Contractual capacity in private international law

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5 International, Supranational and Regional Instruments

5.1 Introduction

In this chapter, the provisions on contractual capacity in international, regional and supranational instruments will be examined. With regard to international instruments, the United Nations Convention on Contracts for the International Sale of Goods (CISG) (the Vienna Sales Convention) of 1980, the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (the Hague) of 1955 and the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 will be investigated. The Hague Principles on Choice of Law in International Commercial Contracts (2015)[1] will also be considered. In respect of regional and supranational instruments, regard will be had to the Convention on the Law Applicable to Contractual Obligations of 1980[2] (the Rome Convention) (a regional convention) and the Regulation on the Law Applicable to Contractual Obligations of 2008[3] (the Rome I Regulation) (a supranational instrument).[4] Some attention will also be devoted to the regional Inter-American conventions and the envisaged African instruments. Of course, if contractual capacity is excluded from the scope of these instruments, the domestic private international law rules of the forum will apply.

1 See www.hcch.net.

2 Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention).

3 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) ("the Rome I Regulation").

4 The Rome I Regulation is considered to be a supranational instrument, rather than regional, as it proceeds from an authority beyond any national government (see Anderson *et al* (2006: 1637 ("supranational")). The Rome Convention is a public international law treaty between states in the same region (Europe). Of course, both regional and supranational instruments are also international in nature as they apply in respect of more than one country.

5.2 International instruments

5.2.1 United Nations Convention on Contracts for the International Sale of Goods (Vienna) (1980) (CISG)

The CISG is mentioned here as it contains some provisions that are relevant to the conflict of laws,[5] although it is primarily a substantive-law convention.[6] The drafters of this international treaty recognised the fact that the conflict of laws remains relevant in a substantive-law context. The CISG refers to and utilises private international law to facilitate its functioning.[7] The relevant provision in the context of contractual capacity is contained in Article 4:

> "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
> (a) the validity of the contract or of any of its provisions or of any usage; …."

Since capacity relates to the validity of a contract, it is clear that Article 4 excludes any consideration of capacity from the ambit of the convention[8] and therefore defers to the arrangement in the applicable rules of private international law.

The other international, regional and supranational instruments to be discussed are all of a pure conflicts nature.

5.2.2 *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* (The Hague) (1955)

Contractual capacity is clearly excluded from the ambit of this Hague convention as Article 5 stipulates: "This Convention shall not apply to: (1) The capacity of the parties…."[9]

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5 See Articles 1(1)(b), 6, 7(2), 28 and 95 of the CISG. For a detailed discussion, see Wethmar-Lemmer (2010).

6 On the relationship between private international law and uniform private law, see Schaafsma (2014).

7 Wethmar-Lemmer (2010: 55).

8 See Kröll, Mistelis and Viscasillas (eds) (2011: 69); Schwenzer (ed) (2010: 49); and Schwenzer, Hachem and Kee (2012: 203). Also see Article 3.1.1 of the UNIDROIT Principles of International Commercial Contracts, which excludes capacity from the scope of its application (*cf* Vogenauer and Kleinheisterkamp (eds) (2009: 401-402)).

9 translation available at http://www.lexmercatoria.org.

5.2.3 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986)

The Hague Convention of 22 December 1986 has never entered into force. In any event, Article 5 expressly excludes capacity from the ambit of the convention: "The Convention does not determine the law applicable to: (a) the capacity of the parties or the consequences of nullity or invalidity of the contract resulting from the incapacity of a party…."[10]

5.2.4 Hague Principles on Choice of Law in International Commercial Contracts (2015)

The provision with regard to capacity is contained in Article 1(3)(a) of the Hague Principles. It clearly excludes capacity from its scope of application. Article 1(3) states: "These Principles do not address the law governing – (a) the capacity of natural persons;…."[11]

5.3 Regional and supranational instruments

5.3.1 Rome Convention[12] and Rome I Regulation[13]

Article 1(2)(a) of the Rome Convention states that the rules of the convention shall not apply to "questions involving the status or legal capacity of natural persons, without prejudice to Article 11". This means that contracting states must in principle apply their domestic private international law rules to the issue of contractual capacity.[14] Article 11, titled "Incapacity", may, however, be relevant in certain scenarios. It reads:

> "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

The Rome Convention has, for contracts concluded as from 17 December 2009, been replaced by the Rome I Regulation. Article 1(2)(a) excludes capacity from its scope in almost identical wording, besides now referring to Article 13 of the Regulation. Article 1(2)(a) provides that "questions involving the status or legal capacity of a natural person, without prejudice to Article 13" are excluded from the scope of the Regulation. Article 13 reads:

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10 available at http://www.hcch.net/index_en.php?act=conventions.text&cid=61&zoek=1986.
11 available at http://www.hcch.net.
12 See note 2.
13 See note 3.
14 The Giuliano-Lagarde Report (1980: *ad* Article 11)

> "In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence."

The wording is therefore identical to Article 11 of the Rome Convention, except that "another law" now reads "the law of another country" and the word "this" has been substituted with "that". The changes do not impact on the meaning of the provision.

The scenario envisaged in Article 11 and Article 13 entails the conclusion of a contract in a country where both parties are physically present. The Giuliano-Lagarde Report[15] and all the authors that were consulted in this regard agree that "the law of the presence of the parties" ("the law of that country") is merely another formulation of "the law of the country where the contract was concluded".[16] Article 11 and Article 13 therefore in effect determine that, if one of the parties to the contract, which was concluded between persons present in the same country at the time of contracting, lacks the contractual capacity in terms of the law or laws applicable to capacity according to the *lex fori*'s private international law,[17] but has such capacity in terms of the *lex loci contractus*, he or she may not invoke this incapacity unless the other par-

15 The Giuliano-Lagarde Report (1980: *ad* Article 11) (*cf* the Giuliano-Lagarde Report *ad* Article 9).

16 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Gaudemet-Tallon (2009: Fasc 552-15); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); and Vonken (2015: 5992). However, in exceptional circumstances the law of the physical presence of the parties and the *lex loci contractus* will not coincide. *Cf* Santa-Croce (2008: Fasc 552-60). The following example may be provided from the perspective of South African law. Natural person A (habitually resident in country X) concludes a contract with B while both parties are present in country Y. A made the offer and B accepted the offer, both by electronic means. In terms of Article 23 of the South African Electronic Communications and Transactions Act 25 of 2002, the contract is concluded in country X (unless A runs a business, in which case the contract will be held to be concluded in the usual place of business).

17 The phrase "another law" in Article 11 and "the law of another country" in Article 13 obviously refer to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law (see Briggs (2014: 583)), (but see Hill (2014: 68)). These may, for instance, be the *lex domicilii* (see Asser/Vonken (2013: 128); and Vonken (2015: 5992)), the *lex patriae* (see Vonken (2015: 5992)), the *lex loci contractus*, the *lex loci solutionis*, the *lex situs*, the *lex fori*, or the proper law of the contract in either a subjective or an objective sense (but see Symeonides (2014: 131 note 125: "In any event, the combined result of these two provisions [Article 1(2)(a) and Article 13] is that contractual capacity is *not* governed by the contractually chosen law."). It may in some countries be difficult to determine what the primary applicable systems are: see, for example, Anton and Beaumont (1990: 336) and Beaumont and McEleavy (2011: 491) on Scots law.

ty was aware of that incapacity at the time of the conclusion of the contract, or was not aware thereof as a result of negligence.

The articles do not distinguish between contracts in respect of immovable property and other contracts, including those involving movable property. The rule therefore applies to all forms of contracts, unless excluded from the scope of the instruments.

The articles provide for the application of the *lex loci contractus* in addition to the law applicable to capacity in terms of the *lex fori*'s private international law when certain requirements are fulfilled, namely, that the contractants were present in the same country at the moment of contracting and that the incapable party had capacity in terms of the *lex loci contractus* (which capacity he or she did not have in terms of the legal system primarily applicable to contractual capacity), unless the capable contractant was aware of the incapacity or was unaware thereof due to his or her negligence. The articles therefore have the same effect as the *Lizardi*[18] rule in French private international law (the application of the *lex loci contractus* in addition to the default legal system).[19] However, in terms of Articles 11 and 13, the contractants are merely required to have been in the same country at the moment of contracting for the *lex loci contractus* to be applied as an additional legal system, while in terms of the *Lizardi*[20] rule the contract in question must have been concluded in the forum state. Articles 11 and 13 are therefore more complete versions of the rule articulated in *Lizardi*, in that they also apply to contracts concluded abroad and as such have a broader scope of application.[21] On the other hand, both Articles 11 and 13 and the original *Lizardi* rule make provision for a fault-related exception to the application of the *lex loci contractus* by way of a three-step model, as identified in Chapter 4, paragraph 4.8.

The rule advanced in Articles 11 and 13 is not relevant when the *lex loci contractus* is in any event a primarily applicable legal system governing capac-

18 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

19 as discussed in Chapter 4, paragraph 4.8 (and also in Chapter 6, paragraph 6.2.5). See paragraph 4.2.7 on the question of whether the capable contractant must be a French national to be protected under the *Lizardi* rule in French private international law. Nationality plays no role under Article 11 of the Rome Convention and Article 13 of the Rome I Regulation: Gaudemet-Tallon (2009: Fasc 552-15).

20 *Lizardi v Chaize* (*supra*).

21 Asser/Vonken (2013: 128); Mayer and Heuzé (2010: 395-396); Niboyet and de Geouffre de la Pradelle (2009: 179-180). On the use of the terms "unilateral" and "bilateral" in this regard, see Chapter 4, paragraph 4.2.7.

ity in terms of the private international law of the forum.[22] When this is the position, the application of the *lex loci contractus* is not dependant on the fulfilment of certain conditions; it governs capacity in all instances. Fawcett and Carruthers correctly state: "[I]f a Contracting State to the Convention applies the law of the place of contracting to the issue of capacity under its traditional private international law rules, Article 11 will not operate."[23] For example, a matter concerning contractual capacity presents itself before a Slovenian court (where the Rome I Regulation is applicable). The court has to pronounce on whether a contractant lacking capacity in terms of his *lex patriae* but capable according to the *lex loci contractus* should be held liable on a contract concluded with a capable contractant. In Slovenian domestic private international law, a contractant lacking capacity in terms of the *lex patriae* will be regarded as capable if he or she would have capacity under the *lex loci contractus*.[24] The *lex patriae* and the *lex loci contractus* are thus applied to contractual capacity on an equal level.[25] The court should arrive at the conclusion that the contractant incapable under the *lex patriae* is liable on the contract as he possesses the necessary contractual capacity.[26] The provision in Article 13 of the Rome I Regulation, which provides for the additional application of the *lex loci contractus* in limited circumstances, is then, naturally, no longer relevant. Article 13 does not limit the application of the *lex loci contractus* prescribed in the forum's private international law but only limits the degree to which the incapable party may escape the application of the *lex loci contractus*. The same would *mutatis mutandis* apply when the *lex loci contractus* is a primarily applicable legal system in circumstances that are wider than these envisaged by Article 13 (Rome I Regulation).

Fawcett, Harris and Bridge correctly illustrate the operation of Article 11 (Rome Convention) / Article 13 (Rome I Regulation) in the context of a

22 Also see the Giuliano-Lagarde Report (1980: *ad* Article 11). However, the authors, in addition, suggest that countries which utilise the proper law ("the law governing the substance of the contract") as a primarily applicable legal system also do not require the rule in Article 11. It is suggested by the present author that this view is incorrect as the proper law and the *lex loci contractus* do not necessarily (and will often not) coincide. See the example in the next paragraph.

23 Fawcett and Carruthers (2008: 752).

24 Private International Law and Procedural Act (1999: Article 13(2)). Also see the discussion on Slovenian private international law in Chapter 4, paragraph 4.2.18.

25 One may also refer to Article 15, paragraph 2 of the Macedonian Private International Law Act (2007) which provides for the application of the *lex loci contractus* to contractual capacity, supplementing the *lex patria* (the primarily applicable legal system). However, from the available sources it is not clear in which cases the *lex patriae* is so supplemented. See, in general, Šarčević (2008: 441-458).

26 The same would apply in Turkey, should it be admitted as a member of the European Union, as the *lex patriae* and the *lex loci contractus* are also applied to contractual capacity on an equal level (Turkish Private International Law Code, Chapter 2, Article 9(1) and (2)).

case that could be heard in a court in the United Kingdom.[27] An 18-year-old Utopian (domiciled in Utopia) concludes a contract of sale with a Ruritanian (domiciled in Ruritania). The contract is concluded while the parties are in each other's physical presence in Ruritania. In terms of the contract, the Ruritanian seller is to complete delivery in Utopia and the buyer is to effect payment in Utopian currency. In terms of Utopian law, a buyer under 21 years of age lacks contractual capacity. In terms of Ruritanian law, 18 is the age of majority. The court subsequently holds that the proper law of the contract is Utopian law.[28] According to Dicey and Morris' Rule 179(1)[29] (the predecessor of Dicey, Morris and Collins' Rule 228),[30] the buyer would be capable if he has capacity in terms of any of the primary applicable legal systems, namely the *lex domicilii* or the proper law of the contract. Since in both instances the law referred to is that of Utopia, it follows (as default position) that the buyer lacks capacity. The Ruritanian sues the Utopian for specific performance and is met with the latter's defence that he lacked contractual capacity in terms of the common-law rules on capacity. As the requirements in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) are met (the Utopian would have had capacity in terms of the law of the country of the conclusion of the contract and the parties were in each other's presence at the moment of the conclusion of the contract), the *lex loci contractus* applies as an additional legal system. The Utopian must therefore be held to possess capacity and the contract, as a result, is valid. However, the Utopian will be able to invoke his common-law incapacity and successfully defend the action if he can prove that the Ruritanian was aware of the lack of capacity. Even if the Ruritanian was unaware of the incapacity, the Utopian will still be successful if he can prove that the seller was unaware of the Utopian's incapacity due to negligence. Of course, if the Utopian is able to prove fault in this regard, no contract between him or her and the Ruritanian came into existence.

Commentators on the Rome Convention and the Rome I Regulation regard Article 11 (Rome Convention) / Article 13 (Rome I Regulation) as a mechanism of protection. As set out in the Giuliano-Lagarde Report on Article

27 Fawcett, Harris and Bridge (2005: 658-659).

28 In terms of Article 4(1)(a) of the Rome I Regulation, the proper law of the contract would probably be the law of Ruritania as that is the law of the country where the seller has his or her habitual residence, unless the contract is manifestly closer connected to another legal system: see Article 4(3). Whether the law of Utopia or Ruritania would be the proper law of the contract, would depend on the relative weight of the provisions in Article 4(1)(a) and 4(3). A similar legal position prevailed under the Rome Convention. See Fredericks and Neels (2003a: 63-73); Fredericks and Neels (2003b: 207-227); Neels and Fredericks (2008a: 351-363); and Neels and Fredericks (2008b: 529-539).

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

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

11[31] and Dicey, Morris and Collins[32] and Hill and Chong[33] on Article 13, as well as Gaudemet-Tallon on both articles,[34] the provision would protect a contractant who in good faith believed that he or she was contracting with an individual of full capacity but, subsequent to the conclusion of the contract, is confronted by the counterpart's incapacity. The *bona fide* contractant, as Fawcett and Carruthers,[35] as well as Fawcett, Harris and Bridge, in their commentary on Article 11[36] submit, would then be protected as the circumstances under which the incapable party's incapacity may be invoked would be limited.[37] However, a *bona fide* contractant will still be liable if he or she was unaware of the counterpart's incapacity due to negligence. Santa-Croce argues that Article 11 favours the validity of the contract, protects the capable party and leads to increased legal certainty.[38] Dutch authors refer in this regard to the protection of the reasonable reliance of the capable contractant on the application of the *lex loci contractus*.[39]

As regards the conditions that must be fulfilled for Article 11 (Rome Convention) / Article 13 (Rome I Regulation) to be applicable, the authors unanimously observe that the contractants must physically have been in the same country at the moment that the contract was concluded.[40] The phrase "a contract concluded between persons who are in the same country", does not, for instance, refer to persons domiciled or resident in the same country. "The same country", according to Reithmann, does not, for example, imply the same city; and the phrase relates to presence in any country, not only the forum state.[41] The articles do not literally refer to the moment of conclu-

31 The Giuliano-Lagarde Report (1980: *ad* Article 11).
32 Collins *et al* (eds) (2012b: 1870).
33 Hill and Chong (2010: 551).
34 Gaudemet-Tallon (2009: Fasc 552-15).
35 Fawcett and Carruthers (2008: 752).
36 Fawcett, Harris and Bridge (2005: 658).
37 See Anton and Beaumont (1990: 335) and Beaumont and McEleavy (2011: 491) who regard the rule in this article as comprehensible and coherent with Lord Salvesen's opinion in *McFeetridge v Stewarts and Lloyds Ltd* 1913 SC 773 at 789 that "[i]n the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights". Also see Gaudemet-Tallon (2009: Fasc 552-15); the Giuliano-Lagarde Report (1980: *ad* Article 11); and MünchKommBGB/Spellenberg (2010: 1040-1041).
38 Santa-Croce (2008: Fasc 552-60).
39 Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).
40 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); and Plender and Wilderspin (2009: 101). The physical presence may have been temporary or fleeting: Asser/Vonken (2013: 128); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992). The parties need not be in each other's physical presence at the conclusion of the contract; they are merely required to be present in the same country: Asser/Vonken (2013: 128); and Vonken (2015: 5992).
41 Reithmann/Martiny/Hausmann (2010: 1913).

sion of the contract, but the authors are in agreement that this is an implied requirement.[42]

The Giuliano-Lagarde Report on Article 11[43] and Dicey, Morris and Collins[44] and Plender and Wilderspin[45] on Article 13 reaffirm that these provisions do not prejudice the protection of a contractant under a disability in terms of his or her personal law where the contract is concluded at a distance, that is: between parties in different countries. This remains the position even if, in terms of the proper law of the contract, the contract is deemed to be concluded in the country where the capable contractant is situated.[46]

Fawcett, Harris and Bridge submit that, in the context of international sales, it will be relatively rare for contractants to be in the same place at the moment of contracting; therefore Article 11 will seldom apply (the same would be true of Article 13).[47] Fawcett and Carruthers further observe that the *locus contractus* would be easily identifiable where both parties are in the same country at the time of the conclusion of the contract.[48]

There is disparity between the authors on whether the provision in Article 11 relates only to natural persons (the same would apply to Article 13). It is clear from the formulation of Article 11 (and Article 13) that the incapable contractant must be a natural person. Reithmann on Article 13 adds that this is the position irrespective of nationality,[49] domicile or residence.[50] Anton and Beaumont submit that Article 11 "applies to natural persons only",[51] implying that the counterparty must also be a natural person. Plender and Wilderspin believe that only one contractant is required to be a natural person, but they are unclear as to which of the parties to the contract they are referring to.[52] Fawcett and Carruthers[53] and Spellenberg[54] correctly point out that there is no requirement that the capable counterpart must be a natural person; it could presumably be a corporation.

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42 MünchKommBGB/Spellenberg (2010: 1052); and Reithmann/Martiny/Hausmann (2010: 1913).
43 The Giuliano-Lagarde Report (1980: *ad* Article 11).
44 Collins *et al* (eds) (2012b: 1870).
45 Plender and Wilderspin (2009: 102).
46 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Collins *et al* (eds) (2012b: 1870).
47 Fawcett, Harris and Bridge (2005: 659).
48 Fawcett and Carruthers (2008: 752).
49 Also see MünchKommBGB/Spellenberg (2010: 1044); and Vonken (2015: 5992).
50 Reithmann/Martiny/Hausmann (2010: 1913). Also see Vonken (2015: 5992).
51 Anton and Beaumont (1990: 335). Also see Beaumont and McEleavy (2011: 490); and Hill (2014: 68). *Cf* the Giuliano-Lagarde Report (1980: *ad* Article 11) ("in the case of natural persons, the question of capacity is not entirely excluded").
52 Plender and Wilderspin (2009: 101).
53 Fawcett and Carruthers (2008: 752).
54 MünchKommBGB/Spellenberg (2010: 1044 and 1045).

In conformity with the Giuliano-Lagarde Report,[55] authors such as Fawcett and Carruthers[56] on Article 11, as well as Hill and Chong,[57] Clarkson and Hill[58] and Dicey, Morris and Collins[59] on Article 13, agree that these provisions will only be applied where there is a conflict of laws. In other words, the content of the law(s) which (according to the otherwise applicable private international law rules of the *lex fori*) govern the capacity of the contractant claiming to be incapable must be different from the content of the *lex loci contractus*. The following may serve as an example: A is domiciled in Botswana and has no contractual capacity in terms of the *lex domicilii*. She concludes a contract in Venezuela. Both A and B are present in Venezuela at the time of the conclusion of the contract. B is domiciled in the United Kingdom. The proper law of the contract is the law of Australia. The case is heard in a court in the United Kingdom. In terms of Australian and Venezuelan law, A would have the relevant capacity to conclude the contract. Assuming that the *lex domicilii* and the (objective) proper law govern contractual capacity in English private international law on an equal level, it will be held that A had contractual capacity at the conclusion of the contract, as she did so in terms of Australian law *qua* proper law. Herein there is no conflict with the law of Venezuela *qua lex loci contractus* and therefore Article 11 (Rome Convention) / Article 13 (Rome I Regulation) will not play a role.[60]

As has been indicated,[61] there is general agreement that the phrase "the law of that country" (the law of presence of the parties) in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) refers to the *lex loci contractus*.[62] Hill and Chong argue in this regard that Article 13 will rarely be relevant in present-day situations because a contractant who concludes a contract abroad will usually be regarded as capable for the purposes of the common-law rules if he has capacity in terms of the *lex loci contractus* - this legal system will frequently also be the objective proper law of the contract.[63] However, this is only true in legal systems where the *lex loci contractus* and the (puta-

55 The Giuliano-Lagarde Report (1980: *ad* Article 11).
56 Fawcett and Carruthers (2008: 752).
57 Hill and Chong (2010: 552).
58 Clarkson and Hill (2011: 251).
59 Collins *et al* (eds) (2012b: 1870).
60 But see the discussion in paragraph 5.4 and Chapter 6, paragraph 6.2.5.
61 See the text at note 16.
62 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 552); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992). *Cf* the Giuliano-Lagarde Report (1980: *ad* Article 9). In exceptional cases, the law of presence of the parties may be different from the *lex loci contractus*. See note 16.
63 Hill and Chong (2010: 552). The latter part of this statement is correct in the context of the Rome Convention and the Rome I Regulation on the assumption that the contract was concluded in the country of the seller.

tive) objective proper law are primarily applicable to contractual capacity. As is clear from Chapter 4, many legal systems do not employ the *lex loci contractus* or the objective proper law as governing legal systems.

Anton and Beaumont suggest that proof of knowledge on the part of the capable contractant, whether actual or imputed,[64] even if the burden is reversed,[65] may present problems and introduce elements of uncertainty in an area where certainty is of paramount importance.[66] "Knowledge" in this context, as indicated by Spellenberg, implies that the capable party knows which law applies to the matter and what the content of that law determines.[67] Lasok and Stone are of the opinion that Article 11 is objectionable in principle because it begs the question of whether a contractant should in any circumstances be required to concern him- or herself with the counterpart's capacity in terms of the latter's personal law.[68] Also, Clarkson and Hill suggest that it is unclear how the negligence test is to be applied.[69] The enquiry, according to them, and as applied to a common factual scenario, is "[i]n what circumstances, if any, would it be negligent for a foreign trader not to know that an English[70] youth of 17 does not have capacity to conclude a commercial contract?"[71] Obviously, however, the outcome of the application of the test for negligence will depend on the specific circumstances of the case.

With regard to the question of which contractant may invoke incapacity, the following observations may be made. In principle, both parties may invoke incapacity in terms of the primarily applicable legal system(s). Fawcett and Carruthers therefore state that the capable party "can raise an incapacity that exists according to the law applied by the traditional private international law rules of the forum even though he or she knew of the incapacity at the time of contracting".[72]

Only the incapable contractant, and not the counterpart, may invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation). The text of these articles indeed

64 Imputed knowledge here refers to the fact that the capable contractant was unaware of the incapacity due to his or her negligence.
65 See the text at notes 76-78 *infra*.
66 Anton and Beaumont (1990: 335). Also see Beaumont and McEleavy (2011: 491).
67 MünchKommBGB/Spellenberg (2010: 1055-1056).
68 Lasok and Stone (1987: 350).
69 Clarkson and Hill (2011: 251); but see MünchKomm/Spellenberg (2010: 1057).
70 The authors probably refer to a minor domiciled in the United Kingdom.
71 Clarkson and Hill (2011: 251).
72 Fawcett and Carruthers (2008: 752-753). Also see Plender and Wilderspin (2009: 102), where they state in respect of a certain example that "[t]he French company … is not prevented by Article13 from pleading the nullity of the contract". This probably refers to the invocation of incapacity in terms of the primarily applicable legal system.

refer to the contractant, who would have capacity in terms of the *lex loci contractus*, invoking his or her incapacity. This is logical as the non-applicability of the *lex loci contractus* in the circumstances referred to in Article 11 (Rome Convention) / Article 13 (Rome I Regulation) is intended to protect the incapable party.[73] The authors support this view. Plender and Wilderspin, for instance, assert that "the incapacity must be invoked by the party who would be rendered incapable if the law of another country [the primary applicable legal system] were applied".[74] Fawcett and Carruthers are similarly of the opinion that the limitation does not prevent "a minor from seeking to uphold a contract, and the other party cannot escape from a contract (valid by the applicable law) by saying that he was unaware that he was contracting with a minor".[75] The same approach is adopted by Fawcett, Harris and Bridge, who submit that Article 11 "does not apply where a person seeks to invoke the common law rules to demonstrate his capacity".[76] This means that only the incapable party can invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation). The authors continue: "Nor does it apply where ... a buyer alleges that the contract is invalid because the seller lacked capacity."[77] This refers to the fact that a capable contractant cannot invoke the non-applicability of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation).

The majority of the authors accept that the incapable contractant bears the burden to prove that his or her counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[78] The Giuliano-Lagarde Report states that the wording of Article 11 "implies that the burden of proof lies on the incapacitated party. It is he who must establish that the other party knew of his incapacity or should have known of it."[79] If the incapable contractant successfully proves knowledge

73 The application of the *lex loci contractus* in terms of Article 11 (Rome Convention) / Article 13 (Rome I Regulation) is intended to protect the party who in good faith and without negligence believed him or herself to be contracting with a capable individual and who is confronted by the incapacity of this counterpart after the contract was concluded.

74 Plender and Wilderspin (2009: 101).

75 Fawcett and Carruthers (2008: 753); but see Reithmann/Martiny/Hausmann (2010: 1917).

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

77 *ibid.*

78 Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5993). Plender and Wilderspin (2009: 102) are unclear on this point; they recognise the significance of proving fault but do not indicate which party bears the onus in this regard. Also see the discussion in Chapter 6, paragraph 6.2.5.

79 The Giuliano-Lagarde Report (1980: *ad* Article 11). Anton and Beaumont (1990: 335), Beaumont and McEleavy (2011: 490-491), Clarkson and Hill (2011: 251), Collins *et al* (eds) (2012b: 1870) and Hill and Chong (2010: 551) all refer to the report in this regard.

on the part of the co-contractant, it will be held that he or she lacked the capacity to contract. On the other hand, if the incapable contractant is unsuccessful, he or she shall be bound to the contract.[80]

5.3.2 CIDIP Conventions

The Inter-American Conference on Private International Law has drafted various conventions that are relevant to contractual capacity in private international law, for instance the Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices (CIDIP I),[81] the Inter-American Convention on Conflict of Laws Concerning Checks (CIDIP II)[82] and the Inter-American Convention on the Law Applicable to International Contracts (CIDIP V).[83]

Article 1 of CIDIP I contains the provisions relating to contractual capacity in respect of bills of exchange:

> "Capacity to enter into an obligation by means of a bill of exchange shall be governed by the law of the place where the obligation is contracted.
>
> Nevertheless, should the obligation be contracted by a person who is not capable under the aforesaid law, the incapacity may not be relied upon in the territory of any other State Party to this Convention if the obligation is valid under the law of that State."

This article therefore stipulates that the capacity to conclude a contract by means of a bill of exchange shall in general be governed by the *lex loci contractus*. There is, however, an exception which provides that a contractant, incapable in terms of the *lex loci contractus*, may not rely on his or her incapacity if the contract is valid according to the *lex fori* (that is: if the latter contractant would have capacity in terms of the *lex fori*). It thus follows that a contractant may only invoke his or her incapacity if he or she lacks capacity in terms of both the *lex loci contractus* and the *lex fori*.

Article 1 of CIDIP II stipulates that the provisions of CIDIP I shall apply subject to certain modifications. These modifications do not, however, relate to capacity and therefore it may be deduced that the capacity to conclude a cheque contract shall still be governed by both the *lex loci contractus* and the *lex fori* – capacity in terms of any one of these legal systems is sufficient.

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80 Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Hill and Chong (2010: 551).

81 See, in general, Idiarte, Pedrouzo and Pereiro (2007: pars 174-230).

82 The word "cheques" rather than "checks" is globally the more common variant. See, in general, Idiarte *et al* (2007: pars 174-230).

83 Organization of American States, Washington DC Office of Inter-American Law and Programs per http://www.oas.org/dil/CIDIPV_convention_internationalcontracts.htm.

Contractual capacity is expressly excluded from the ambit of CIDIP V, also known as the Mexico City Convention.[84] Article 5 reads:

> "This Convention does not determine the law applicable to:
> a) questions arising from the marital status of natural persons, the capacity of the parties, or the consequences of nullity or invalidity of the contract as a result of the lack of capacity of one of the parties...."

The domestic private international law of the member states will therefore have to be applied to the issue of contractual capacity.

5.3.3 Future African instruments

The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg, on more than one occasion, has proposed to the African Union to draft a regional instrument, in the form of a model law, on the law applicable to international contracts of sale and/or, more generally, international commercial contracts.[85] In contrast to the exclusion or only partial regulation of the contractual capacity of natural persons in previous domestic, regional, supranational and international instruments, the current author submits that the African instrument(s) should contain a detailed provision in this regard, along the lines of what will be proposed in Chapter 6.[86]

5.4 Summary

It has been illustrated that contractual capacity is excluded from the scope of the CISG of 1980,[87] the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels* of 1955,[88] the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986,[89] the Hague Principles on Choice of Law in International Commercial Contracts (2015)[90] and the Mexico City Convention.[91] Capacity is also excluded from the ambit of both the Rome Convention and the Rome I Regulation through the respective Articles 1(2)(a), except for the provisions of Article 11

84 as it was signed in Mexico City (Mexico) on 17 March 1994.
85 the proposed African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts.
86 This applies also to the proposed African Principles on the Law Applicable to International Commercial Contracts, as it is probably more frequently the case in emerging economies, rather than fully developed economies, that natural persons partake in international commercial transactions.
87 Article 4.
88 Article 5.
89 Article 5.
90 Article 1(3)(a).
91 Article 5.

(Rome Convention) and Article 13 (Rome I Regulation), which may be relevant in certain scenarios.

Articles 11 and 13 provide for the application of the *lex loci contractus* in addition to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, subject to the fulfilment of certain requirements. Articles 11 and 13 therefore have the same effect as the *Lizardi*[92] rule originating in French private international law. Both the *Lizardi* rule and the provisions in the Rome instruments utilise a three step-model in determining the applicability of the *lex loci contractus* (conditional on the existence of fault on the part of the capable party), as identified in Chapter 4, paragraph 4.8. The difference between the arrangements is that, for the *lex loci contractus* to apply as an additional legal system, the parties must have been in the same country at the moment of contracting (Rome Convention and Rome I Regulation) or the contract must have been concluded in the forum state (*Lizardi*).[93]

The rule contained in Articles 11 and 13 will not be relevant when the *lex loci contractus* is in any event a primarily applicable legal system, as capacity will be governed by this legal system in all instances; it will not be dependent on the fulfilment of conditions. This will also be the position where the *lex loci contractus* is primarily applicable in circumstances wider than these envisaged by Articles 11 and 13.

The authors generally regard Article 11 (Rome Convention) / Article 13 (Rome I Regulation) as a mechanism of protection for the *bona fide* and non-negligent capable contractant.[94] The authors have also identified certain conditions that have to be fulfilled for Article 11 / 13 to be applicable, namely:

(i) the contractants must have been present in the same country at the moment of concluding of the contract;[95]

92 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

93 *Lizardi v Chaize* (supra). Also, the capable party having the French nationality may be a possible requirement in French law.

94 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Asser/Kramer/Verhagen (2015: 278-279); Asser/Vonken (2013: 126); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 658); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and Santa-Croce (2008: Fasc 552-60). See further Anton and Beaumont (1990: 335); and Beaumont and McEleavy (2011: 491).

95 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); and Plender and Wilderspin (2009: 101).

(ii) the contractant invoking incapacity must be a natural person;[96]

(iii) a conflict of laws must exist, namely a difference in the relevant substantive provision regarding capacity in the *lex loci contractus* and the primarily applicable legal system(s);[97]

(iv) the contractant invoking incapacity must have capacity according to the *lex loci contractus*; and

(v) the contractant invoking incapacity must be incapable of contracting in terms of the primarily applicable legal system(s).[98]

However, the current author suggests that condition (iii) does not add value as a conflict of laws is already implied in conditions (iv) and (v).[99]

If the conditions are fulfilled, the *lex loci contractus* will apply as an additional applicable legal system. The *lex loci contractus* will nevertheless not be applied as an additional legal system if the capable contractant was aware of the counterpart's incapacity in terms of the primarily applicable legal system(s), or was unaware thereof due to negligence. If the *lex loci contractus* is a primarily applicable legal system, it will be applied irrespective of any fault on the part of the capable party.

The incapable contractant bears the burden of proving that the counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[100]

96 Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); Fawcett and Carruthers (2008: 752); Hill (2014: 68); MünchKommBGB/Spellenberg (2010: 1044 and 1045); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1913); and Vonken (2015: 5992).

97 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); and Hill and Chong (2010: 552).

98 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 552); and Plender and Wilderspin (2009: 101).

99 See the discussion in this regard in Chapter 6, paragraph 6.2.5.

100 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490-491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5993).

Both contractants may in principle invoke an incapacity in terms of any of the primarily applicable legal system(s).[101] However, only the incapable contractant may invoke the non-applicability of the *lex loci contractus* as an additional legal system in terms of Articles 11 or 13, and not the capable counterpart.[102]

The Inter-American Conventions CIDIP I and CIDIP II contain specific provisions relating to contractual capacity. Article 1 of CIDIP I, relating to bills of exchange, also applies within the ambit of CIDIP II, concerning cheques. According to the conventions, therefore, the capacity to conclude a bill of exchange or a cheque contract shall be governed by the *lex loci contractus* and the *lex fori* on an equal level.

Finally, the present author submits that the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts should contain detailed provisions on contractual capacity along the lines of the proposal in Chapter 6.

101 See Fawcett and Carruthers (2008: 752-753), as well as Plender and Wilderspin (2009: 102).

102 Fawcett and Carruthers (2008: 753); Fawcett, Harris and Bridge (2005: 658); and Plender and Wilderspin (2009: 101).