012b: 1869).

206 Collier (2001: 209-210); Hill and Chong (2010: 551); McClean and Beevers (2009: 386); and O'Brien (1999: 319).

207 Fawcett, Harris and Bridge (2005: 658).

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

209 Fawcett and Carruthers (2008), as well as Fawcett, Harris and Bridge (2005), do not express clear support for any of the legal systems to govern capacity.

210 Collins *et al* (eds) (2012b: 1865 (Rule 228)).

211 Clarkson and Hill (2011: 250).

212 Hill and Chong (2010: 550).

213 McClean and Beevers (2009: 388).

214 Carter (1987: 24).

215 Collier (2001: 210).

216 Fawcett, Harris and Bridge (2005: 658). Also see their critique against this rule (at 658).

217 Briggs (2014: 583).

218 Clarence Smith (1952: 471).

219 Collier (2001: 267).

220 Collins *et al* (eds) (2012b: 1332-1333).

221 But see Cheng who maintains that, while popular opinion favours the application of the *lex situs* to contractual capacity in respect of immovable property, this issue should be governed by the *lex domicilii* (1916: 75-82 and 128).

222 Clarkson and Hill (2011: 474).

223 O'Brien (1999: 551).

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

3.2.1.2 Scotland

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

3.2.1.2.1 The courts

3.2.1.2.1.1 Introduction

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

3.2.1.2.1.2 *McFeetridge v Stewarts & Lloyds Ltd*²²⁷

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

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

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

225 Anton and Beaumont (1990: 276).

226 1913 SC 773.

227 *ibid.*

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

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

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

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

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

3.2.1.2.1.3 *Obers v Paton's Trustees*²³¹

In a non-commercial context, the Scottish courts may apply the *lex domicilii* to capacity.²³² In this regard, Anton and Beaumont²³³ discuss the decision in *Obers v Paton's Trustees*.²³⁴

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

228 *McFeetridge v Stewarts & Lloyds Ltd* (*supra*: 789).

229 *ibid.*

230 Anton and Beaumont (1990: 277-278).

231 (1897) 24 R 719. Also see *De Virte v MacLeod* (1869) 6 SLR 236, where the *lex domicilii* was applied.

232 Anton and Beaumont (1990: 278-279).

233 Anton and Beaumont (1990: 278).

234 *Obers v Paton's Trustees* (*supra*).

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

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

3.2.1.2.1.4 Summary

In summary, as illustrated in the prominent Scottish decisions, the courts seem inclined to apply the *lex loci contractus* to capacity in mercantile (commercial) contracts²³⁸ and the *lex domicilii* in respect of non-mercantile (non-commercial) contracts.²³⁹

3.2.1.2.2 The authors

3.2.1.2.2.1 Anton and Beaumont

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

235 In Scots law this related to a child's legal share of his or her parents' moveable property on their death. See note 21 for an explanation. See <http://www.scan.org.uk/index.html>.

236 *Obers v Paton's Trustees* (*supra*: 350).

237 *Obers v Paton's Trustees* (*supra*: 352).

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

239 See *De Virte v MacLeod* (1869) 6 SLR 236; and *Obers v Paton's Trustees* (1897) 24 R 719.

240 Anton and Beaumont (1990: 276). Also see Beaumont and McEavey (2011: 491).

241 They refer to Collins *et al* (eds) (1987: 1203); and North and Fawcett (1987: 481).

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

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

3.2.1.2.2.2 *Crawford and Carruthers*

These authors do not expressly support any of the available legal systems but seem to endorse Cheshire's suggestions during his David Murray lecture in 1948.²⁴⁴ These suggestions were two-fold: first, a contract is not void due to incapacity if the contractants are capable in terms of the putative proper law; and, secondly, a contractant incapable according to the putative proper law should not be allowed to rely on his or her incapacity if he or she possesses capacity in terms of the *lex domicilii*. The putative proper law referred to here should be objectively ascertained because parties cannot confer capacity on themselves by merely selecting an unconnected law.²⁴⁵

3.2.1.2.2.3 *Summary*

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

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

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

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

245 Crawford and Carruthers (2006: 437).

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

247 Anton and Beaumont (1990: 278).

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

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

3.3 AUSTRALASIA

3.3.1 Australia

3.3.1.1 Introduction

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

3.3.1.2 The courts

3.3.1.2.1 Introduction

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

3.3.1.2.2 *Gregg v Perpetual Trustee Company*²⁵⁴

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

249 Crawford and Carruthers (2006: 437), as per Cheshire's view (Cheshire (1948)).

250 Anton and Beaumont (1990: 437). Also see Beaumont and McEavey (2011: 491) and Crawford and Carruthers (2006: 437).

251 Davies, Bell and Brereton (2010: 406-407); Nygh (1991: 279); Sykes and Pryles (1991: 614); Tilbury, Davis and Opeskin (2002: 768); and the Australian Law Reform Commission (1992: 100).

252 (1918) 18 SR (NSW) 252.

253 (1996) 20 ACSR 67.

254 (1918) 18 SR (NSW) 252.

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

3.3.1.2.3 *Homestake Gold of Australia v Peninsula Gold Pty Ltd*²⁶¹

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

255 The Act entered into force on 1 January 1891 and the Smiths were married on 31 January 1895.

256 [1895] 1 Ch 83.

257 [1901] 2 IR 232.

258 *Gregg v Perpetual Trust Company* (*supra*: 256).

259 *ibid.*

260 *ibid.*

261 (1996) 20 ACSR 67.

262 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*: 1).

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

Young J approached the matter from a private international law perspective as the minors were domiciled in Australia, New Zealand and the United Kingdom. He held that the issue of capacity pertains to the domain of the substantive validity of a contract because it determines whether enforceable rights and obligations are to flow from an agreement between contractants. In rejecting the application of the *lex domicilii*, the judge cited the Canadian author McLeod, who submits that the application of the *lex domicilii* is unsatisfactory in modern commerce and should thus be abandoned.²⁶³ The *lex loci contractus*, according to Young J, should also be disregarded because this legal system was only applied in cases involving negotiable instruments²⁶⁴ or marriage contracts.²⁶⁵ Although he mentioned Dicey and Morris' Rule 181²⁶⁶ (the predecessor of Rule 228(1) of Dicey, Morris and Collins),²⁶⁷ that an individual's contractual capacity is governed by either the proper law or the law of domicile and residence, the court found the most compelling approach to be that advocated by Cheshire and North²⁶⁸ – that contractual capacity in a commercial context should be regulated by the proper law of the contract objectively ascertained. Indeed, this legal system was applied by the Ontario Court of Appeal in *Charron v Montreal Trust Co*²⁶⁹ and later by Brightman J in *The Bodley Head Limited v Flegon*.²⁷⁰ The objective putative proper law, Young J added, is also favoured by modern Australian authors such as Nygh²⁷¹ and Sykes and Pryles,²⁷² as well as by the Canadian conflicts author, McLeod.²⁷³ As a result, he arrived at the conclusion that contractual capacity is to be governed by the objectively ascertained proper law of the contract. He stated: "I believe I should follow the *Charron* case and apply the proper law of contract."²⁷⁴

263 McLeod (1983: 491).

264 as in *Bondholders Securities Corporation v Manville* (*supra*).

265 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (*supra*: 8).

266 Collins *et al* (eds) (1993: 1271).

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

268 North and Fawcett (1992: 511).

269 (1958) 15 DLR (2d) 240 (Ontario) at 240.

270 [1927] 1 KB 669 (CA) at 680.

271 Nygh (1995: 303).

272 Sykes and Pryles (1991: 614). However, these authors, of course, support the objective and subjective proper law – see paragraph 3.3.1.3.4.

273 McLeod (1983: 490-492).

274 *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (*supra*: 8).

Sychold,²⁷⁵ however, is of the opinion that *Charron v Montreal Trust Co*,²⁷⁶ on which Young J heavily relies, is not strong authority, as the court simply assumed that the problem (namely, that separation agreements between spouses were invalid in Quebec at the time) was one of capacity rather than invalidity due to public policy. In addition, the proper law *in casu* was also the *lex fori* and the Ontarian Court of Appeal was clearly reluctant to apply the civil-law rules of Quebec (the law of Quebec was the *lex domicilii*). According to the author, the court in the *Charron* case²⁷⁷ arbitrarily decided to apply the proper law to capacity as a matter of policy, as advocated by English commentators, instead of following English case law on marital property settlements (where the *lex domicilii* was always applied). Sychold submits that there remains considerable scope for the application of the *lex domicilii* to contractual capacity, particularly in non-commercial contracts in Australian private international law.²⁷⁸

3.3.1.2.4 Summary

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

3.3.1.3 The authors including the Australian Law Reform Commission

3.3.1.3.1 Davies, Bell and Brereton

According to these authors, contractual capacity should be governed by the proper law of the contract. This approach was, according to them, correctly adopted in a Canadian,²⁷⁹ an English²⁸⁰ and an Australian²⁸¹ case.²⁸² One question remains, however: could an incapable contractant acquire capacity by selecting an appropriate law? In other words, is the proper law referred to objectively determined or could it also be subjectively ascertained? The authors are undecided on this issue. They refer to Dicey, Morris and Collins' Rule 209(1)²⁸³ (the predecessor of Rule 228(1) of Dicey, Morris and Collins),²⁸⁴ who suggest that capacity should be governed by the proper law of the contract objectively ascertained,²⁸⁵ in contrast to Sykes and Pryles' approach that a choice by the contractants should be given effect to – the

275 Sychold (2007: par 184).

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

277 *ibid.*

278 Sychold (2007: par 184).

279 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario).

280 *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680.

281 *Homestake Gold of Australia Ltd v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67.

282 Davies, Bell and Brereton (2010: 406-407).

283 Collins *et al* (eds) (2006b: 1621).

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

285 Davies, Bell and Brereton (2010: 407).

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

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

3.3.1.3.2 *Mortensen*

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

3.3.1.3.3 *Sychold*

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

286 Sykes and Pryles (1991: 614), referred to by Davies, Bell and Brereton (2010: 407).

287 The Australian Law Reform Commission (1992: 101), referred to by Davies, Bell and Brereton (2010: 407).

288 Davies, Bell and Brereton (2010: 669).

289 [1909] 2 Ch 129.

290 Davies, Bell and Brereton (2010: 407).

291 Mortensen (2006: 403).

292 Mortensen (2006: 404).

293 Mortensen (2006: 460).

294 Sychold (2007: par 185).

295 *ibid.*

3.3.1.3.4 Sykes and Pryles

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

In respect of non-matrimonial contracts, the proper law of the contract should apply, although there is common-law authority favouring the *lex loci contractus*, namely *Male v Roberts*.²⁹⁷ At the time of this decision, the authors submit, there was a strong presumption that the *lex loci contractus* was indeed the proper law of the contract. The case is therefore consistent with the view that the proper law of the contract governs capacity.²⁹⁸ The authors also commend Dicey and Morris' Rule 182²⁹⁹ (the predecessor of Rule 228(1) of Dicey, Morris and Collins)³⁰⁰ that capacity should be governed by either the proper law of the contract or the personal law, which would mean that an individual shall possess capacity if he or she has such under either law.

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

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

296 Sykes and Pryles (1991: 344).

297 (1800) 3 ESP 163.

298 as decided in *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680 and *Charron v Montrael Trust Co* (1958) 15 DLR (2d) 240 (Ontario).

299 Collins *et al* (eds) (1987: 1161-1162).

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

301 Collins *et al* (eds) (1987: 1161-1162); and North and Fawcett (1987: 480).

302 Sykes and Pryles (1991: 614).

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

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

3.3.1.3.5 *Tilbury, Davis and Opeskin*

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

303 *ibid.*

304 Sykes and Pryles (1991: 614).

305 *ibid.*

306 Tilbury, Davis and Opeskin (2002: 768).

307 Tilbury, Davis and Opeskin (2002: 770).

308 as in *The Bodley Head Ltd v Flegon* [1972] 1 WLR 680, which is discussed in paragraph 3.2.1.1.1.8.

309 Tilbury, Davis and Opeskin (2002: 771).

3.3.1.3.6 *The Australian Law Reform Commission*

The commission partially supports Dicey and Morris' Rule 182,³¹⁰ the predecessor of Dicey, Morris and Collins' current Rule 228.³¹¹ In terms of the commission's interpretation of Rule 182, capacity according to the *lex domicilii*, the law of habitual residence or the proper law of the contract is sufficient to validate a contract. However, according to the commission, domicile is an inappropriate connecting factor in a commercial context. The place of residence of the incapable contractant is preferable.³¹² The commission is in favour of the application of the proper law of the contract, which may be subjectively or objectively determined. This view is based on Sykes and Pryles' contention³¹³ that there is no justification for differentiating between capacity and, for example, essential validity. Contractants may intentionally select the law of a country which upholds the validity of the contract, as opposed to the law of a country that does not. There seems to be no explanation as to why the selection of a legal system may be effective for the purposes of essential validity but not for the purposes of contractual capacity. The commission therefore recommends that capacity in terms of either the alleged incapable contractant's residence or the proper law of the contract should suffice for the validity of a contract.³¹⁴

3.3.1.3.7 *Summary*

All the Australian authors,³¹⁵ as well as the Australian Law Reform Commission,³¹⁶ are in favour of the application of the proper law of the contract to contractual capacity. Mortenson³¹⁷ employs the technically correct term of "putative proper law" in this regard. The authors have different opinions on how the proper law must be determined. Mortensen³¹⁸ and Tilbury, Davis and Opeskin³¹⁹ are of the opinion that the proper law must be objectively determined, but Sychold,³²⁰ Sykes and Pryles³²¹ and the Australian Law Reform Commission³²² would apply the legal system chosen by the parties (the proper law established subjectively) and, only in the absence of such a choice, the proper law objectively ascertained. Sykes and Pryles,³²³ however,

310 Collins *et al* (eds) (1987: Rule 182).

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

312 hence, partially supporting Dicey and Morris.

313 Sykes and Pryles (1991: 614) referring to North and Fawcett (1987: 480).

314 The Australian Law Reform Commission (1992: 101). Also see Tetley (1994: 237).

315 Davies, Bell and Brereton (2010: 407); Mortensen (2006: 404); Sychold (2007: par 185); Sykes and Pryles (1991: 614); and Tilbury, Davis and Opeskin (2002: 771).

316 The Australian Law Reform Commission (1992: 101).

317 Mortensen (2006: 404).

318 Mortensen (2006: 404).

319 Tilbury, Davis and Opeskin (2002: 771).

320 Sychold (2007: par 185).

321 Sykes and Pryles (1991: 614).

322 The Australian Law Reform Commission (1992: 101).

323 Sykes and Pryles (1991: 614).

require that a connected legal system be chosen. Davies, Bell and Brereton³²⁴ do not express an opinion on whether the proper law must be objectively or may also be subjectively determined. Sychold³²⁵ and the Australian Law Reform Commission³²⁶ would pair the proper law with the law of habitual residence in the context of an alternative reference rule. Sykes and Pryles,³²⁷ in commending the views of Dicey and Morris³²⁸ would possibly add both the law of habitual residence and the *lex domicilii* to the application of the proper law. None of the Australian authors are in favour of the application of the *lex loci contractus*.

Davies, Bell and Brereton³²⁹ and Mortensen³³⁰ favour the application of the *lex situs* in respect of immovable property. Sykes and Pryles,³³¹ on the other hand, reject the application of the *lex situs* in respect of immovables in favour of the subjective or objective proper law of the contract, possibly in addition to the *lex domicilii* and the law of habitual residence. As the other authors³³² and the Australian Law Reform Commission³³³ do not distinguish between contracts in respect of immovable property and other contracts, they probably also favour the application of the proper law in this regard (whether objectively or also subjectively determined, and whether or not linked to the other alternatively applicable legal systems).

3.3.2 New Zealand

There is no case law from New Zealand dealing specifically with contractual capacity. According to Angelo,³³⁴ capacity will be governed by the law of domicile. The content of domicile is, of course, determined in accordance with the *lex fori*. The author partially cites Rule 209 of Dicey, Morris and Collins³³⁵ (the predecessor of Rule 228(1) of Dicey, Morris and Collins)³³⁶ to the effect that capacity according to the proper law may also be sufficient for the existence of a contract. This implies that there may be scope for the application of the proper law to capacity in the New Zealand context.

324 Davies, Bell and Brereton (2010: 407).

325 Sychold (2007: par 185).

326 The Australian Law Reform Commission (1992: 101).

327 Sykes and Pryles (1991).

328 Collins *et al* (eds) (1987: 1161-1162).

329 Davies, Bell and Brereton (2010: 669).

330 Mortensen (2006: 460).

331 Sykes and Pryles (1991: 618).

332 Sychold (2007); and Tilbury, Davis and Opeskin (2002).

333 The Australian Law Reform Commission (1992).

334 Angelo (2012: par 75).

335 Collins *et al* (eds) (2006b: 1621).

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

3.4 NORTH AMERICA

3.4.1 Canada (the common-law provinces)

3.4.1.1 *The courts*

3.4.1.1.1 *Charron v Montreal Trust Co*³³⁷

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

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

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

337 (1958) 15 DLR (2d) 240 (Ontario).

338 *ibid.*

339 The court also held that the law of Quebec was not applicable to the separation agreement.

340 *Charron v Montreal Trust Co* (*supra*: 244).

341 *ibid.*

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

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

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

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

3.4.1.2 *The authors*

3.4.1.2.1 *Pitel and Rafferty*

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

342 *ibid.*

343 The court referred to: Cheshire (1957: 221-224); Falconbridge (1954: 383-385); and Morris *et al* (eds) (1958: 769-774).

344 There is a spelling error in the original text; it reads: Ontaario.

345 *Charron v Montreal Trust Co* (*supra*: 244-245).

346 *Charron v Montreal Trust Co* (*supra*: 245).

347 Rafferty *et al* (2010: 756).

348 Pitel and Rafferty (2010: 281).

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

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

3.4.1.2.2 Walker

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

349 *ibid.*

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

351 Pitel and Rafferty (2010: 326).

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

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

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

355 Walker (2005: § 31.4d).

356 Walker (2005/2014: § 31.5b).

357 Walker (2005/2014: 31.5b).

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

3.4.1.2.3 Summary

To summarise, the Canadian authors hold divergent views on contractual capacity. Pitel and Rafferty³⁵⁹ favour the putative proper law of contract, including an express choice of law if such choice was made *bona fide*, was legal and not inconsistent with public policy. They support the application of the *lex situs* to capacity with regard to contracts involving immovables in general, but in respect of foreign immovable property, the proper law shall govern.³⁶⁰ Walker³⁶¹ seems to reject the application of the *lex domicilii* and the *lex loci contractus* in a commercial context but has no objection against the application of the objectively determined proper law. She possibly, however, favours the *lex situs* in respect of contractual capacity concerning immovable property.³⁶²

3.4.2 United States of America

3.4.2.1 The courts

3.4.2.1.1 Introduction

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

3.4.2.1.2 *Milliken v Pratt*³⁶⁷

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

359 Pitel and Rafferty (2010: 281).

360 Pitel and Rafferty (2010: 326-327).

361 Walker (2005: § 31.4d).

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

363 Clarence Smith (1952: 446-471); Symeonides (2008b: 227-228); and Van Rooyen (1972: 119).

364 125 Mass 374 (1878).

365 245 US 412 (1918).

366 45 NE 737 (1897).

367 125 Mass 374 (1878). See the discussion by Cramton, Currie, Kay and Kramer (1993: 17-20); Hay, Weintraub and Borchers (2009: 493-496); Lowenfeld (2002: 14-17); Simson (2005: 24-27); Symeonides, Collins Perdue and Von Mehren (1998: 29-32); and Vernon, Weinberg, Reynolds and Richman (2003: 255-258).

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

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

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

3.4.2.1.3 *Union Trust Company v Grosman et al*³⁷¹

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

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

368 *Milliken v Pratt* (*supra*: 375).

369 *Milliken v Pratt* (*supra*: 376). See the commentary by Hay (1994: 196); Hay, Weintraub and Borchers (2009: 496); and Weintraub (2001: 441).

370 *Milliken v Pratt* (*supra*: 382). Also see McDougal, Felix and Whitten (2001: 495); and Scoles, Hay, Borchers and Symeonides (2000: 882).

371 245 US 412 (1918).

372 *Union Trust Company v Grosman et al* (*supra*: 416).

373 See McDougal, Felix and Whitten (2001: 495).

3.4.2.1.4 *Polson v Stewart*³⁷⁴

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

3.4.2.1.5 *Summary*

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

3.4.2.2 *Restatement (Second)*

The most important contemporary approach to private international law of contract in the United States is the Restatement (Second), as 23 states follow this approach.³⁷⁸ Five further states³⁷⁹ could be added to this total as these adhere to the “significant contacts approach”, which is highly comparable to that employed in the Restatement in that it also entails taking a variety of connecting factors into consideration. The discussion on choice-of-law methodology in the United States will therefore be limited to the Restatement. There is uncertainty on how precisely the states adhering to these approaches will resolve a particular contract conflict issue. In fact, the Restatement itself, and the courts that follow it, have been described as “equivocal” in designating the applicable law.³⁸⁰ Nevertheless, the Restatement remains a

374 45 NE 737 (1897).

375 125 Mass 374 (1878).

376 245 US 412 (1918).

377 45 NE 737 (1897).

378 Alaska; Arizona; Colorado; Connecticut; Delaware; Idaho; Illinois; Iowa; Kentucky; Maine; Michigan; Mississippi; Missouri; Montana; Nebraska; New Hampshire; Ohio; South Dakota; Texas; Utah; Vermont; Washington; and West Virginia. See Symeonides (2011: 331). See also Symeonides (2008b: 225). As far as the present author could determine, no distinction is drawn between international and interstate conflicts cases.

379 Arkansas; Indiana; Nevada; North Carolina; and Puerto Rico (the Puerto Rican *Projet* is discussed in Chapter 4). See Symeonides (2011: 32).

380 Symeonides (2008b: 225).

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

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

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

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

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

382 The American Law Institute (1971: VIII).

383 The American Law Institute (1971: 632).

384 *ibid.*

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

386 The American Law Institute (1971: 564).

387 § 187(2)(a).

388 § 187(2)(b).

389 See Symeonides (2008b: 228).

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

In the absence of such a choice, the proper law, in terms of paragraph 198(1), shall be determined with reference to § 188.³⁹³ According to § 188(1), the primarily applicable rule in this regard, the proper law of a contract shall be the law of the state that has the most significant relationship to the parties and the contract, having particular regard to the relevant factors enunciated in § 6.³⁹⁴ The connecting factors ("contacts"), in terms of the secondary statement, § 188(2), to be considered in applying the principles of § 6 to ascertain the proper law (which would be the same or similar in terms of the "significant contacts approach") include: the *locus contractus*; the place of negotiating the contract; the *locus solutionis*; the location of the subject matter of the contract; and the domicile, habitual residence, nationality, the place of incorporation and place of business of the contractants. The contacts will have to be evaluated according to their comparative importance with regard to the particular issue.³⁹⁵ Paragraph 198(1) therefore also provides for the application of the objectively determined proper law in the absence of a permissible subjectively determined *lex causae*.

390 The American Law Institute (1971: 565).

391 *ibid.*

392 *ibid.*

393 See the American Law Institute (1971: 575). Also see Symeonides (2008b: 228).

394 These factors include: "(a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied" (the American Law Institute (1971: 10)).

395 The American Law Institute (1971: 575).

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

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

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

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

396 The values of certainty, predictability and uniformity of result underlie the need for protecting the justified expectations of the parties. See the American Law Institute (1971: 576).

397 The American Law Institute (1971: 577).

398 *ibid.*

399 The American Law Institute (1971: 579).

400 The American Law Institute (1971: 580).

401 *ibid.*

402 The American Law Institute (1971: 580).

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

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

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

The proper law of the contract must be determined with reference to certain presumptions in § 189-197.⁴⁰⁷ For instance, contracts of sale of movable property (chattels) will usually be governed by the *lex loci solutionis* in respect of delivery.⁴⁰⁸

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

403 *ibid.*

404 except as otherwise stipulated in §§ 189-199 and 203. See the American Law Institute (1971: 575).

405 The American Law Institute (1971: 581).

406 The American Law Institute (1971: 581).

407 The American Law Institute (1971: 586-632).

408 § 191, discussed by the American Law Institute (1971: 594-600).

409 See Born (1996: 673). Also see Symeonides (2008b: 228).

410 The American Law Institute (1971: 632).

411 *ibid.*

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

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

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

412 *ibid.*

413 The American Law Institute (1971: 634).

414 See McDougal, Felix and Whitten (2001: 579). Although the rule concerns "validity", its scope is broad as it applies to such issues "as whether a married woman has capacity to sell or lease her interests in land" (the American law Institute (1971: 587)).

415 The American Law Institute (1971: 588).

416 *ibid.*

417 See the text at note 405.

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

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

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

3.5 THE FAR EAST

3.5.1 India

3.5.1.1 Introduction

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

3.5.1.2 The courts

3.5.1.2.1 Early case law

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

418 The American Law Institute (1971: 588).

419 *ibid.*

420 Diwan and Diwan (1998: 523); and Agrawal and Gupta (2003: par 202).

421 Diwan and Diwan (1998: 523) assert that the *lex loci contractus* may also be seen as a possible governing legal system but they discard it because of being "least justified on principle."

422 ILR (1891) 19 Bom 697, as referred to by Agrawal and Gupta (2003: par 202) and Diwan and Diwan (1998: 523).

423 ILR (1902) 25 All 195, as referred to by Agrawal and Gupta (2003: par 202).

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

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

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

3.5.1.2.3 *Nachiappa Chettiar v Muthu Karuppan Chettiar*⁴³⁰

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

424 AIR 1933 Mad 756.

425 Berriedale Keith (ed) (1927: 599).

426 with reference to *Cooper v Cooper* (1888) 13 App Cass 88.

427 *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* (*supra*: par 24).

428 Although the incorrect reference is provided (namely: 1897), the court was clearly referring to *Sottomayer v De Barros (2)* (1879) 5 PD 94.

429 *ibid.*

430 AIR 1946 Mad 398.

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

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

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

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

3.5.1.2.5 *Summary*

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

431 *Nachiappa Chettiar v Muthu Karuppan Chettiar* (*supra*: par 32).

432 *Nachiappa Chettiar v Muthu Karuppan Chettiar* (*supra*: par 33).

433 [2005] 60 SCL 249 SC.

434 *Technip Sa v Sms Holding (Pvt) Ltd & Ors* (*supra*: 4).

435 *Kashibadin v Shripat* ILR (1891) 19 Bom 697; and *Lachmi v Fateh* ILR (1902) 25 All 195.

436 *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Husain and Ors* AIR 1933 Mad 756.

437 *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.

438 [2005] 60 SCL 249 SC.

3.5.1.3 The authors

3.5.1.3.1 Agrawal and Singh

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

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

3.5.1.3.2 Diwan and Diwan

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

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

439 Agrawal and Singh (2010: par 201).

440 Agrawal and Singh (2010: par 201A). Also see Agrawal and Gupta (2003: par 201).

441 with reference to *Kashibadin v Shripat* ILR (1891) 19 Bom 697.

442 with reference to *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756.

443 with reference to *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.

444 Agrawal and Singh (2010: par 202). Also see Agrawal and Gupta (2003: par 202).

445 Agrawal and Singh (2010: par 203). Also see Agrawal and Gupta (2003: par 203).

446 Agrawal and Singh (2010: par 203). Also see Diwan and Diwan (1998: 524); and Agrawal and Gupta (2003: par 203).

447 Diwan and Diwan (1998: 523), referring to Dicey and Morris (undated) 745. The authors are probably referring to Morris *et al* (eds) (1967).

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

The authors find the application of the proper law of the contract, objectively ascertained, the most appropriate approach. The proper law should not be subjectively determined as this would allow a contractant to confer capacity upon himself by merely choosing a favourable legal system.⁴⁴⁹ The authors concur with Dicey and Morris⁴⁵⁰ in this regard that the objective proper law would provide for situations where a contractant is incapable in terms of the *lex loci contractus* but capable according to the *lex loci solutionis*. The authors here refer to the common-law position, where the *lex loci solutionis* (the law of the country of the performance) was usually chosen as the proper law of the contract.⁴⁵¹ The objective proper law approach, of course, involves the application of the legal system which has the most substantial connection with the contract and application thereof would be “correct on principle and ... in accordance with justice and convenience”.⁴⁵²

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

3.5.1.3.3 Summary

The views held by the Indian authors are rather dissimilar. Diwan and Diwan⁴⁵⁴ expressly reject the (exclusive) application of both the *lex domicilii* and the *lex loci contractus* to contractual capacity but support the objective proper law of the contract.⁴⁵⁵ According to these authors, it is settled Indian law that the *lex situs* shall govern capacity in respect of contracts relating to immovable property.⁴⁵⁶ Agrawal and Singh,⁴⁵⁷ on the other hand, distinguish between non-commercial and commercial contracts. Capacity in respect of non-commercial contracts should be governed by the putative proper law. When this contract relates to immovable property, the *lex situs*

448 Diwan and Diwan (1998: 524), referring to Morris (1967: 744).

449 Diwan and Diwan (1998: 524).

450 Morris *et al* (eds) (1967: 745).

451 For the position in South African law today, see Chapter 2, paragraph 2.2.

452 Diwan and Diwan (1998: 524).

453 Diwan and Diwan (1998: 407). The authors add that, therefore, if an individual is incapable in terms of the law of the country where the property is situated then any conveyance of such property anywhere in the world would be invalid. But conveyance will of course never be done in a country other than the *situs*. The statement may, however, be applicable to a foreign court order in this regard.

454 Diwan and Diwan (1998: 523-524).

455 Diwan and Diwan (1998: 524).

456 Diwan and Diwan (1998: 407).

457 Agrawal and Singh (2010: par 201).

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

3.5.2 Malaysia

3.5.2.1 Introduction

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

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

3.5.2.2 The authors

3.5.2.2.1 Hickling and Wu

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

It does seem, however, that the authors in final instance support the approach enunciated in Dicey and Morris' Rule 147⁴⁶⁴ (the predecessor of Rule 228 by Dicey, Morris and Collins)⁴⁶⁵ that a contractant should be regarded as having capacity if he is capable in terms of the proper law of the contract, the *lex domicilii* or the law of residence. This view is "liberal and realistic".⁴⁶⁶ The authors also refer to Canadian case law,⁴⁶⁷ where the proper law of the contract was applied to capacity.⁴⁶⁸

458 *ibid.*

459 Agrawal and Singh (2010: par 203).

460 Hickling and Wu (1995: 170-171).

461 Hickling and Wu (1995) do not refer to any cases decided by the Malaysian courts.

462 Hickling and Wu (1995: 170-171).

463 Hickling and Wu (1995: 170-171) with reference to the early English cases *Male v Roberts* (1800) 3 ESP 163 and *Schmidt & Ors v Spahn* (1863) Leic 229.

464 Collins *et al* (eds) (1980: 778).

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

466 Hickling and Wu (1995: 171).

467 *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario).

468 They also refer to the American decision in *Milliken v Pratt* 125 Mass 374 (1878). However, in the discussion above (see par 3.4.2.1.2), it was illustrated that the court applied the *lex loci contractus* to the issue of capacity.

3.5.3 Singapore

3.5.3.1 Introduction

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

3.5.3.2 The authors

3.5.3.2.1 Tan

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

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

In the final instance, the author supports the approach advocated by Dicey and Morris in Rule 182⁴⁷³ (now Rule 228 of Dicey, Morris and Collins),⁴⁷⁴ which he refers to as “the alternative reference test”, namely that an individual shall have capacity if he is capable in terms of the (putative) proper law (as objectively determined), the *lex domicilii* or the law of habitual residence.⁴⁷⁵

469 Tan (1993: 471) does not refer to any decisions of the courts of Singapore.

470 Tan (1993: 471).

471 *ibid.*

472 *ibid.*

473 Collins *et al* (eds) (1987: 1202-1207).

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

475 Tan (1993: 472).

3.6 AFRICA⁴⁷⁶

3.6.1 Ghana

Oppong⁴⁷⁷ argues that the proper law should govern contractual capacity in Ghanaian private international law.⁴⁷⁸ The application of the *lex domicilii*, the *lex loci solutionis* or the *lex loci actus* may lead to arbitrary results. He states: "The most closely connected test takes account of all connecting factors. It is more likely to lead to an outcome consistent with the expectations of the parties."⁴⁷⁹ He argues that, although the courts should take account of the choice of law clause in the contract, "it should not be allowed to prevail or exclusively govern the issue of capacity to contract. Allowing choice of law agreements to supersede other connecting factors would enable parties to evade limitations imposed on them by national laws."⁴⁸⁰ It seems that the objectively determined proper law usually has priority over the subjectively determined proper law if they do not coincide, but it remains unclear when account must nevertheless be taken of a choice of law clause in these circumstances.

3.6.2 Nigeria

No reported Nigerian decisions could be found specifically addressing the law applicable to contractual capacity. The Nigerian conflicts author, Agbede, has expressed some views on the issue.⁴⁸¹ He draws a distinction between non-commercial and commercial contracts. He submits that in the case of the former the *lex domicilii* should apply⁴⁸² but in the case of the latter, the proper law of the contract.⁴⁸³ It is settled law in Nigeria, he continues, that the contractual capacity for the disposition of interests in immovable property, either *inter vivos* or *mortis causae*, is governed by the *lex rei sitae*.⁴⁸⁴

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

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

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

⁴⁷⁹ Oppong (2012: par 94).

⁴⁸⁰ *ibid.*

⁴⁸¹ Agbede (2004: par 73).

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

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

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

3.7 SUMMARY

In the case law from the common-law countries, as discussed, support may be found for the *lex domicilii*,⁴⁸⁵ the *lex loci contractus*⁴⁸⁶ and the objective proper law of the contract⁴⁸⁷ to govern contractual capacity. In respect of immovable property, the *lex situs*⁴⁸⁸ and the *lex domicilii*⁴⁸⁹ are applied. It is apparent that the courts do not draw a clear distinction between commercial and non-commercial matters. For instance, although the *lex domicilii* was applied predominantly in non-commercial matters,⁴⁹⁰ there are also two decisions concerning commercial issues where the *lex domicilii* was held to govern capacity,⁴⁹¹ as well as an *obiter dictum* of the Indian Supreme Court in this regard.⁴⁹² Also, although the *lex loci contractus* predominantly featured in cases concerning commercial contracts,⁴⁹³ it was applied in one decision of the English Probate Division which concerned a non-commercial matter.⁴⁹⁴ The proper law of the contract (objectively ascertained) was applied in commercial⁴⁹⁵ and non-commercial contexts.⁴⁹⁶ There is one English decision where the court refrained from indicating the law applicable to capacity in a commercial context.⁴⁹⁷

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is a difference of opinion amongst the authors as to whether the proper law of the contract must be determined objectively or whether a choice of law should be taken into account. Authors as Carter,⁵⁰⁷ Clarkson and Hill,⁵⁰⁸ Crawford and Carruthers,⁵⁰⁹ Dicey, Morris and Collins,⁵¹⁰ Diwan and Diwan,⁵¹¹ Hill and Chong,⁵¹² McClean and Beavers,⁵¹³ Tilbury, Davis and Opeskin,⁵¹⁴ and Walker⁵¹⁵ are of the opinion that the proper law must be determined objectively. Sychold⁵¹⁶ and the Australian Law Reform Commission⁵¹⁷ would apply the proper law either subjectively or objectively determined. This is also the position under the Restatement (Second).⁵¹⁸ According to Collier,⁵¹⁹ a choice of law may be taken into account if it was not made

498 See for example Collier (2001: 209-210).

499 Agrawal and Singh (2010: par 201) in respect of non-commercial contracts.

500 Collier (2001: 209-210).

501 Crawford and Carruthers (2006: 437).

502 Hill and Chong (2010: 551).

503 Mortensen (2006: 404).

504 O’Brien (1999: 319).

505 Pitel and Rafferty (2010: 281).

506 Tan (1993: 472).

507 Carter (1987: 24).

508 Clarkson and Hill (2011: 250).

509 Crawford and Carruthers (2006: 437).

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

511 Diwan and Diwan (1998: 524).

512 Hill and Chong (2010: 551).

513 McClean and Beevers (2009: 386).

514 Tilbury, Davis and Opeskin (2002: 771).

515 Walker (2005/2014: § 31.5b).

516 Sychold (2007: par 185).

517 The Australian Law Reform Commission (1992: 101).

518 The American Law Institute (1971: § 187 and § 188).

519 Collier (2001: 209-210).

in order to confer capacity. Pitel and Rafferty⁵²⁰ are of the opinion that only an express choice of law may be taken into account; the choice of law must also be *bona fide*, legal and not in contravention of public policy.⁵²¹ According to Sykes and Pryles,⁵²² the parties are only allowed to choose the law of a connected state. Oppong⁵²³ states that a choice of law must be taken into consideration but should not prevail or apply to the matter exclusively.

Various authors favour the sole application of the proper law to contractual capacity (at least as far as commercial contracts are concerned); they include Agbede,⁵²⁴ Davies, Bell and Brereton,⁵²⁵ Diwan and Diwan,⁵²⁶ Mortensen,⁵²⁷ O'Brien,⁵²⁸ Oppong,⁵²⁹ Pitel and Rafferty,⁵³⁰ and Tilbury, Davis and Ope-skin.⁵³¹ However, more writers would apply the proper law as part of an alternative reference rule. A combination of the proper law and the law of domicile is advocated by Carter,⁵³² Clarkson and Hill⁵³³ and Crawford and Carruthers.⁵³⁴ This is also the position in the Restatement (Second).⁵³⁵ Sychold⁵³⁶ and the Australian Law Reform Commission⁵³⁷ favour the application of the proper law together with the law of habitual residence. Dickey, Morris and Collins⁵³⁸ are of the opinion that the proper law should be applied together with "the law of domicile and residence" ("the personal law"). It is not clear whether a person has to be domiciled and resident in the same country for the personal law to apply or whether the law of domicile and the law of residence are both applicable legal systems. The proposal by the authors is nevertheless subscribed to by authors as Hill and Chong,⁵³⁹

520 Pitel and Rafferty (2010: 281).

521 Briggs, who supports the subjective proper law of the contract, similarly asserts that it could be excluded on the basis of public policy (Briggs (2014: 583, 596, 615-616 and 948-949)).

522 Sykes and Pryles (1991: 614).

523 Oppong (2012: par 94).

524 Agbede (2004: par 74).

525 Davies, Bell and Brereton (2010: 407).

526 Diwan and Diwan (1998: 524).

527 Mortensen (2006: 404).

528 O'Brien (1999: 319).

529 Oppong (2012: par 94).

530 Pitel and Rafferty (2010: 281).

531 Tilbury, Davis and Ope-skin (2002: 771).

532 Carter (1987: 24).

533 Clarkson and Hill (2011: 250).

534 Crawford and Carruthers (2006: 437). Cf Angelo (2012: par 75); and Collier (2001: 209-210).

535 The American Law Institute (1971: § 198(2), § 187 and § 188).

536 Sychold (2007: par 185).

537 The Australian Law Reform Commission (1992: 101).

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

539 Hill and Chong (2010: 551).

and McClean and Beevers,⁵⁴⁰ Hickling and Wu⁵⁴¹ and Tan⁵⁴² are in favour of the simultaneous application of the proper law, the law of domicile and the law of habitual residence.

Anton and Beaumont⁵⁴³ and Agrawal and Singh⁵⁴⁴ would apply the *lex loci contractus* as the sole applicable legal system in respect of ordinary commercial contracts.⁵⁴⁵ Dicey, Morris and Collins⁵⁴⁶ and Clarence Smith⁵⁴⁷ add the *lex loci contractus* as an applicable legal system in specific circumstances. According to Dicey, Morris and Collins, this legal system must apply in the alternative (together with the proper law and the law of domicile and residence) if both parties were in the same country at the time of conclusion of the contract, unless fault was present on the part of the contract-assertor in that he or she was aware of the incapacity in terms of the proper law or the law of domicile and residence, or was not aware thereof as a result of negligence. Clarence Smith is of the opinion that the *lex loci contractus* should only be applied in the alternative (that is: in addition to the *lex domicilii*) if no fault was present on the part of the contract-assertor in that he or she did not know and could not reasonably be expected to know that the counterpart was incapable according to his or her *lex domicilii*.⁵⁴⁸

In respect of contractual capacity relating to immovable property, considerable support exists for the application of the *lex situs*.⁵⁴⁹ Clarkson and Hill,⁵⁵⁰ O'Brien⁵⁵¹ and Pitel and Rafferty⁵⁵² draw a distinction between local and foreign immovable property. In the first mentioned scenario, the *lex situs*

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

541 Hickling and Wu (1995: 171).

542 Tan (1993: 472).

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

544 Agrawal and Singh (2010: par 203).

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

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

547 Clarence Smith (1952: 470).

548 Clarence Smith (1952: 470).

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

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

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

552 Pitel and Rafferty (2010: 327).

must apply but the proper law of the contract⁵⁵³ should govern capacity in respect of foreign immovables. Sykes and Pryles⁵⁵⁴ reject the *lex situs*, as they prefer the application of the proper law (subjectively or objectively determined) to govern capacity in this context. The American Law Institute follows a dissimilar approach. In terms of the Restatement (Second), capacity in respect of contracts involving immovables is governed by the subjectively and objectively determined proper law,⁵⁵⁵ the *lex domicilii*⁵⁵⁶ as well as the *lex situs*, unless it is clear that the contract should rather be governed by another law, for instance, on the basis of public policy.⁵⁵⁷ Many of the authors,⁵⁵⁸ as well as the Australian Law Reform Commission,⁵⁵⁹ do not make a distinction between contracts in respect of immovables and other contracts. They are therefore presumably of the opinion that the general arrangement with regard to contractual capacity should also apply in respect of immovable property.

553 which may or may not also be the *lex situs*: see Clarkson and Hill (2011: 474-476).

554 Sykes and Pryles (1991: 618).

555 The American Law Institute (1971: § 198(1)).

556 The American Law Institute (1971: § 198(2)).

557 The American Law Institute (1971: § 189).

558 Angelo (2012); Carter (1987); Crawford and Carruthers (2006); Hickling and Wu (1995); Hill and Chong (2010); McClean and Beevers (2009); Oppong (2012); Sychold (2007); and Tan (1993).

559 The Australian Law Reform Commission (1992).