Contractual capacity in private international law

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6 Evaluation, Conclusions and Proposals

6.1 Introduction

In this chapter, proposals are made regarding the law that should be applied to the contractual capacity of natural persons in South African private international law. They could also be considered by the courts in neighbouring countries Botswana, Lesotho, Namibia, Swaziland and Zimbabwe (which all share the Roman-Dutch heritage in this regard), as well as in other mixed jurisdictions and common-law countries. In addition, the proposals are intended to be part of national, regional, supranational and international instruments, in particular, the envisaged African Principles on the Law Applicable to International Contracts of Sale and the African Principles on the Law Applicable to International Commercial Contracts. For this purpose, the legal systems applied to contractual capacity in various legal systems are evaluated in paragraph 6.2. The consequences of incapacity are discussed in paragraph 6.3 and the underlying interests and the protection of both parties in paragraph 6.4. In paragraph 6.5, the different forms and the possible application of the proposals are discussed. The final proposals are to be found in paragraph 6.6 (in narrative form) and in paragraph 6.7 (in codified form).

Sometimes it is stated that certain conflicts rules in respect of capacity are designed to protect the incapable party and other rules would favour the counterpart.[1] For instance, application of the personal law would favour the incapable party and application of the *lex loci contractus* would protect the local merchant. However, in a particular case, application of the personal law could well be to the disadvantage of the party invoking incapacity and application of, for instance, the *lex loci contractus* to his or her advantage. An example would be the scenario where a person of 18 years old, capable in terms of the relevant personal law (for instance, the law of domicile, habitual residence and / or nationality), concludes a contract in another country where the age of majority is 21, and then does not want to be bound to the contract. Everything therefore depends on the content of the relevant legal systems.

1 See, for example, Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 491); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 658); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and Santa-Croce (2008: Fasc 552-60).

Nevertheless, some legal systems are, in the abstract, closer connected to the one party than to the other and application thereof can therefore, in this limited sense, be said to be to the advantage of the relevant person. These underlying interests will be integrated into the discussion and the evaluation of the various legal systems that could be considered to be applied to contractual capacity in paragraph 6.2.

The protection of the respective parties, furthermore, depends on the content of the other legal systems simultaneously applicable to capacity under an alternative reference rule as proposed in paragraph 6.6 and 6.7. The underlying interests of the parties are touched upon again in paragraph 6.4. Particular attention will there be given to the interests of the capable and incapable party in the context of such an alternative reference rule, with specific reference to the reasonable expectations of the parties in respect of the law applicable to capacity.

The relevant moment in time for determining contractual capacity is, in principle, the instance of conclusion of the contract.[2] The question must therefore be asked whether the relevant individual had contractual capacity at that specific time and not, for instance, whether he or she has such capacity at the time of the legal proceedings.[3] However, according to generally accepted practice, contractual capacity that was previously acquired will not be affected by a subsequent change in an individual's domicile or habitual residence.[4] The general principles of private international law (including the doctrine of public policy) will determine whether a retrospective change in the content of the applicable law must be taken into account.[5]

6.2 An evaluation of the various legal systems that could be applied to contractual capacity

6.2.1 The *lex domicilii* / the law of domicile

The *lex domicilii* plays a prominent role with regard to contractual capacity in many private international law systems. The application of the law of domicile is, however, also subject to considerable criticism. The majority of the cri-

2 See Article 1(1) and Article 3(6) of the proposal in paragraph 6.7.

3 for example at the time of *litis contestatio* (the close of pleadings).

4 See paragraph 6.2.2 *in fine* and Article 2 of the proposal in paragraph 6.7. This principle is only applicable to varying connecting factors (for instance, domicile and habitual residence) and not to constant connecting factors (as the *locus contractus* and the *lex situs* in respect of immovable). For this terminology see Collins *et al* (eds) (2012a: 66).

5 See, for example, Collins *et al* (eds) (2012a: 68-76); and Forsyth (2012: 127-128). The time element also plays a role in Article 3(1)-(2) of the proposal in paragraph 6.7: knowledge of the incapacity or negligence in this regard must be determined at the time of conclusion of the contract. *Cf* Article 1(3) of the proposal in paragraph 6.7.

tique relates to the unfairness that would arise as a result of its exclusive application. The argument is that it would be unfair to expect a contractant to an international commercial contract to possess knowledge of his or her counterpart's capacity in terms of the latter's *lex domicilii*.[6] It cannot be allowed that a contractant could escape liability simply because of incapacity in terms of the law of domicile, which is unknown to the counterpart.[7] Briggs[8] and Clarkson and Hill[9] correctly submit that there may be no reason for the latter to suppose that the other party is domiciled in a foreign country. Fawcett and Carruthers[10] and Walker[11] add that the application of the *lex domicilii* is incompatible with the fiduciary expectations between contractants to a commercial transaction.

Dicey, Morris and Collins,[12] Forsyth[13] and McClean and Beevers[14] further submit that the application of the *lex domicilii* is also highly inconvenient. The line of argumentation here is that a contractant can surely not be expected to diligently enquire about the domicile of each of his or her co-contractants before concluding an agreement with them.

A number of authors highlight the impracticality of applying the law of domicile. Carter[15] and Fawcett, Harris and Bridge[16] indeed argue that, where an international contract is concluded, it would be impractical if one of the contractants could escape liability on the grounds of incapacity by the domiciliary law. Knowledge of incapacity in terms of the *lex domicilii*, according to Fawcett, Harris and Bridge,[17] also plays a role in this regard if the contract was concluded at a distance by electronic means. It would be impractical, as far as Tilbury, Davis and Opeskin are concerned, if a contractant was expected to know or have regard to an incapacity arising under the domiciliary law of his or her counterpart.[18] Huo submits that ascertaining an individual's domicile to a great extent depends on proof of his or her inten-

6 Collier (2001: 209); Collins *et al* (eds) (2012b: 1867); Fawcett, Harris and Bridge (2005: 657); McClean and Beevers (2009: 385); Schoeman, Roodt and Wethmar-Lemmer (2014: par 114); and Tan (1993: 470). Also see the commentary by Lord Salveson in *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773 at 789.

7 Edwards and Kahn (2003: par 333); and Fawcett and Carruthers (2008: 750). Also see Sykes and Pryles (1991: 344).

8 Briggs (2014: 948).

9 Clarkson and Hill (2011: 250).

10 Fawcett and Carruthers (2008: 750).

11 Walker (2005/2014: § 31.5b).

12 Collins *et al* (eds) (2012b: 1867).

13 Forsyth (2012: 337).

14 McClean and Beevers (2009: 386-387).

15 Carter (1987: 23).

16 Fawcett, Harris and Bridge (2005: 657). Also see Hill and Chong (2010: 550); O'Brien (1999: 318); and Oppong (2012: par 94).

17 Fawcett, Harris and Bridge (2005: 657). Also see Mádl and Vékás (1998: 124).

18 Tilbury, Davis and Opeskin (2002: 770). Also see the commentaries by Morden J in *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario) at 244; and Gray CJ in *Milliken v Pratt* 125 Mass 374 (1878) at 382.

tion.[19] Domicile may indeed often be impossible to establish accurately[20] without recourse to the courts. It would thus be almost impossible for the capable contractant to determine the counterpart's domicile prior to the conclusion of the agreement.[21]

Another contention relates to the fact that the cases in which the English courts applied the *lex domicilii* do not feature in the context of the capacity to conclude a commercial contract; they all concerned the capacity to marry or to conclude a marriage settlement.[22] Briggs[23] and Dicey, Morris and Collins submit in this regard that the capacity to marry certainly depends on the law of the individual's domicile at the conclusion of the marriage, but "there is every ground for distinguishing as a matter of common sense between the ordinary contracts of everyday life and the formal contract of marriage".[24] The authors explain that if a man domiciled in England, for example, marries a woman in, say, France, his capacity to marry shall be governed by English law, but it does not follow that his contractual capacity, should he, for instance, purchase a ring in France, be determined by the same law. On the contrary, as the authors submit, "in accordance with principle and with such authority as there is … it should be governed by French law".[25] Authors such as Collier[26] and Van Rooyen[27] confirm that the *lex domicilii* finds support primarily in decisions that do not concern commercial contracts. Collier's objection to the application of this legal system in a commercial context is based on the fact that "[t]hese [cases] seem to have little relevance to commercial contracts".[28] Van Rooyen holds a corresponding opinion as he states: "Unfortunately there are a number of cases, bearing a relation to matrimonial law, in which it was declared that the *lex domicilii* should, in respect of contractual capacity, be applied to all contracts."[29]

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19 This would certainly be the case in South African law: see Chapter 2, paragraph 2.2.3.

20 See Briggs (2014: 948).

21 Huo (2010: 175).

22 Here reference is made to the prominent English cases *Sottomayor v De Barros (1)* (1877) 3 PD 1; *Cooper v Cooper* (1888) 13 App Cas 88; and *Baindail v Baindail* [1946] P 122. Regard could also be had to the Scottish decisions *De Virte v MacLeod* (1869) 6 SLR 236 and *Obers v Paton's Trustees* (1897) 34 R 719.

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

24 Collins *et al* (eds) (2012b: 1867). *Cf* Chong (1916: 68).

25 Collins *et al* (eds) (2012b: 1867). Also see Carter (1987: 24 note 98) who believes that *dicta* insinuating that the *lex domicilii per se* governs contractual capacity are unsupportable.

26 Collier (2001: 209).

27 Van Rooyen (1972: 116).

28 Collier (2001: 209) (my insertion).

29 Van Rooyen (1972: 116) (own translation from the Afrikaans: "Ongelukkig is daar in 'n aantal sake, wat met die huweliksreg verband hou, verklaar dat die *lex domicilii* by *alle* kontrakte ten opsigte van handelingsbevoegdheid toegepas moet word"). Also see Diwan and Diwan (1998: 523); McClean and Beevers (2009: 386); Tilbury, Davis and Opeskin (2002: 770); and Walker (2005: § 31.4d); (2006: 517). Diwan and Diwan *op cit* indicate that the *lex domicilii* has been utilised in cases concerning status and applied to commercial contracts by analogy.

Finally, Hickling and Wu,[30] Sychold[31] and the Australian Law Reform Commission[32] regard the *lex domicilii* as an inappropriate connecting factor in ordinary commercial contracts.[33] Sychold, in particular, mentions that the application of the *lex domicilii* may be "inconsistent with the requirements of 'modern commerce'".[34] Huo, in this regard, submits that domicile as a connecting factor may have an inadequate link with a contractant; its application in such a case would be inappropriate.[35]

However, the country of domicile is, after all, legally deemed to be an individual's permanent home[36] or at least for an indefinite period.[37] Further, capacity may be seen as an incident of legal status (which is governed by the *lex domicilii* in common-law systems);[38] therefore there should be a natural connection between an individual's personal law and his or her contractual capacity.[39] In addition, domicile forms a strong connection between the individual and the state in which he or she resides, similar to nationality in traditional civil-law systems. Mádl and Vékás indeed state that domicile may operate as a "decisive element of a rational and justified connecting factor along with or instead of nationality".[40] According to the Restatement (Second), the *lex domicilii* could be utilised to govern capacity as it serves as a protective mechanism.[41] It is also stated that the *lex domicilii* has an enduring relationship to the parties; an individual at all times maintains a close relationship with his or her personal law.[42] Whether the *lex domicilii* will indeed protect the incapable contractant, as suggested in the Restatement (Second), will, of course, depend on that legal system's content; moreover, it depends on the content of the legal systems that are simultaneously applicable under

30 Hickling and Wu (1995: 171).
31 Sychold (2007: par 184).
32 The Australian Law Reform Commission (1992: 100). Also see Diwan and Diwan (1998: 523).
33 See the commentary by Young J in *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 at 8. See the criticism by the Probate Division in *Sottomayer v De Barros (2)* (1879) 5 PD 94 at 100 and the commentary by Ramesam J in *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain and Ors* AIR 1933 Mad 756 par 24.
34 Sychold (2007: par 184).
35 See Huo (2010: 175).
36 Collins *et al* (eds) (2012a: 132); Forsyth (2012: 131); Huo (2010: 175); and Mádl and Vékás (1998: 123). Also see Cheng (1916: 72-73).
37 In Section 1(2) of the South African Domicile Act 3 of 1992, the common-law definition of "domicile" was changed from residence with the intention to remain permanently to residence with the intention to remain for an indefinite period. See Forsyth (2012: 138).
38 See, for example, Collins *et al* (eds) (2012b: 1866); Forsyth (2012: 337); and Hill and Chong (2010: 550).
39 Collins *et al* (eds) (2012b: 1866); Forsyth (2012: 337); and Hill and Chong (2010: 550).
40 Mádl and Vékás (1998: 123).
41 The American Law Institute (1971: 632). Also see Tan (1993: 471); and Stone (2010: 329).
42 The American Law Institute (1971: 581).

an alternative reference rule.[43] It may, however, safely be accepted that a close connection exists between an individual and his or her law of domicile.

The *lex domicilii* plays a prominent role in many of the jurisdictions with codified rules in this regard, such as Argentina,[44] Brazil,[45] Israel,[46] Lithuania,[47] Mexico,[48] Quebec,[49] Switzerland[50] and Uruguay,[51] where it governs as the primary applicable legal system, as well as in Louisiana,[52] and Venezuela,[53] where it applies on an equal level with the putative proper law of the contract. This is also the proposal in the Puerto Rican *Projet*.[54] The law of domicile also specifically applies to the consequences of incapacity in Uruguay.[55] The *lex domicilii* applies to capacity in terms of § 198(2) of the Restatement (Second) in American private international law.[56] Under this code, the *lex domicilii* is also one of the legal systems applicable to capacity in respect of immovable property.[57]

Common-law authors such as Rodenburg,[58] Paulus Voet,[59] Johannes Voet,[60] Huber[61] and Van der Keessel,[62] applied the *lex domicilii* to status and contractual capacity (as far as movable property is concerned); it applied by virtue of comity. There is also support for this legal system to govern capacity in South African case law.[63]

The argument that English case law, in which the *lex domicilii* featured, did not concern commercial matters, can be challenged. It was indeed favoured by the common-law courts to govern capacity in commercial contracts such

43 See paragraph 6.4.
44 Civil Code of Argentina (1869–1987–1997: Article 6).
45 Introductory Act to the Civil Code of Brazil (1942: Article 7).
46 Legal Capacity and Guardianship Law (1962: §77).
47 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16).
48 Civil Code of Mexico (1928–1988: Article 13(II)).
49 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3083).
50 The Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).
51 Civil Code of Uruguay (1868–1941–1994: Article 2393).
52 Civil Code of Louisiana (1991: Article 3539).
53 Venezuelan Act on Private International Law (1998: Article 16).
54 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
55 Civil Code of Uruguay (1868–1941–1994: Article 2393).
56 The American Law Institute (1971: § 198(2)).
57 The American Law Institute (1971: § 198(1), § 198(2) and § 189).
58 Rodenburg (1653: *De Jure Conjugum* 1.3.1) as referred to by Van Rooyen (1972:15).
59 P Voet (1661: *De Statutis* 4.3.17).
60 J Voet (1829: *Commentarius* 4.1.29, 4.4.8 and 27.10.11).
61 Huber (1768: *HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41).
62 Van der Keessel (1961: *Praelectiones* 73 (*Th* 27), *Praelectiones* 75 (*Th* 27), *Praelectiones* 98 (*Th* 42), *Praelectiones* 101 (*Th* 42) and *Praelectiones* 102 (*Th* 42)).
63 *Powell v Powell* 1953 (4) SA 380 (W). Also see the *dicta* by Innes J in *Hulscher v Voorschotkas voor Zuid Afrika* 1908 (TS) 542 at 546-547 and that of Trollip J in *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) at 33D.

as cession[64] and suretyship.[65] Although these cases concerned spousal consent, the contracts involved were purely of a commercial nature. Finally, in an *obiter dictum* in a recent decision of the Indian Supreme Court, which concerned the acquisition of a company, it was in general suggested that the *lex domicilii* should be applied to contractual capacity.[66]

The points of critique raised against the application of the *lex domicilii* (primarily that it is inconvenient and unfair in the international commercial sphere to expect the counterpart to enquire about an individual's contractual capacity and that it would be impractical if a party could escape liability due to incapacity by the domiciliary law) do not apply in the context of an alternative reference rule where the *lex domicilii* is only one of a number of legal systems that may be utilised to indicate contractual capacity. The capable contractant may, for instance, also invoke the putative objective proper law of the contract to establish capacity. Apart from weighty authority in its favour, the naturally strong connection between an individual and the country of domicile justifies the inclusion of the *lex domicilii* in the proposal in paragraph 6.6 and 6.7.

Carter argues that an individual should always be able to rely for enabling purposes upon his or her capacity under the *lex domicilii*.[67] This suggestion is given shape in Article 1(4) of the proposal in paragraph 6.7.

6.2.2 The law of habitual residence

In as far as the conventions of the Hague Conference on Private International Law are concerned, the law of the country of habitual residence first made its appearance in the Hague Convention on Civil Procedure of 1896.[68] Since then it has gained momentum. A clear progression of thought from the law of nationality to the law of habitual residence is evident.[69] At present, habitual residence has all but replaced nationality as a connecting factor in the Hague Conventions.[70]

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64 *De Virte v MacLeod* (1869) 6 SLR 236.

65 *Union Trust Company v Grosman et al* 245 US 412 (1918). Also see *Polson v Stewart* 45 NE 737 (1897), where the court applied the *lex domicilii* to capacity in respect of a contract for the transfer of immovable property.

66 *Technip Sa v Sms Holding (Pvt) Ltd & Ors* [2005] 60 SCL 249 SC.

67 Carter (1987: 24).

68 Mádl and Vékás (1998: 124).

69 Mádl and Vékás (1998: 125).

70 See, for example, the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (1989); the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993); the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (1996); the Hague Convention on the International Protection of Adults (2000); and the Hague Protocol on the Law Applicable to Maintenance Obligations (2007).

Authors such as Clarkson and Hill,[71] Dicey, Morris and Collins,[72] Hickling and Wu,[73] Hill and Chong,[74] McClean and Beevers[75] and Tan[76] propose the application of this legal system together with domicile and the putative proper law of the contract in order to establish capacity.[77] The Australian Law Reform Commission[78] and the author Sychold[79] propose that capacity should be governed by either the proper law or the habitual residence of the incapable contractant.

In some of the jurisdictions with codified rules in this regard, such as China,[80] Estonia[81] and Macau,[82] the law of habitual residence applies as the primarily applicable legal system.[83] The law of residence applies alongside the *lex fori* and the proper law of the contract in the private international law of Oregon.[84] However, the law of residence applies exclusively in cases where fault exists on the part of the capable contractant.[85] In Romanian private international law, the law of habitual residence plays a prominent role alongside the *lex patriae* in that a lack of capacity (or limited capacity) in terms of either of these legal systems may not be relied upon where a capable contractant *bona fide* believed that the incapable party had full capacity on the basis of the *lex loci contractus*.[86]

Habitual residence is increasingly employed as a connecting factor in South African private international law, often due to the influence of international conflicts conventions.[87] It already plays a role in respect of the formal valid-

71 Clarkson and Hill (2011: 250).
72 Collins *et al* (eds) (2012b: 1865).
73 Hickling and Wu (1995: 171).
74 Hill and Chong (2010: 550).
75 McClean and Beevers (2009: 388).
76 Tan (1993: 472).
77 Also see Angelo (2012: par 75); Carter (1987: 24); Collier (2001: 209-210); Fawcett, Harris and Bridge (2005: 658); and Sykes and Pryles (1991: 614).
78 The Australian Law Reform Commission (1992: 101).
79 Sychold (2007: par 185).
80 Chinese Private International Law Act (2010: Chapter two, Article 12).
81 Estonian Private International Law Act (2002: § 12(1)).
82 Civil Code of Macau (1999: Chapter III, Articles 24 and 30).
83 In the Netherlands (according to Book 10 of the Dutch Civil Code (2012: Article 40)), the question of whether the one spouse requires the consent of the other spouse when concluding a contract, and what the consequences are if such consent was not acquired, are governed by the law of the country of the habitual residence of the spouse whose consent was to be obtained at the time of contracting. No other country seems to have a similar rule. Also see Asser/Vonken (2012: 99); Strikwerda (2015: 145); Ten Wolde (2013: 144-145); and Vonken (2015: 6052).
84 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1)). The Law refers to "residence" instead of "habitual residence", but the present author submits that the two concepts will usually be interpreted in the same manner.
85 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).
86 Romanian Private International Law Code (1992: Chapter II, Article 17).
87 Neels and Wethmar-Lemmer (2008: 588).

ity of wills[88] and the determination of the proper law of a contract,[89] as well as in the context of the Hague conventions on international child abduction[90] and inter-country adoption,[91] both incorporated in the Children's Act.[92] In a South African context, habitual residence is the concept that is most closely related to that of the more traditional one of domicile. As such, this legal system also represents a close connection between the individual and the country of his or her residence.[93]

Whether application of the law of habitual residence will indeed provide protection to the incapable contractant, will, of course, depend on its content and on the content of the other legal systems forming part of an alternative reference rule. However, it may safely be accepted that an individual has a sufficiently close connection to the country and law of his or her habitual residence.[94] Due to the role played by, as well as the developments in respect of the law of the country of habitual residence, it also features in the proposed alternative reference rule on the law applicable to contractual capacity.

Many civil law codes contain the provision that, once an individual has obtained contractual capacity, subsequent changes in his or her personal law shall not affect this capacity.[95] This rule is sensible since a contractant will

88 Section 3*bis* (ii)1(a)(ii) of the Wills Act 7 of 1953.

89 Fredericks and Neels (2003: 68).

90 Hague Convention on the Civil Aspects of International Child Abduction (1980).

91 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).

92 38 of 2005. Also see Forsyth (2012: 219-228) on residence and jurisdiction in international cases. Furthermore, Section 13(1)(b) of the Divorce Act 70 of 1979 refers to ordinary residence in the context of the recognition and enforcement of foreign divorce orders. See Schoeman, Roodt and Wethmar-Lemmer (2014: 37-50) on the difference between habitual and ordinary residence.

93 Also see the American Law Institute (1971: 581).

94 See paragraph 6.4.

95 See the codes of Angola (Civil Code of Angola (1966: Article 29)); Belgium (Belgian Private International Law Code (2004: Chapter II, Article 34 § 1)); Bulgaria (Bulgarian Private International Law Code (2005: Article 51)); Estonia (Estonian Private International Law Act (2002: § 12(2))); Germany (Introductory Act to the Civil Code (1994: § 7(2))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 11[1])); Lithuania (Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(5))); Mozambique (Civil Code of Mozambique (1966: Article 29)); Portugal (Civil Code of Portugal (1966: Article 29)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 15)); Spain (Spanish Civil Code (1889–1981: Article 9(1))); Switzerland (Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35)); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Turkey (Private International Law Code of Turkey (2007: Chapter 2, Article 9(3))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(2))); Uruguay, as in Idiarte *et al* (2007: par 187); and Venezuela (Venezuelan Act on Private International Law (1998: Article 17)). Also see Schwimann (2001: 53-54) on Austrian private international law, as well as Asser/Vonken (2013: 120-122); Ten Wolde (2013: 122); and Vonken (2015: 5990) who confirm that the notion of *semel maior*, *semper maior* is generally accepted in the Netherlands.

be able to rely on his or her newly obtained capacity but not on the previous incapacity.[96] This rule promotes legal certainty which is of the essence in international contracting. As such, it is included in the proposal in paragraphs 6.6 and 6.7, both in respect of domicile and habitual residence.

6.2.3 The law of the place of business

The current author further submits that a rule providing for the substitution of a natural person's law of domicile and habitual residence by the law of his or her place of business be included in the proposed alternative reference rule. This proposal is inspired by Belarusian,[97] Bulgarian,[98] Russian,[99] Ukrainian[100] and Uzbekistani[101] private international law. In all these jurisdictions, the law of the country of registration as an entrepreneur governs capacity as the primary legal system.[102] This will usually be the relevant person's place of business. Different legal systems are applicable in the absence of such a country of registration. In Belarus,[103] Russia,[104] the Ukraine[105] and Uzbekistan,[106] the law of the country where the principle or major entrepreneurial activities are executed shall apply, while in Bulgaria,[107] the law of the country where the core establishment is situated governs. In effect, the natural person's place of business is substituted for the law of domicile and habitual residence. This is in conformity, in respect of habitual residence, with the provision in Article 19(1) of the Rome I Regulation, which, in the context of determining the proper law of a contract, states: "The habitual residence of a natural person acting in the course of his business activity shall be his principle place of business."[108] The current author submits that the law of the principle place of business of a natural person acting in the course and scope of his or her business activities represents a closer connection to the relevant individual in this context rather than his or her personal law; it is definitely also closer connected to the contract itself.

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96 Also see Kegel and Schurig (2000: 493); Kropholler (2006: 318); Reithmann/Martiny/Hausmann (2010: 1877); and Staudinger/Hausmann (2013: 49 and 52-53).
97 Civil Code of the Republic of Belarus (1999: Article 1104).
98 Bulgarian Private International Law Code (2005: Article 52).
99 Civil Code of the Russian Federation (2001: Article 1201).
100 Ukrainian Private International Law Code (2005: Article 19).
101 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
102 Civil Code of the Republic of Belarus (1999: 1104(4)); Bulgarian Private International Law Code (2005: Article 52); Civil Code of the Russian Federation (2001: Article 1201); Ukrainian Private International Law Code (2005: Article 19); and the Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
103 Civil Code of the Republic of Belarus (1999: Article 1104(4)).
104 Civil Code of the Russian Federation (2001: Article 1201).
105 Ukrainian Private International Law Code (2005: Article 19).
106 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).
107 Bulgarian Private International Law Code (2005: Article 52).
108 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

6.2.4 The *lex patriae* / the law of nationality

The law of the country of nationality, the *lex patriae*, plays a vital role with regard to contractual capacity in many jurisdictions. The Italian author Ubertazzi, however, expresses critique against application of the *lex patriae* in this regard by raising an argument which stems from a principle established in the Treaty of Maastricht, the founding treaty of the European Union.[109] The current version, in Article 18 of the Treaty on the Functioning of the European Union, reads as follows: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."[110] The author is of the opinion that nationality as a connecting factor in private international law is incompatible with this principle in the context of contractual capacity in international commerce.[111] Countries bound by the Treaty of Maastricht should therefore not be allowed to utilise the connecting factor of nationality in a reference rule.[112] Another possible interpretation of Article 18 in the context of private international law would be that states may not discriminate between people of different nationality but that conflicts rules may nevertheless utilise nationality as a connecting factor in a conflicts rule provided that the same rule applies to all individuals. As this issue entails the interpretation of foundational European law, no attempt is made to solve the matter here.

Ubertazzi further warns that the application of the *lex patriae* in this regard creates the burden for a contractant to determine the nationality of his or her counterpart,[113] which is difficult and inconvenient, especially in the case of long-distance contracts, including those concluded by electronic means. According to the author, policy considerations dictate that the proper law of the contract should be applicable instead of nationality.[114]

Further problems exist with the application of the *lex patriae*. For instance, it would be inappropriate if an individual's capacity were to be determined according to the law of his or her nationality when he or she has been domi-

109 Ubertazzi (2008: 711-736); Art 12 of the Treaty on European Union (Maastricht, 7 February 1992).

110 Consolidated Version of the Treaty on the Functioning of the European Union (26 October 2012) 2012 *Official Journal of the European Union* C 326/49.

111 For a different view, see MünchKommBGB/Birk (2010: 1573-1577).

112 Ubertazzi (2008:733-735). According to the author, application of nationality as a connecting factor would also lead to a distinction made between natural and juristic persons (as only natural persons have a nationality properly so-called) and this is not objectively justifiable.

113 See Staudinger/Hausmann (2013: 20, 601, 603, 605 and 612) who further submit that normal legal interaction and legal certainty demand that the application of the law of nationality be limited.

114 Ubertazzi (2008: 733-735).

ciled and habitually resident in another country for a substantial period of time and has no real connection with the country of citizenship.[115] A law of nationality does not even exist in the case where an individual is stateless.[116] An individual may also have more than one nationality, and this is indeed often the position in many cases today.[117] Further, nationality cannot consistently determine the internal law to which an individual is subject. One may consider the United States of America in this regard, which is a political unit comprising of a variety of legal systems but there is one American citizenship.[118] In India, again, adherents of different religions are subject to different personal-law systems, irrespective of nationality.[119]

Although Section 9(3) of the Constitution of South Africa does not list nationality as a ground for unfair discrimination, the words "on one or more grounds, including ... "[120] leave this possibility open and the courts have made use thereof to declare various types of discrimination unfair on the basis of nationality.[121] This could conceivably include the application of a particular legal system in respect of an individual merely on the basis of his or her nationality.[122]

115 Huo (2010: 174). Also see Forsyth (2012: 3 note 7 and 50-51); and Mádl and Vékás (1998: 122-123).

116 Mádl and Vékás (1998: 122). For a solution, see Article 16(1) of Book 10 of the Dutch Civil Code (2012): the law of habitual residence will apply. Also see Article 17 in respect of stateless individuals.

117 Huo (2010: 175); and Mádl and Vékás (1998: 122). A solution may be to apply the law of the most effective nationality. See, for instance, Article 11(1) of Book 10 of the Dutch Civil Code (2012): if a minor has two nationalities, the law of nationality of the country where he or she has his or her habitual residence must apply to contractual capacity. If the minor does not have habitual residence in either state, the *lex patriae* with which he or she has the closest connection will apply.

118 Huo (2010: 175).

119 See in general Agrawal (2010). For the standard solution in the Hague Conventions, see, for instance, Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions (1961): "For the purposes of the present Convention, if a national law consists of a non-unified system, the law to be applied shall be determined by the rules in force in that system and, failing any such rules, by the most real connexion which the testator had with any one of the various laws within that system." Also see for example Article 15(1) and (3) of Book 10 of the Dutch Civil Code (2012). *Cf* Section 3*bis* (3) of the Wills Act 7 of 1953, discussed by Forsyth (2012: 401) and Neels (1990: 555).

120 Section 9(3) of the Constitution of the Republic of South Africa, 1996 provides: "The state may not unfairly discriminate directly or indirectly against anyone … "

121 See *Larbi-Odam v MEC for Education (North-West Province)* 1998 (1) SA 745 (CC); *Khosa & Others v Minister of Social Development & Others* 2004 (6) BCLR 569 (CC); and *The Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); (2007) 28 ILJ 537 (CC). *Cf Baloro v University of Bophuthatswana* 1995 (4) SA 197 (BSC).

122 Also see Ubertazzi (2008: 733-735).

In South African private international law, the *lex patriae* plays a very limited role,[123] namely, in respect of the formal validity of wills,[124] the recognition and enforcement of foreign divorce orders,[125] an application in terms of Section 21(1) of the Matrimonial Property Act[126] and the determination of the proper law of a contract.[127] Globally, however, considerable support does exist for the application of the *lex patriae*. As indicated in Chapter 4, 30 of the 53 jurisdictions discussed (around 57%), apply the *lex patriae* to contractual capacity as the legal system of departure.[128] In Mongolia,[129] the *lex patriae* applies to the capacity of foreigners. In Slovakia it governs capacity in cases where a foreigner concludes a contract outside the forum state.[130] In the latter jurisdiction, and in the Czech Republic,[131] the *lex patriae* also applies to contractual capacity in respect of cheques and bills of exchange.[132] In Ukrainian[133] and Burkinabe private international law,[134] this legal system specifically also applies to the consequences of incapacity.

123 Neels and Wethmar-Lemmer (2008: 588).
124 Section 3*bis* (1)(a)(iii) and 3*bis* (4)(a) of the Wills Act 7 of 1953.
125 Section 13(1)(c) of the Divorce Act 70 of 1979.
126 88 of 1984. See *Ex Parte Senekal* 1989 1 SA 38 (T) 39-40.
127 Fredericks and Neels (2003: 68); and Van Rooyen (1972: 98).
128 Algeria (Civil Code of Algeria (1975: Chapter II, Article 10)); Angola (Civil Code of Angola (1966: Articles 25 and 31(1))); Austria (Austrian Private International Law Act (1978: Chapter 2, § 9)); Belarus (Civil Code of the Republic of Belarus (1999: Article 1104(1))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(1))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Egypt (Civil Code of Egypt (1948: Article 11)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 10[1] and § 11[1])); Iran (Civil Code of Iran (1935: Articles 6 and 962)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(1))); Japan (Act on the General Rules of Application of Laws (2006: Article 4(1))); Mongolia (Civil Code of Mongolia (2002: Article 543(2))); Mozambique (Civil Code of Mozambique (1966: Articles 25 and 31(1))); Portugal (Civil Code of Portugal (1966: Article 25 and 31(1))); Qatar (Civil Code of Qatar (2004: Article 11)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 11)); Russia (Civil Code of the Russian Federation (2001: Chapter 67, Article 1195(1))); Slovakia (Private International Law and International Procedural Law Act (1963: § 3(1))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1))); Spain (Spanish Civil Code (1889–1981: Article 9.1)); Syria (Civil Code of Syria (1949: Article 12(1))); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Thailand (Act on Conflict of Laws (1938: Section 10)); Tunisia (Private International Law Code (1998: Article 40)); the Ukraine (Ukrainian Private International Law Code (2005: Article 17(1))); the United Arab Emirates (Civil Code of the United Arab Emirates (1985: Article 11)); and Vietnam (Civil Code of the Socialist Republic of Vietnam (1996: Article 831(1))).
129 Civil Code of Mongolia (2002: Article 543(2)).
130 Private International Law and International Procedural Law Act § 3(2).
131 Act on Private International Law (2012: Part Four, Title I, § 31(1)).
132 Act Concerning Bills of Exchange and Cheques No 191/1950 Coll, Sections 69 and 91.
133 Ukrainian Private International Law Code, Article 18(2).
134 Code on the Law of Persons and the Family (1989: Chapter II, Article 1017).

It has been submitted that the application of the law of nationality is relatively uncomplicated because nationality is normally easily ascertainable (that is: by a court at the time of the proceedings, not for a contracting party at the time of contracting).[135] It is also stated that nationality often does have a close connection with an individual and is therefore a proper connecting factor for the personal law.[136] Whether the law of nationality indeed provides protection to the incapable party, would, of course, depend on its content, and also on the substance of the laws that are simultaneously applicable under an alternative reference rule.[137]

Some of the critique levelled against application of the *lex patriae* (for instance, that it is impractical and unfair in the international commercial sphere to expect the counterpart to enquire about an individual's nationality) is not convincing in the context of an alternative reference rule, where the law of nationality is only one of a number of systems that may be utilised to indicate contractual capacity.[138] In favour of the *lex patriae* is the fact that nationality, in the context of legal proceedings (*ex post facto*) is often readily determinable. Nevertheless, it was decided not to include the *lex patriae* in the proposal in paragraph 6.6 and 6.7, mainly based on the following considerations:

(1) In the current social realities of cross-border mobility of individuals, nationality often does not indicate a very strong connection to a particular country; in any event much less than domicile and even habitual residence.

(2) The utilisation of nationality as a connecting factor is contrary to South African and common-law traditions.

(3) Application of nationality as a connecting factor in this context may be in conflict with the Constitution.

In the context of the proposed African codifications referred to in paragraph 6.5, it may, nevertheless be necessary to add the *lex patriae* as one of the primary applicable legal systems in order to obtain consensus, as many African legal systems belong to the civil-law family and indeed employ the law of nationality as the primary applicable legal system, where nationality is a prevalent connecting factor in this regard.

135 Huo (2010: 174). Also see North and Fawcett (1992: 133).
136 Forsyth (2012: 50); Huo (2010: 174); Mádl and Vékás (1998: 122); and the American Law Institute (1971: 581).
137 See paragraph 6.4.
138 Compare paragraph 6.2.1 in respect of domicile.

6.2.5 The *lex loci contractus* / the law of the country where the contract was concluded

Globally, the *lex loci contractus* is a prominent legal system in the context of contractual capacity. It found favour among the common-law authors such as Huber,[139] Van der Keessel[140] and Van Bijnkershoek.[141] Huber[142] and Van der Keessel[143] believed that the consequences of status (such as capacity) were to be governed by the *lex loci contractus*, but Van Bijnkershoek applied it as the primarily applicable legal system.[144]

Anton and Beaumont[145] and Forsyth[146] draw a distinction between mercantile and non-mercantile contracts. In the case of the former, the *lex loci contractus* should prevail[147] but in the case of the latter, the *lex domicilii*.[148] Agrawal and Singh submit that the *lex loci contractus* shall apply in Indian private international law as far as commercial contracts are concerned.[149] This legal system also forms part of Kahn's alternative reference rule, together with the proper law of the contract and the *lex domicilii*.[150] The *lex loci contractus* applies, according to Clarence Smith, if the capable contractant could not reasonably be expected to know of his or her counterpart's incapacity in terms of the latter's *lex domicilii*.[151]

139 Huber (1768: *HR* 1.3.44).
140 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
141 Van Bijnkershoek (1926: *Obs Tum* no 71 and 1523).
142 Huber (1687: *HR* 1.3.44).
143 Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).
144 Van Bijnkershoek (1926: *Obs Tum* no 71 and 1523). Also see Schoeman, Roodt and Wethmar-Lemmer (2014: par 109) in this regard.
145 Anton and Beaumont (1990: 276-279).
146 Forsyth (2012: 341).
147 See Cheng (1916: 73-74) who submits that "for the promotion and facilities of commerce, the adoption of the *lex loci contractus* is so necessary and imperative that the 'blessings' resulting from its adoption outweigh the evils".
148 Cheng's position (1916: 127-128) is that the *lex domicilii* applies in principle but the capacity to "make contracts of a business nature, but not relating to immovables" is to be governed by the *lex loci contractus*.
149 Agrawal and Singh (2010: par 203). Also see Agrawal and Gupta (2003: par 203). Hickling and Wu (1995: 170-171) maintain that the *lex loci contractus* remains a compelling choice in determining capacity. *Cf* Cheng (1916: 71 and 128).
150 Kahn (1991: 128); and Kahn (2000: 876), with whom Sonnekus (2002: 147) concurs. Also see Edwards and Kahn (2003: par 333).
151 Clarence Smith (1952: 470).

The *lex loci contractus* has been applied by the courts in England,[152] India,[153] Scotland,[154] South Africa[155] and the United States of America.[156] Further, it features as the primarily applicable legal system in codified jurisdictions such as Azerbaijan[157] and Uzbekistan,[158] but applies on an equal level with the *lex patriae* in Slovenia[159] and Turkey,[160] and with the law of habitual residence in China.[161]

The application of the *lex loci contractus* as governing legal system is subject to substantial criticism. The *lex loci contractus*, for instance, may be completely fortuitous, contrived or unknown,[162] lacking any real connection with the contractants or the substance of the contract.[163] This is especially evident in the case of cross-border contracting *via* telephone, Skype, letter, fax, email or electronic data interchange.[164]

The *locus contractus* regarding contracts concluded telephonically would in terms of South African law be in the country where the acceptance of the offer is communicated to the offeror (the information / communication theory), while with those concluded through the post, it would be in the country where the letter of acceptance is both written and posted (the expedition theory).[165] In both instances the *locus contractus* could be a country that has no connection with the contractants or with the substance of the

152 *Baindail v Baindail* [1946] P 122; *Male v Roberts* (1800) 3 ESP 163; and *Sottomayer v De Barros (2)* (1879) 5 PD 94. Also see the commentary by Lord Macnaughten in *Cooper v Cooper* (1888) 13 App Cass 88 at 108; and Lord Greene MR in *Baindail v Baindail* (*supra*: 128).

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

154 *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773 with particular reference to the commentary by Lord Salvesen at 789.

155 *Kent v Salmon* 1910 TPD 637. Also see *Hulscher v Voorschotkas voor Zuid Afrika* 1908 TS 542 at 546; and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).

156 *Milliken v Pratt* 125 Mass 374 (1878). Gray CJ *in casu* (at 382) was of the opinion that applying the *lex loci contractus* to capacity would be in conformity with the expectations of the contractants.

157 Private International Law Code of Azerbaijan (2000: Article 10(2)).

158 Civil Code of Uzbekistan (1997: Chapter 71, Article 1169).

159 Private International Law and Procedural Act (1999: Article 13(1) and (2)).

160 Private International Law Code of Turkey (2007: Chapter 2, Article 9(1) and (2)).

161 Chinese Private International Law Act (2010: Chapter Two, Article 12).

162 Agrawal and Singh (2010: par 203); the American Law Institute (1971: 580); Carter (1987: 25); Collier (2001: 209); Collins *et al* (eds) (2012b: 1868); Diwan and Diwan (1998: 524); Edwards and Kahn (2003: par 333); Fawcett and Carruthers (2008: 751); Forsyth (2012: 340); Kahn (2000: 875); McClean and Beevers (2009: 387); MünchKommBGB/Spellenberg (2010: 1042 and 1052); Schoeman, Roodt and Wethmar-Lemmer (2014: par 114); and Walker (2005: § 31.4.d). This was also the opinion of Morden J in *Charron v Montreal Trust Co* (1958) 15 DLR (2d) 240 (Ontario) at 244.

163 The American Law Institute (1971: 580); Forsyth (2012: 332-333); and O'Brien (1999: 318).

164 *Cf* Wunsh J in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W) 172 A-B.

165 Van Niekerk and Schulze (2011: 70).

contract. The Electronic Communications and Transaction Act[166] stipulates that the *locus contractus* is the country where the acceptance of the offer is received by the offeror, which is taken to be at the offeror's place of business or residence.[167] When this provision is applicable, there will indeed be a link between the place of contracting and the offeror, but this may not necessarily be a significant connecting factor in South African private international law as far as the contract as a whole is concerned, for instance, if both performances in terms of the contract have to take place in another country.[168]

The *locus contractus* may also be difficult to determine.[169] In respect of telephonic contracts, while a general rule does exist, its application to a particular set of facts may be complicated. During the course of a telephonic discussion between contractants it may be difficult to ascertain which party effected the final offer so as to establish where the acceptance of this offer was communicated to the offeror.[170] Determining the *locus contractus* in contracts concluded *via* fax is even more contentious as there is uncertainty on this issue in South African law. It has been suggested that these contracts be regarded as instantaneous and that the information theory should apply. In other words, the *locus contractus* would be where the acceptance of the offeror's offer is communicated to him or her. This will, however, only be the case where contractants are present at their facsimile machines at the same time and responding to each other's messages as parties would telephonically.[171] This, however, hardly ever happens. Telefax messages are usually received automatically and given due attention by the addressee later; it should thus not be regarded as instantaneous communication. Determining the *locus contractus* with reference to the provisions of the Electronic Communications and Transactions Act[172] would, in contrast to the above, not be difficult, in that it stipulates the manner in which this is to be established.[173]

166 25 of 2002.
167 Sections 22(2) and 23(c). Also see the discussion on the Act in Chapter 2, paragraph 2.2.4.
168 See Chapter 2, paragraph 2.2.
169 See Forsyth (2012: 332-333).
170 Van Niekerk and Schulze (2012: 71).
171 *ibid.*
172 25 of 2002.
173 The difficulties in determining the *lex loci contractus* were circumvented in the context of the formal validity of a contract in Article 9 of the Rome Convention (Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention)) and Article 11 of the Rome I Regulation (note 108) by substituting the law "of either of the countries where either of the parties … is present at the time of conclusion" for the more traditional application of the law of the place where the contract was concluded.

Additional critique may be levelled against the *lex loci contractus*. Agrawal and Singh,[174] Diwan and Diwan[175] and Fawcett and Carruthers[176] submit that the application of the *lex loci contractus* would enable a contractant to evade an incapacity (imposed by, for instance, the law that governs the contract in other respects or the personal law of the incapable individual) by simply concluding the contract in a country where the law is more "favourable". Kahn argues that the parties may select a place of contracting with the intent to evade the otherwise applicable law.[177] O'Brien believes that the application of the *lex loci contractus* could be exploited by the stronger contractant who may intentionally conclude a contract in a country where the protection of the counterpart, whose capacity is in doubt, is the weakest.[178] On the other hand, a party could insist to conclude the contract in a certain location for the purposes of a possible protection on the basis of incapacity, if the deal does no longer seem favourable.

Carter submits that, although the *locus contractus* is considered to be the place in which the last event necessary for the formation of the contract occurred, this cannot justify why the *lex loci contractus* should have preference in governing capacity.[179] In the United Kingdom, the *lex loci contractus* was generally accepted to govern capacity at a time when it was assumed that contracts were subject to the law of the country where they were concluded.[180]

In many legal systems, the *lex loci contractus* will therefore only apply if certain requirements are met. Perhaps the most well-known examples are Article 11 of the Rome Convention[181] and Article 13 of the Rome I Regulation,[182] as inspired by the French *Lizardi* decision.[183] The effect of these articles is that a contractant who transacted with his or her counterpart, while present in the same country, but who is incapable in terms of the law(s) governing capacity according to the *lex fori*'s private international law and neverthe-

174 Agrawal and Singh (2010: par 203).
175 Diwan and Diwan (1998: 524).
176 Fawcett and Carruthers (2008: 751).
177 Kahn (2000: 875).
178 O'Brien (1999: 318).
179 Carter (1987: 25).
180 Briggs (2014: 583 note 215); Clarkson and Hill (2011: 250); O'Brien (1999: 318); Sykes and Pryles (1991: 614); and Tilbury, Davis and Opeskin (2002: 770). Also see Collier (2001: 209); and the commentary by Young J in *Homestake Gold of Australia v Peninsula Gold Pty Ltd* (1996) 20 ACSR 67 at 8.
181 note 173.
182 note 108.
183 *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193. See the discussion on French law in Chapter 4, paragraph 4.2.7. See further MünchKommBGB/Spellenberg (2010: 1040).

less capable under the *lex loci contractus*,[184] may not rely on this incapacity unless the counterpart was aware of the incapacity at the time of contracting or lacked this knowledge due to negligence.

The *lex loci contractus* therefore applies in addition to the law primarily governing capacity under the *lex fori*'s private international law when certain requirements are complied with, namely: the contractants were present in the same country at the moment of contracting and the party asserting incapacity is capable in terms of the *lex loci contractus* but incapable under the legal system/s otherwise indicated by the *lex fori's* private international law. The *lex loci contractus* nevertheless does not apply if the counterpart was aware of this fact or unaware thereof due to negligence. Article 11 and Article 13 therefore have the same effect as the *Lizardi*[185] rule in French private international law.[186] The similarity between the articles and the *Lizardi* rule is that in both cases provision is made for a fault-related exception to the application of the *lex loci contractus* by way of a three-step model. The difference between them, however, is that the articles in the Rome Convention[187] and the Rome I Regulation[188] require the contractants to have been in the same country at the moment of contracting for the *lex loci contractus* to be applied as an additional legal system, while, in the *Lizardi* case, it is required that the contract must have been concluded in the forum state.

The rule in Article 11 / Article 13 is not relevant when the *lex loci contractus* is in any event a primarily applicable legal system governing capacity in terms of the private international law of the forum.[189] In such a case, the application of this legal system would not be dependent on the compliance

184 The Articles refer to "the law of that country" (see Chapter 5, paragraph 5.3.1) but the Giuliano-Lagarde Report (1980: *ad* Article 11) and all the authors consulted in this regard agree that this is merely another formulation of "the law of the country where the contract was concluded". See Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Gaudemet-Tallon (2009: Fasc 552-15); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); and Vonken (2015: 5992). However, in exceptional circumstances the law of the physical presence of the parties and the *lex loci contractus* will not coincide. *Cf* Santa-Croce (2008: Fasc 552-60). The following example may be provided from the perspective of South African law. Natural person A (habitually resident in country X) concludes a contract with B while both parties are present in country Y. A made the offer and B accepted the offer, both by electronic means. In terms of Article 23 of the South African Electronic Communications and Transactions Act 25 of 2002, the contract is concluded in country X (unless A runs a business, in which case the contract will be held to be concluded in the usual place of business).

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

186 as discussed in Chapter 4, paragraph 4.2.7.

187 note 173.

188 note 108.

189 See the Giuliano-Lagarde Report (1980: *ad* Article 11).

of conditions; it governs capacity in all instances.[190] The articles do not limit the application of the *lex loci contractus* prescribed by the forum's private international law; it only limits the degree to which the incapable party may escape the application of the *lex loci contractus*.

The rule in Article 11 / Article 13 is described as a mechanism of protection in that it would protect a contractant who in good faith and without negligence believed that he or she was contracting with a capable individual but is subsequently confronted by the latter's incapacity.[191] In effect, the articles prescribe the alternative application of the *lex loci contractus* in respect of capacity in the absence of knowledge or negligence. The capable contractant would then be protected as the circumstances under which the incapable party's incapacity may be invoked, would be limited.[192] Whether or not the capable contractant is indeed protected in a particular case, will, of course, depend on the content of the *lex loci contractus* and the content of the other legal systems simultaneously applicable under an alternative reference rule.[193]

For the application of the rule in Article 11 / Article 13, the contractants must physically have been in the same country at the moment that the contract was concluded.[194] In this context, therefore, the debate on the *locus contractus* (in situations involving the telephone, letters, fax, electronic data inter-

190 See Fawcett and Carruthers (2008: 752). For examples, see the Private International Law and Procedural Act of Slovenia (1999: Article 13(2)); and the Private International Law Code of Turkey (2007: Chapter 2, Article 9(1) and (2)). Also see the Macedonian Private International Law Act (2007: Article 15, paragraph 2).

191 The Giuliano-Lagarde Report (1980: *ad* Article 11); Collins *et al* (eds) (2012b: 1870); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 551); and MünchKommBGB/Spellenberg (2010: 1040-1041). The protection would, in particular, make sense where the incapable party concludes the contract at the business premises of the counterpart. See paragraph 6.4. Also see Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).

192 Fawcett and Carruthers (2008: 752); and Fawcett, Harris and Bridge (2005: 658). Also see Anton and Beaumont (1990: 335) (and Beaumont and McEleavy (2011: 491)) who regard the rule in this article as comprehensible and coherent with Lord Salvesen's opinion in *McFeetridge v Stewarts & Lloyds Ltd* (*supra*: 789) that "[i]n the case of a minor the reasonable view seems to be that he should have such protection in respect of his minority as the country in which he contracts would extend to a native, but that he should have no higher or different rights". See further Santa-Croce (2008: Fasc 552-60) who submits that Article 11 favours validity, protects the capable contractant and leads to increased legal certainty. See Asser/Kramer/Verhagen (2015: 278-279) and Asser/Vonken (2013: 126) who refer to the protection of the reasonable reliance of the capable contractant on the application of the *lex loci contractus* in this regard. Also see Gaudemet-Tallon (2009: Fasc 552-15); the Giuliano-Lagarde Report (1980: *ad* Article 11); and MünchKommBGB/Spellenberg (2010: 1040-1041).

193 See paragraph 6.4.

194 Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Fawcett, Harris and Bridge (2005: 659); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1913); Santa-Croce (2008: Fasc 552-60); and Vonken (2015: 5992).

change and email) is irrelevant. According to Dicey, Morris and Collins[195] and Plender and Wilderspin,[196] this provision does therefore not prejudice the protection of a contractant incapable in terms of his or her personal law where the contract is concluded at a distance between parties in different countries.[197] But, again, the protection, or not, of an incapacitated individual will depend on the content of the legal system(s) referred to by the *lex fori*'s private international law. This remains the position even if, according to the proper law, or, it may be added, the *lex fori*, the contract is deemed to be concluded in the country where the capable contractant is situated.[198]

Of course, both the contracting parties (the incapable and the capable party) are in need of protection. It is the role of private international law to mediate between the interests of both parties. This perspective on the matter is discussed in more detail in paragraph 6.4; it is given content in the proposal made in paragraphs 6.6 – 6.7.

The incapable contractant in terms of Article 11 / Article 13 must be a natural person irrespective of nationality,[199] domicile or residence,[200] but there is no such a requirement with regard to the counterpart. The latter may presumably be a corporation.[201]

It is a requirement for Article 11 / Article 13 to take effect that the incapable contractant, as determined according to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law,[202] must be deemed to have capacity according to the *lex loci contractus*. This is derived from the phrase "the law of that country" in Article 11 / Article 13.[203]

Fault plays the role of an exception in Article 11 / Article 13. The *lex loci contractus* will not apply on the basis of these articles where the capable con-

195 Collins *et al* (eds) (2012b: 1870).
196 Plender and Wilderspin (2009: 102).
197 On contracts concluded at a distance, see MünchKommBGB/Spellenberg (2010: 1052); and Reithmann/Martiny/Hausmann (2010: 1913).
198 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Collins *et al* (eds) (2012b: 1870).
199 Also see MünchKommBGB/Spellenberg (2010: 1044); and Vonken (2015: 5992).
200 Reithmann/Martiny/Hausmann (2010: 1913).
201 Fawcett and Carruthers (2008: 752); and MünchKommBGB/Spellenberg (2010: 1045). Also see Plender and Wilderspin (2009: 101); and Vonken (2015: 5992). *Cf* Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 490); and Hill (2014: 68).
202 as derived from the phrases "another law" (Article 11) and "the law of another country" (Article 13).
203 The Giuliano-Lagarde Report (1980: *ad* Article 11). Also see Anton and Beaumont (1990: 335); Asser/Vonken (2013: 128); Beaumont and McEleavy (2011: 490); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Gaudemet-Tallon (2009: Fasc 552-15); Hill and Chong (2010: 552); MünchKommBGB/Spellenberg (2010: 1041); Plender and Wilderspin (2009: 101); Reithmann/Martiny/Hausmann (2010: 1917); Santa-Croce (2008: Fasc 552-60); and Voken (2015: 5992).

tractant had knowledge of his or her counterpart's incapacity in terms of the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, or was unaware thereof due to negligence.

In principle, both parties may invoke incapacity in terms of the primarily applicable legal system(s).[204] But only the incapable contractant, and not the counterpart, may invoke the non-applicability of the *lex loci contractus* in terms of Article 11 and Article 13. Indeed, Article 11 and Article 13 refer to the contractant who would have capacity in terms of the *lex loci contractus* invoking his or her incapacity. This is logical as the non-applicability of the *lex loci contractus* in the circumstances referred to in Article 11 / 13 is intended to protect the incapable party.[205]

The incapable contractant bears the burden to prove that the capable counterpart was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence.[206] The authoritative[207] Giuliano-Lagarde Report[208] states that the formulation of Article 11 implies that the incapable contractant must establish that his or her counterpart had knowledge of the incapacity or should have had such knowledge.[209] If the incapable contractant successfully proves knowledge or negligence on the part of the co-contractant, he or she (the incapable party) lacked the capacity to contract. On the other hand, should this contractant (the incapable party) be unsuccessful, he or she shall be bound to the contract.[210]

There are numerous examples in codified jurisdictions of the application of the *lex loci contractus* in addition to the primarily applicable legal system in particular circumstances. In this regard, the presence of one or more of the following conditions is usually required:

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204 See Fawcett and Carruthers (2008: 752-753). Also see the example by Plender and Wilderspin (2009: 102).

205 The application of the *lex loci contractus* in terms of Article 11 / 13 is intended to protect the party who in good faith and without negligence believed himself to be contracting with a capable individual and is confronted by the incapacity of this counterpart after the contract was concluded. Also see Fawcett and Carruthers (2008: 753); Fawcett, Harris and Bridge (2005: 658); Plender and Wilderspin (2009: 101); and Reithmann/Martiny/Hausmann (2010: 1917). *Cf* Staudinger/Hausmann (2013: 636).

206 Anton and Beaumont (1990: 335); Asser/Kramer/Verhagen (2015: 441); Asser/Vonken (2013: 129); Beaumont and McEleavy (2011: 490-491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); Hill and Chong (2010: 551); Santa-Croce (2008: Fasc 552-69); and Vonken (2015: 5993). Also see MünchKommBGB/Spellenberg (2010: 1055-1056); and Plender and Wilderspin (2009: 102).

207 Anton and Beaumont (1990: 335); Beaumont and McEleavy (2011: 491); Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); and Hill and Chong (2010: 551).

208 The Giuliano-Lagarde Report (1980: *ad* Article 11).

209 *ibid*.

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

1 the contract in question was concluded in the forum state;
2 the parties to the contract were present in the same country at its conclusion;
3 the forum state is the country where performance is to be effected; and
4 there was no fault on the part of the contract assertor.[211]

In jurisdictions such as Belarus,[212] Iran,[213] Mongolia,[214] Slovakia,[215] Spain,[216] Taiwan[217] and Thailand[218] condition 1 is sufficient for the *lex loci contractus* to apply as an additional legal system. Similarly, in Japanese private international law, this legal system applies in the presence of condition 2.[219]

Condition 4 is here formulated as a requirement (the absence of fault) that must be fulfilled for the *lex loci contractus* to be applied. This was called the two-step model.[220] Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)), namely the *lex patriae* and / or the *lex domicilii* and/or the law of habitual residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3, referred to above (and as prescribed by the *lex fori*'s private international law), are fulfilled *and* fault is absent on the part of the capable contractant. The same result may be reached in formulating the no-fault principle as an exception to the applicability of the *lex loci contractus* where fault exists. This is the three-step model. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)), namely the *lex patriae* and / or the *lex domicilii* and / or the law of habitual residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3, referred to above (and as prescribed by the *lex fori*'s private international law) are present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant.

In Romania, the absence of fault on the part of the capable contractant is the sole requirement for the *lex loci contractus* to be applied (within the context of the two-step model).[221] In Estonian,[222] Lithuanian,[223] Russian[224] and Tuni-

211 On the possible requirement of French nationality, see Chapter 4, paragraph 4.2.7.
212 Civil Code of the Republic of Belarus (1999: Article 1104 (3)).
213 Civil Code of Iran (1935: Article 962).
214 Civil Code of Mongolia (2002: Article 543(5)).
215 Private International Law and International Procedural Law Act (1963: § 3(2)).
216 Spanish Civil Code (1889–1981: Article 10.8).
217 Private International Law Act (2010: Chapter 2, § 10).
218 Act on Conflict of Laws (1938: Section 10).
219 Act on the General Rules of Application of Laws (2006: Article 4(2)).
220 See Chapter 4, paragraph 4.8.
221 Romanian Private International Law Code (1992: Chapter II, Article 17).
222 Estonian Private International Law Act (2002: § 12(3)).
223 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(1)).
224 Civil Code of the Russian Federation (2001: Chapter 67, Article 1197(2)).

sian[225] private international law, the mere presence of fault leads to the non-application of the law of the country where the contract was concluded (in the context of the three-step model).

Jurisdictions such as Angola,[226] Israel,[227] Macau,[228] Mozambique[229] and Portugal[230] require that the contract was concluded in the forum state for the *lex loci contractus* to apply. However, this legal system will not apply if the contract assertor was at fault (three-step model). This arrangement resembles the *Lizardi* rule[231] in French private international law.[232] The *lex loci contractus / lex fori* applies where a contractant incapable in terms of the personal law concluded a contract in the forum state where he or she possesses contractual capacity, unless the capable contractant was or should have been aware of the incapacity at the moment of contracting.

In Bulgaria,[233] Burkina Faso,[234] Germany,[235] Italy,[236] the Netherlands,[237] Quebec,[238] South Korea[239] and Switzerland,[240] the *lex loci contractus* is applied where a contractant, incapable in terms of the relevant personal law, concluded a contract with his or her counterpart while present in the same country (requirement 2 listed above), where the incapable party would have contractual capacity. However, this legal system shall not apply where the capable contractant was or should have been aware of the incapacity at the moment of contracting – the three step model in respect of fault. Clearly, the rule provided in these codifications is in conformity with that in Article 11 of the Rome Convention[241] and Article 13 of the Rome I Regulation.[242]

Vietnamese private international law requires compliance with conditions 1 and 3,[243] listed above, for the *lex loci contractus* to be applicable. The addition-

225 Private International Law Code (1998: Article 40).
226 Civil Code of Angola (1966: Article 28(2)).
227 Legal Capacity and Guardianship Law (1962: § 77).
228 Civil Code of Macau (1999: Chapter III, Article 27(2)).
229 Civil Code of Mozambique (1966: Article 28(2)).
230 Civil Code of Portugal (1996: Article 28(2)).
231 *Lizardi v Chaize* (*supra*).
232 French Civil Code (1804–2004: Article 3).
233 Bulgarian Private International Law Code (2005: Article 50(2)).
234 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
235 Introductory Act to the Civil Code (1994: § 12). Also see Staudinger/Hausmann (2013: 605) on the reasons for preferring the application of the *lex loci contractus* in this context.
236 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).
237 Book 10 of the Dutch Civil Code (2012: Article 11(2)).
238 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086).
239 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1)).
240 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)). But see Siehr (2002: 145).
241 note 173.
242 note 108.
243 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)).

al application of the *lex loci contractus* may also be dependent on the presence of three conditions, as in Algeria,[244] Egypt,[245] Qatar,[246] Syria[247] and the United Arab Emirates,[248] namely conditions 1, 3 and 4 (in the context of the two-step model in respect of the absence of fault).

The *lex loci contractus* is also applied in addition to the default legal system(s) in situations not covered by the conditions as discussed above. In Argentinean[249] private international law, the *lex loci contractus* applies only where contracts are concluded outside the forum state, while in Israel[250] it applies when the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity. In Lithuania, on the other hand, the *lex loci contractus* is utilised when foreign citizens have no domicile.[251] In Hungarian private international law, this legal system only governs capacity when the contract is concluded in the forum state and it relates to essential goods. However, when performance in terms of the contract is to be effected in Hungary and it relates to non-essentials, the *lex fori / lex loci solutionis* is to be applied,[252] and not the *lex loci contractus*.

In some jurisdictions, the *lex loci contractus* as an additional legal system is not applicable to certain types of contracts. In general, this legal system shall not apply as an alternative governing system where contracts involve family law or the law of succession. In Chinese,[253] Slovenian[254] and Thai[255] private international law, the latter is the only limitation to the application of the *lex loci contractus*. In Angola,[256] Burkina Faso,[257] Estonia,[258] Germany,[259] Italy,[260] Macau,[261] Mozambique,[262] Portugal,[263] South Korea[264] and Taiwan[265] the *lex*

244 Civil Code of Algeria (1975: Chapter II, Article 10).
245 Civil Code of Egypt (1948: Article 11).
246 Civil Code Qatar (2004: Article 11).
247 Civil Code of Syria (1949: Article 12(1)).
248 Civil Code of the United Arab Emirates (1985: Article 11).
249 Civil Code of Argentina (1869–1987–1997: Article 7).
250 Legal Capacity and Guardianship Law (1962: § 77).
251 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).
252 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).
253 Chinese Private International Law Act (2010: Chapter two, Article 12).
254 Private International Law and Procedural Act (1999: Article 13(4)).
255 Act on Conflict of Laws (1938: Section 10).
256 Civil Code of Angola (1966: Article 28(2)).
257 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
258 Estonian Private International Law Act (2002: § 12(4)).
259 Introductory Act to the Civil Code (1994: § 12). Also see Reithmann/Martiny/Hausmann (2010: 1914-1915).
260 Italian Statute on Private International Law (1995: Chapter II, Article 23(4)).
261 Civil Code of Macau (1999: Chapter III, Article 27(2)).
262 Civil Code of Mozambique (1966: Article 28(2)).
263 Civil Code of Portugal (1996: Article 28(2)).
264 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(2)).
265 Private International Law Act (2010: Chapter 2, § 10).

loci contractus does not apply where the contract involves immovable property situated abroad. The *lex loci contractus* shall not apply as an additional legal system in Bulgarian,[266] Israeli[267] and Swiss[268] law where the contract relates to real rights in respect of immovable property in general; in Turkey it shall not apply in respect of immovable property situated abroad.[269] In the Lithuanian code the additional limitation concerns contracts involving real rights in general,[270] while in Romania it pertains to the *transfer* of immovable property.[271] In the Japanese code the further limitation concerns contracts relating to immovable property situated in a country where the law regarding immovables differs from that in the *lex loci contractus*,[272] while in Israel, the limitation relates to immovable property in general[273] and cases where the contract caused substantial harm or prejudice to the incapable party.[274]

The current author submits that the exclusive or the unconditional primary application of the *lex loci contractus* is undesirable.[275] As has been indicated, the application of the *lex loci contractus* may be completely fortuitous, contrived or unknown, lacking any necessary connection with the contractants or the substance of the contract. It is also difficult to determine in specific circumstances. The case law in which it was applied is rather dated. Further, an opportunistic contractant may avoid invalidity by contracting in a country where the protection of the incapable party is weakest. The place of contracting could be selected with the intention of evading the law that otherwise would have been applicable. Finally, the *lex loci contractus* should not be granted preference merely because of the importance of the *locus contractus* with regard to the formation of the contract.[276]

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266 Bulgarian Private International Law Code (2005: Article 50(3)).

267 as submitted by Einhorn (2012: par 130).

268 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(2)).

269 Private International Law Code of Turkey (2007: Chapter 2, Article 9(2)). The same provision as that in Turkey exists in Greek private international law, except there (in Greece) the limitation relates to the additional application of the *lex fori* and not the *lex loci contractus*.

270 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(2)).

271 Romanian Private International Law Code (1992: Chapter II, Article 17).

272 Act on the General Rules of Application of Laws (2006: Article 4(3)).

273 See Einhorn (2012: par 130).

274 Legal Capacity and Guardianship Law (1962: § 77).

275 The common-law author Van Bijnkershoek also did not apply the *lex loci contractus* exclusively in all circumstances, as gathered from his commentary on a decision of the *Hoge Raad* (*Obs Tum* no 1523), as referred to by Van Rooyen (1972: 21). The *lex loci contractus* also does not apply exclusively in terms of the Restatement (Second) – see the American Law Institute (1971: 579).

276 In South African private international law, the *lex loci contractus* and probably the proper law of the contract govern the formal validity of a contract. See Forsyth (2012: 343); *Ex Parte Spinazze* 1985 (3) SA at 633 (A) 665H; and *Creutzberg v Commercial Bank of Namibia Ltd* 2006 (4) All SA 327 (SCA).

Nevertheless, the additional application of the *lex loci contractus* is supported in particular circumstances. This will provide a mechanism of protection to the *bona fide* capable contractant, for instance a local merchant, who is confronted by his or her counterpart's incapacity. The capable contractant is protected in that the counterpart's incapacity may only be invoked under limited circumstances.[277] The *locus contractus* remains important since, as Spellenberg and Hausmann put it, the contractants participated in legal interaction in that country. Further, the additional application of this legal system will safeguard confidence in the local law[278] and, in cases where the parties are in each other's presence, it is readily ascertainable which legal system is the *lex loci contractus*.[279] Also, according to Hausmann, the *lex loci contractus* is known *ab initio*, its application is foreseeable and it is geographically the best system to govern capacity.[280]

Article 11 of the Rome Convention[281] and Article 13 of the Rome I Regulation[282] determine that the *lex loci contractus* should apply, in addition to the primary applicable legal systems, only when the contractants were in the same country at the moment of contracting. This legal system shall not apply where the capable contractant was or should have been aware of the incapacity at the time of contracting. This is the rule also applied in codified jurisdictions such as Bulgaria,[283] Burkina Faso,[284] Germany;[285] Italy,[286] the Netherlands,[287] Quebec[288] and South Korea.[289] Limiting the application of the *lex loci contractus* to the scenario where both parties are present in the same country, often avoids dispute over where exactly the contract was concluded.[290] Application of this legal system seems to be justified to a greater extent where a real (and not a mere artificial) link with the *locus contractus* is present. In these circumstances, the application of the law of the country of contracting will probably coincide with the expectations of the parties. The limited application of the *lex loci contractus* also protects the incapable party in distance contracts (for instance, these concluded by telephone or by email), but only if the par-

277 The clash of interests of the capable and incapable party is further discussed in paragraph 6.4.
278 MünchKommBGB/Spellenberg (2010: 1042); and Staudinger/Hausmann (2013: 605).
279 MünchKommBGB/Spellenberg (2010: 1042).
280 Staudinger/Hausmann (2013: 605).
281 note 173.
282 note 108.
283 Bulgarian Private International Law Code (2005: Article 50(2)).
284 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).
285 Introductory Act to the Civil Code (1994: § 12).
286 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).
287 Book 10 of the Dutch Civil Code (2012: Articles 11(2)).
288 Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086).
289 Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1)).
290 This is not necessarily the case, for instance where Section 22(2) and Section 23(c) of the South African Electronic Communications and Transactions Act 25 of 2002 are applicable: the contract is concluded at a party's place of business (or residence) irrespective of his or her physical presence.

ties were in different countries at the time of the conclusion of the contract; it does not provide sufficient protection in respect of distance contracts where the parties were in the same country at the specific time. The current author therefore suggests, as Siehr[291] and Einhorn,[292] that the contractants should have been in each other's presence for the *lex loci contractus* to be applicable. The capable contractant should not be protected by the additional application of this legal system if the contract was concluded at a distance; the incapable party should enjoy greater protection in these cases. The proposed condition for the application of the *lex loci contractus* as an additional legal system will therefore have a somewhat narrower scope than the one found in the Rome I Regulation[293] and countries with similar arrangements. Of course, where the protection of the parties is mentioned in this paragraph, one should remember that their abstract interests are referred to. In a specific case, the protection of a particular party depends on the content of the various legal systems.[294]

If the capable party is a juristic person, the parties must be deemed to be in each other's presence when, for instance, the contract was concluded at the business premises of the first mentioned party. It will also be stipulated in the proposed rule that the incapable contractant must be a natural person (irrespective of nationality, domicile or habitual residence); the co-contractant could be a corporation.

The proposed rule will have an effect similar to that of *Lizardi*,[295] which is applied in jurisdictions with codified rules in this regard such as Angola,[296] France,[297] Israel,[298] Macau,[299] Mozambique[300] and Portugal,[301] but the requirement in these systems that the contract must have been concluded in the forum state is to be disregarded. This is an arbitrary distinction which limits the protection afforded by the rule to a more limited scenario. The requirement of the conclusion of the contract in the forum state, practically leads to the application of the *lex fori* instead of the *lex loci contractus*. Such a *lex fori* orientation, originating from a somewhat parochial approach to private international law, cannot be supported. Moreover, it appears that, in practice and in theory, the application of the *Lizardi* rule is in any event extended to contracts that are concluded abroad.[302]

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291 Siehr (2002: 145).
292 Einhorn (2012: par 128).
293 note 108.
294 See paragraph 6.4.
295 *Lizardi v Chaize* (*supra*).
296 Civil Code of Angola (1966: Article 28(2)).
297 French Civil Code (1804–2004: Article 3).
298 Legal Capacity and Guardianship Law (1962: § 77).
299 Civil Code of Macau (1999: Chapter III, Article 27(2)).
300 Civil Code of Mozambique (1966: Article 28(2)).
301 Civil Code of Portugal (1996: Article 28(2)).
302 Van Rooyen (1972: 114). Also see Lipp (1999: 107); Mayer and Heuzé (2010: 395-396); Niboyet and de Geouffre (2009: 179-180); and Santa-Croce (2008: Fasc 552-60).

Sometimes it is stated that the provisions of Article 11 and Article 13 will only apply when there is a conflict of laws.[303] In other words, the content of the law(s) which, according to the otherwise applicable private international law rules of the *lex fori*, govern(s) the capacity of the contractant claiming to be incapable must be different from that of the *lex loci contractus*.[304] Of course, the additional application of the *lex loci contractus* only becomes relevant where there is a conflict of laws in the particular case. In a sense this applies to the whole norm complex of private international law.[305] Nevertheless, it should, in principle, be determined from the outset which legal system(s) govern(s) capacity. The proposed rule does therefore not refer to the existence of a conflict of laws.

An implied requirement in terms of Article 11 / Article 13 exists that the contractant lacking capacity in terms of the primary applicable legal system(s) according to the *lex fori*'s private international law, would have had capacity according to the *lex loci contractus*.[306] This does not feature as such in the proposed rule. Of course, the additional application of the *lex loci contractus* only becomes relevant when the otherwise incapable contractant has capacity according to the *lex loci contractus*. However, listing it as a requirement would be superfluous.

In the rule proposed, the existence of fault will, in conformity with the approaches in the Rome instruments[307] and numerous jurisdictions of the civil-law tradition,[308] play the role of an exception in that the *lex loci contractus*

303 Clarkson and Hill (2011: 251); Collins *et al* (eds) (2012b: 1870); Fawcett and Carruthers (2008: 752); and Hill and Chong (2010: 552).

304 See Clarkson and Hill (2011: 251) with particular reference to the Giuliano-Lagarde Report (1980: *ad* Article 11) for an explanation of this requirement.

305 Somehow it became tradition to make this pertinent statement specifically in the current context and in respect of the incidental question. See for example Collins *et al* (eds) (2012a: 55-56). Also see the discussion in Chapter 5, paragraph 5.4.

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

307 Article 11 of the Rome Convention (note 173) and Article 13 of the Rome I Regulation (note 108).

308 For example, Angola (Civil Code of Angola (1966: Article 28(2))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(2))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1018)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 12)); Israel (Legal Capacity and Guardianship Law (1962: § 77)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(2))); Macau (Civil Code of Macau (1999: Chapter III, Article 27(2))); Mozambique (Civil Code of Mozambique (1966: Article 28(2))); the Netherlands (Book 10 of the Dutch Civil Code (2012: Article 11(2))); Portugal (Civil Code of Portugal (1996: Article 28(2))); Quebec (Civil Code of Quebec (1991: Book 10, Chapter 1, Article 3086)); South Korea (Conflicts of Laws Act of the Republic of Korea (2001: Article 15(1))); and Switzerland (Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1))).

will not apply where the capable contractant had knowledge of his or her counterpart's incapacity according to the primarily applicable legal system(s) in terms of the *lex fori*'s private international law, or was unaware thereof due to negligence. The generally accepted three-step model[309] is preferred as it implies the *ab initio* application of the *lex loci contractus* and is perhaps more in line with the proposed arrangement in respect of the onus of proof.[310]

Presence of fault is a necessary exception in this regard as it provides protection for both parties to the contract.[311] Where fault is present on the part of the contract assertor, the incapable party may rely on his or her incapacity in terms of the primarily applicable legal system(s) and avoid liability since no valid contract came into existence. Where fault is absent, on the other hand, the capable party (the contract assertor) will be protected in that he or she may duly insist upon the enforcement of the contract if the otherwise incapable party would have had capacity in terms of the *lex loci contractus*. The current author submits that the adoption of the *lex loci contractus*, together with the exception, constitutes a *via media* between the (abstract) interests of the incapacitated party and the capable contractant.[312]

It is suggested by the current author that the determination of negligence will have to take place in terms of the substantive law of the *lex fori* as this concept forms part of the private international law rule of the forum.[313] If the rule forms part of a regional, supranational or international instrument, substantiation of the negligence test may have to take place in an autonomous manner specifically tailored for the particular instrument.[314] This may involve taking into consideration the content of the negligence test in other member countries. In any event, whether a person was negligent will depend on all the circumstances of the case, for instance, the type of transaction and the amount involved (purchasing a book or a bicycle *versus* selling

309 See the text at notes 186-187 and 220-221.
310 See the text at notes 317-318.
311 See Van Rooyen (1972: 123).
312 See paragraph 6.4.
313 In South Africa, the criterion is the "reasonable person" test as formulated in *Jones NO v Santam Bpk* 1965 (2) SA 542 (A). See Knobel (ed) (2010: 131-133). But see Forsyth (2012: 340 note 145), suggesting the *lex domicilii* governs the content of negligence if it were to play a role. *Cf* Marques dos Santos (2000: 144) on Article 44(2) of the Civil Code of Macau, which has the forseeability of damages as a requirement for a certain legal system to be applicable. According to the author, it is unclear in terms of which legal system foreseeability must be determined. Staudinger/Hausmann (2013: 633) submit that the content of negligence as referred to in § 12 of the EGBGB should be determined by German law. But see Staudinger/Hausmann (2013: 602) arguing in favour of a European-orientated interpretation of the mentioned paragraph. *Cf* MünchKommBGB/Spellenberg (2010: 1041).
314 See Gaudemet-Tallon (2009: Fasc 552-15), Mayer and Heuzé (2010: 395-396), MünchKommBGB/Spellenberg (2010: 1917), Reithmann/Martiny/Hausmann (2010: 1915), Santa-Croce (2008: Fasc 552-60) and Vignal (2008: Fasc 545) on Article 11 / Article 13 as a substantive rule of private international law. *Cf* MünchKommBGB/Spellenberg (2010: 1041).

immovable property or 51% of the shares of a company)[315] and the characteristics of the natural or juristic person involved (an auditor or a bank *versus* an inexperienced individual).[316]

As was indicated above,[317] many legal systems automatically exclude the additional application of the *lex loci contractus* in respect of certain contracts involving immovable property and family or succession law. The effect of these provisions is similar to the scenario where the capable party is negligent in not knowing about the incapacity of the other party – in both cases the *lex loci contractus* is not a governing law.

In terms of the proposed rule, the contractant invoking his or her incapacity is the individual who would have capacity in terms of the *lex loci contractus*. It thus follows that only the incapable contractant, and not his or her counterpart, may invoke the non-applicability of the *lex loci contractus*. Of course, this limitation shall not prevent an incapable party from seeking to uphold a contract, nor shall it entitle a capable contractant from escaping contractual liability by asserting that he or she was unaware of the counterpart's incapacity. The incapable contractant shall bear the burden to prove that the capable contractant was aware of the incapacity at the moment of contracting or was unaware thereof as a result of negligence. Should the incapable contractant successfully prove knowledge on the part of the co-contractant, it will be found that he or she lacked the capacity to contract. Should this contractant be unsuccessful, he or she will be bound to the contract (if that is indeed the context of the *lex loci contractus*).

In conformity with the custom in codified jurisdictions, it is preferable that the application of *lex loci contractus* in the manner described be limited in specific circumstances. It is therefore proposed that this legal system should not apply when the incapacity in question relates to contracts involving family or succession law or to agreements concerning immovable property. This is a sensible limitation because in these types of transactions, there would

315 See Asser/Kramer/Verhagen (2015: 281-282); Asser/Vonken (2013: 126 and 129); Asser/Vonken (2012: 101-102); MünchKommBGB/Spellenberg (2010: 1057); Ten Wolde (2013: 123-124); and Vonken (2015: 5993). *Cf* Siehr (2002: 145); and Einhorn (2012: par 130). Also see Batiffol and Lagarde (1983: 491); Mayer and Heuzé (2010: par 525); Santa-Croce (2008: Fasc 552-60); and Vignal (2008: Fasc 545).

316 The onus to prove negligence is on the incapable contractant but it will be easier to prove negligence in the case of, for instance, immovable property or when the capable contractant is a bank. See Asser/Vonken (2013: 129); Asser/Vonken (2012: 101-102); MünchKommBGB/Spellenberg (2010: 1057); Reithmann/Martiny/Hausmann (2010: 1880 and 1915); Staudinger/Hausmann (2013: 27, 604 and 634); Ten Wolde (2013: 123-124); and Vonken (2015: 5993). Also see the decision of the *Bundesgerichtshof* in BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; www.unalex.eu which concerned the contractual capacity of a German company to conclude a transnational contract.

317 See the text at notes 253-274.

be the opportunity for, and therefore the duty of, a proper investigation in respect of capacity.

It is also proposed that the *lex loci contractus* should apply to capacity as an alternative legal system when contractants conclude an agreement of a recurrent nature in respect of reasonably essential items.[318] The inclusion of such a rule in respect of contractual capacity is clearly tenable as it would exclude the unrealistic and impractical onus[319] on merchants selling everyday goods from determining the personal law of a purchaser in all cases. Policy considerations would indicate more protection for such merchants than those selling expensive items such as jewellery or motor vehicles. The fault exception, in general applicable to the *lex loci contractus*, would therefore not apply in these circumstances. Indeed in Hungarian private international law, the *lex loci contractus* will apply irrespective of fault when the contract concerns essential items.[320]

6.2.6 The *lex causae* / the proper law of the contract

As a contract does not come into existence without the necessary capacity,[321] reference in this context should always be made to the putative proper law of the contract, that is: the legal system that would have been the proper law if the contractants indeed had contractual capacity. Authority for the proper law as an applicable legal system in the context of contractual capacity may be found with many authors, as well as in decisions and codifications.

The Italian author Ubertazzi expresses support for the application of the proper law to contractual capacity in general.[322] She states that the application of the proper law would allow various aspects of a contract to be governed by the same law and that it overcomes the traditional dichotomy between nationality and domicile states and therefore the differences between civil-law and common-law systems. As such, it would promote international harmony and legal certainty.[323] If all the aspects of a contract are governed by the same law, the burden of the contractants to inform themselves on the different laws applicable to the various elements of the agreement would be alleviated. The application of the proper law broadens the scope of the law that governs most aspects in respect of contracts (that

318 See Schwenzer, Hachem and Kee (2012: 206-207) on "the necessities of life". *Cf* Asser/Vonken (2013: 126 and 129).
319 See Mádl and Vékás (1998: 132-135).
320 However, in Hungarian law the contract must have been concluded in the forum state. See the Hungarian Private International Law Code (1979: Chapter II, § 15[2]).
321 *Cf* Symeonides (2014: 130-131) on the so-called "bootstrapping problem".
322 Ubertazzi (2008: 729-734).
323 In this regard, see Ubertazzi (2008: 734) where she asserts that subjecting capacity to the proper law in the case of choice of jurisdiction agreements also assists to ensure the predictability of the competent court.

is the proper law) and reduces the scope of the exceptions (as would be the case if contractual capacity were not governed by the proper law).[324]

Critique is, nevertheless, levelled against both the subjectively and objectively determined proper law. The most prominent critique against the subjectively determined proper law (the proper law indicated by a choice of law of the parties, either expressly or tacitly) is that it would allow parties to confer capacity upon themselves by simply selecting a governing law under which they would have capacity.[325] Hill and Chong[326] assert that, if this were allowed, the protective effect of the individual's personal law would be eliminated.[327] According to Crawford and Carruthers[328] and Fawcett and Carruthers,[329] it is unacceptable for parties to choose a legal system in this context because it may be unrelated to the parties or the contract.

Oppong views the subjective proper law as less important in comparison to the objectively determined proper law. He submits that, while courts should take cognisance of a choice of law clause within a contract in this regard, it should not be given priority (over the objective proper law) or be allowed exclusive application to issues of contractual capacity. Granting the subjective proper law priority would enable contractants to evade limitations imposed on them by national laws.[330] The author also submits that "[t]he policy reasons that inform national laws on legal competence should not be sacrificed in favour of party autonomy".[331]

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324 In support of the proper law, Ubertazzi also submits that, where the private international law rule applies the proper law to maximise the protection of the more vulnerable contractant, the corresponding rules on contractual capacity in international commerce also subject the contractant's capacity to the law that provides the weaker party the most protection. This argument is, however, not convincing because it would depend on the content of all relevant legal systems which system provides the most protection to the contractant asserting incapacity. See paragraph 6.4 in this regard.

325 Carter (1987: 24); Clarkson and Hill (2011: 250); Collier (2001: 210); Collins *et al* (eds) (2012b: 1869); Crawford and Carruthers (2006: 437); Diwan and Diwan (1998: 524); Fawcett and Carruthers (2008: 751); Hill and Chong (2010: 551); McClean and Beevers (2009: 386); and Schoeman, Roodt and Wethmar-Lemmer (2014: par 107). The current author agrees with Kahn (1991: 128) who (with reference to a remark by Innes CJ in *Hulscher v Voorschotkas voor Zuid Africa* 1908 (TS) 542 at 546) submits that the application of the subjective proper law leads to the incorrect assumption that the contractants are capable of exercising a choice of law. Also see the view of Bristowe J in *Ferraz v d'Inhaca* 1904 TH 137 at 143.

326 Hill and Chong (2010: 551).

327 See Van Rooyen (1972: 126). Also see paragraph 6.4.

328 Crawford and Carruthers (2006: 437).

329 Fawcett and Carruthers (2008: 751).

330 Oppong (2012: par 94); and Oppong (2013: 144). Also see the American Law Institute (1971: 565).

331 Oppong (2013: 144).

However, some support does exist for the application of the subjectively determined proper law to capacity. The Australian Law Reform Commission[332] and Sykes and Pryles[333] submit that there should be no difference in this context between capacity and essential validity: contractants are indeed allowed to intentionally select the law of a country that upholds the validity of the contract. Where the law of a connected country is selected, there is no reason why the provision should be effective for essential validity but denied such effectivity with regard to capacity. The problems in respect of the scope of party autonomy in respect of essential validity and capacity are similar. Therefore, the same rule should be applied to both issues.[334] Sychold argues that, in Australian private international law, there is no authority for the assertion that "the proper law" refers only to this legal system objectively ascertained.[335] Young J in *Homestake Gold of Australia v Peninsula Pty Ltd*[336] (authority for the application of the proper law) did not decide on the matter, nor was it dealt with in the Canadian decision of *Charron v Montreal Trust Co*,[337] the prime basis for the judge's decision. Young J only indirectly touched on the issue by referring to a passage from Cheshire and North.[338] Sychold believes that the prominent Australian authorities[339] would prefer the application of both the subjectively and objectively determined proper law to contractual capacity.[340]

A choice of law (the subjective proper law) may be taken into consideration, Collier suggests, as long as it was not chosen to confer capacity which would not have existed otherwise.[341] Although the author's statement seems to suggest a limited freedom of choice in respect of capacity, in effect it only allows a choice of the *prima facie* applicable legal system(s) (for instance, the law of domicile) or the objective proper law of the contract. These are the systems that would have applied in the absence of a choice of law in this regard.

Pitel and Rafferty prefer an approach whereby the putative proper law, including any express choice of law (the subjective proper law), is applied to capacity. Of course, the choice of law should be made "*bona fide*, legal and in accordance with public policy".[342] The authors believe that such an

332 The Australian Law Reform Commission (1992: 101).
333 Sykes and Pryles (1991: 614).
334 The Australian Law Reform Commission (1992: 101); and Sykes and Pryles (1991: 614).
335 Sychold (2007: par 185).
336 *Homestake Gold of Australia v Peninsula Pty Ltd* (1996) 20 ACSR 67.
337 (1958) 15 DLR (2d) 240 (Ontario).
338 North and Fawcett (1992: 511).
339 Sykes and Pryles (1991: 614).
340 Sychold (2007: par 185).
341 Collier (2001: 210).
342 Pitel and Rafferty (2010: 281).

approach would be more adaptable to the various circumstances.[343] According to Ubertazzi, one of the advantages of applying the subjective proper law is that it provides maximum space for individual autonomy, as a contractant would be able to choose a legal system to govern contractual capacity.[344] Also, Stone argues that incapacitating rules are a "tiresome nuisance";[345] it should be possible to avoid such by the choice of a validating law. This would facilitate international trade.[346] According to Briggs, the proper law should include a choice of law by the contractants as the chosen law may just as well invalidate a contract or could even have a higher degree of majority.[347] A chosen law could, however, be excluded on the basis of public policy.[348]

According to the American Law Institute, application of the subjective proper law promotes the protection of the justified expectations of contractants and the possibility of accurately predicting contractual rights and duties;[349] it therefore secures certainty and predictability. Although the subjective proper law would enable contractants to evade prohibitions that exist in the state that would otherwise be the proper law of the contract, the demands of certainty, predictability and convenience enjoy priority.[350] Parties should therefore have the power to choose the applicable law.

As stated above, the objectively ascertained proper law as the applicable law in this context, is also not free from criticism. Anton and Beaumont are of the opinion that the exclusive application of the objective proper law will lead to uncertainty in respect of ordinary business contracts.[351] Fawcett, Harris and Bridge maintain that determining the objective proper law may lead to excessive uncertainty because "the common law rules on the objective proper law will have to be used, rather than those found under Article 4 of the Rome Convention,[352] for determining the applicable law in the absence of choice".[353] However, the present author submits that the provisions of the Rome Convention[354] / Rome I Regulation[355] should be utilised in determining the proper law applicable to contractual capacity.[356] The authors seem to confuse the exclusion of capacity under the Rome Convention[357] / Rome I

343 *ibid*.
344 Ubertazzi (2008: 730).
345 Stone (2010: 329).
346 *ibid*.
347 Briggs (2014: 949).
348 Briggs (2014: 583, 615-616 and 949).
349 The American Law Institute (1971: 565). Also see Stone (2010: 329).
350 See the American Law Institute (1971: 565).
351 Anton and Beaumont (1990: 278).
352 note 173. This would also apply in respect of Article 4 of the Rome I Regulation (note 108).
353 Fawcett, Harris and Bridge (2005: 658).
354 note 173.
355 note 108.
356 Also see Briggs (2014: 595; *cf* 948).
357 note 173.

Regulation[358] with the non-applicability thereof in determining the proper law for the purposes of capacity. There seems to be no reason in logic or authority for the discontinued common-law rules on the determination of the proper law of contract to suddenly be revived to determine the proper law test for capacity.

Forsyth submits that determining the objective proper law is an unpredictable task and that certainty is a principal feature in commercial contracts. The outcome in a particular case would not be more predictable, he continues, even if it is accepted[359] that the objective proper law and the *lex domicilii* apply to capacity.[360] The present author submits that the uncertainty argument depends on the jurisdiction in question. In a European context it would not be convincing, as the Rome I Regulation[361] provides a high degree of certainty in the determination of the proper law. In a South African context, where the determination of the proper law is less certain, it may be of some persuasive value. However, steps should be taken to remedy the uncertainty in South African law in this regard.[362] Sonnekus views the exclusive application of the objective proper law to capacity as a rigid approach and unsatisfactory; it would clearly yield unfair results.[363]

However, the majority of authors support the objectively ascertained proper law of contract to govern contractual capacity. The most prominent argument in its favour is that the objective proper law of the contract is the system of law with which the contract is most closely connected, rather than any one of the respective parties.[364] Application of the objective proper law, as Fawcett, Harris and Bridge put it, ensures a strong connection between capacity and the contract itself.[365] Oppong views this legal system as the most appropriate because a governing law is determined by taking all connecting factors into consideration.[366] According to Diwan and Diwan, the application of the objectively ascertained proper law is correct in principle and would be in accordance with justice and convenience.[367] O'Brien submits that, although this legal system does not ensure the protection of the weaker contractant as a reference to his or her personal law might,[368] it is

358 note 108. Article 1(2)(a) of the Rome Convention (note 173); and Article 1(2)(a) of the Rome I Regulation.
359 Reference is here made to the exceptions proposed by Van Rooyen (1972: 126).
360 Forsyth (2012: 340). Also see Schoeman, Roodt and Wethmar-Lemmer (2014: par 107).
361 note 108.
362 See Chapter 2, paragraph 2.2.5.
363 Sonnekus (2002: 147).
364 Clarkson and Hill (2011: 250); Collier (2001: 210); Collins *et al* (eds) (2012b: 1869); and Fawcett and Carruthers (2008: 751).
365 Fawcett, Harris and Bridge (2005: 658).
366 Oppong (2012: par 94); and Oppong (2013: 145).
367 Diwan and Diwan (1998: 524).
368 See paragraph 6.4.

nevertheless preferred as it "avoids both accident and machination".[369] According to Oppong and the American Law Institute, application of the objective proper law promotes the protection of the justified expectations of contractants.[370]

A number of authors support the application of the objective proper law without offering any further explanations.[371] It may also be mentioned that this legal system has been applied by the courts in Australia,[372] Canada,[373] England[374] and South Africa.[375]

The objective proper law features in Dicey, Morris and Collins' alternative reference rule, together with the *lex domicilii* and the law of habitual residence.[376] Many authors support precisely this approach to determining capacity.[377] The Australian Law Reform Commission[378] and Sychold[379] favour the application of the proper law (subjectively or objectively determined) together with the law of habitual residence, while Crawford and Carruthers argue for the application of the objective proper law alongside the *lex domicilii*.[380] The objective proper law also features in Kahn's approach, as supported by Sonnekus. According to this approach, a contractant shall have contractual capacity if he or she is capable in terms of the *lex domicilii*, the *lex loci contractus*, the objective proper law and, where the relevant contract involves immovable property, the *lex situs*.[381] Also, the objective proper law

369 O'Brien (1999: 319) here probably refers to the *lex domicilii*. Also see Mortensen (2006: 403-404); and Pitel and Rafferty (2010: 281).

370 Oppong (2012: par 94); Oppong (2013: 145); and the American Law Institute (1971: 577).

371 Carter (1987: 23-24); Davies, Bell and Brereton (2010: 406-407); McClean and Beevers (2009: 386-387); Tilbury, Davis and Opeskin (2002: 768 and 771); and Walker (2005/2014: 31.5b). See Agbede (2004: par 74), who favours the proper law to govern capacity in a Nigerian context, but it is assumed that he is in fact referring to the objectively ascertained proper law. Also see Angelo (2012: par 75) who believes that the objectively determined proper law may possibly govern capacity in New Zealand private international law.

372 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*).

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

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

375 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W). *Cf Powell v Powell* 1953 (4) SA 380 (W); and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W).

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

377 Clarkson and Hill (2011: 250); Hickling and Wu (1995: 171); Hill and Chong (2010: 550); McClean and Beevers (2009: 388); and Tan (1993: 472). Some authors view the approach as commendable: Angelo (2012: par 75); Carter (1987: 24); Collier (2001: 210); Fawcett, Harris and Bridge (2005: 658); and Sykes and Pryles (1991: 614). Also see the critique against this approach by Fawcett, Harris and Bridge (2005: 258).

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

379 Sychold (2007: par 185).

380 Crawford and Carruthers (2006: 437).

381 Kahn (1991: 128); Kahn (2000: 876); and Sonnekus (2002: 147-148). Also see Edwards and Kahn (2003: par 333), Forsyth (2012: 341) and Schoeman, Roodt and Wethmar-Lemmer (2014: par 115) who mention this approach but do not express clear support for it.

applies alongside the law of domicile according to Van Rooyen's alternative reference rule.[382]

The proper law plays a significant role in the private international law of a number of codified jurisdictions. In terms of the Belgian private international law, the proper law applies as the primarily applicable legal system.[383] In Oregon, capacity is governed by the law of habitual residence and the proper law of the contract.[384] According to the Civil Code of Louisiana,[385] the Puerto Rican *Projet*[386] and the Venezuelan private international law code,[387] capacity is governed by both the *lex domicilii* and the proper law of the contract.

From the discussion above, it follows that the putative proper law of the contract should feature as one of the legal systems to govern capacity. The advantages of the putative proper law may be summarised as follows. The putative proper law allows various aspects of a contract to be governed by the same law. The contractants' burden of obtaining knowledge of the legal systems governing the various elements of the contract would thus be reduced. Application of the proper law would promote international harmony of decision, in that it would overcome the traditional dichotomy between nationality and domicile states and, as such, the difference between civil-law and common-law systems. Applying this legal system broadens the scope of the law that governs most aspects of contracts and reduces the possibility of exceptions.

The putative proper law should be objectively ascertained. This is the system of law with which the contract is most closely connected; it ensures a strong connection between capacity and the contract itself, rather than one of the parties. In finding this legal system, all connecting factors are taken into consideration, thereby promoting fairness, certainty and convenience. The results yielded through its application are generally consistent with the expectations of the parties. Courts in Australia,[388] Canada,[389] England[390] and South Africa[391] have also applied this legal system to capacity.

382 Van Rooyen (1972: 126).
383 Belgian Private International Law Code (2004: Chapter II, Article 34 § 2).
384 Oregon's Conflict Law Applicable to Contracts (2001: Section 5).
385 Civil Code of Louisiana (1991: Article 3539).
386 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
387 Venezuelan Act on Private International Law (1998: Article 16).
388 *Homestake Gold of Australia v Peninsula Pty Ltd* (*supra*).
389 *Charron v Montreal Trust Co* (*supra*).
390 *The Bodley Head Ltd v Flegon* (*supra*).
391 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* (*supra*). *Cf Powell v Powell* (*supra*); and *Guggenheim v Rosenbaum (2)* (*supra*).

The subjectively ascertained proper law of the contract should clearly not be taken into consideration as contractants should not be allowed to confer capacity upon themselves by simply selecting a governing law under which they would be capable. Such an extensive space for party autonomy should be discouraged as this may eliminate the (abstract) protective effect of the personal law.[392] Parties should not be able to evade the limitations imposed by the personal law by a mere choice of law.

Although the putative objective proper law should not exclusively govern capacity, it should apply as a primarily applicable legal system. It should, however, not apply where the capable contractant, the contract assertor, was aware or should have been aware of the incapacity in terms of the law of domicile or habitual residence at the time of contracting. Application of the proper law provides a mechanism of protection to the *bona fide* and non-negligent contract assertor who is confronted by his or her counterpart's incapacity. The latter contractant is again protected by the proposed exception in that the counterpart's incapacity may only be invoked under limited circumstances. Of course, the protection of a party in a particular case in effect depends on the content of the various legal systems.[393]

According to the proposed rule, there are no requirements that have to be complied with for the application of the putative objective proper law. Applying this legal system in any event comes down to the application of the law most closely connected to the contract and the parties. The existence of fault on the part of the capable contractant, however, will result in the non-application of this legal system. The existence of fault, in this context, therefore plays the role of an exception to the application of the putative proper law (the three-step model). The present author submits that the adoption of the putative objective proper law, together with the exception, constitutes a *via media* between the abstract interests of the incapacitated party and the capable contractant.[394] Examples of similar exclusions of the proper law in the manner described may be found in the contract conflicts code of Oregon[395] and in the Puerto Rican *Projet*.[396] Van Rooyen's approach follows the same methodology.[397] In all three cases, the proper law is one of the primarily applicable legal systems. In Oregon, it applies alongside the law

392 See paragraph 6.4.
393 *ibid*.
394 This perspective on the matter is discussed in more detail in paragraph 6.4.
395 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1) and (2)).
396 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).
397 Van Rooyen (1972: 126).

of habitual residence,[398] while according to the *Projet*[399] and Van Rooyen,[400] the *lex domicilii* serves as the other primary applicable legal system. In all the examples, the proper law of the contract shall not apply if the capable contractant knew or should have known of his or her counterpart's incapacity at the time of contracting. When this situation arises, the law of habitual residence (Oregon) or the *lex domicilii* (the *Projet* and Van Rooyen) shall govern capacity. The effect of the proposed rule is that, where fault is present on the part of the capable contractant, the incapable party may rely on his or her incapacity and avoid liability; no valid contract came into existence. Where fault is absent, the contract assertor will be protected in that he may duly insist upon the enforcement of the contract.

Only the incapable contractant and not the counterpart should be able to invoke the non-applicability of the putative objective proper law as the non-applicability of this legal system in the circumstances mentioned is intended to protect the incapable contractant. As was suggested in respect of the *lex loci contractus*, this arrangement should not prevent an incapable party from seeking to uphold a contract, nor shall it entitle a capable contractant from escaping contractual liability by asserting that he or she was unaware of the counterpart's incapacity.

In terms of the proposed rule, the incapable contractant bears the burden of proving that the capable contractant (contract assertor) was aware of the incapacity at the moment of contracting, or was unaware thereof as a result of negligence. Obviously, if knowledge or negligence is proven, the incapable contractant will avoid liability; if not, he or she will be bound to the contract.

Similar to what was argued in respect of the *lex loci contractus*, it is proposed that the putative objective proper law should not apply when the incapacity in question involves contracts relating to family or succession law, or to agreements concerning immovable property. The line of argumentation here is that there would in these circumstances be opportunity for, and therefore the duty of, a proper investigation in respect of capacity.[401]

398 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(1)).

399 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 36).

400 Van Rooyen (1972: 126).

401 See the text at note 253-274. However, in many cases the *lex situs* will also be the proper law of the contract. See Article 4(1)(c) of the Rome I Regulation (note 108); and Forsyth (2012: 370).

6.2.7 The *lex rei sitae* / the *lex situs* / the law of the country where the immovable property is situated

The *lex rei sitae* or *lex situs* is most commonly associated with governing capacity in respect of immovable property. Common-law authors such as Johannes Voet,[402] Huber[403] and Van der Keessel[404] indeed applied this legal system to capacity in respect of contracts involving immovables. This is also the approach among many contemporary authors such as Agbede,[405] Agrawal and Singh,[406] Anton and Beaumont,[407] Briggs,[408] Clarence Smith,[409] Clarkson and Hill,[410] Collier,[411] Davies, Bell and Brereton,[412] Dicey, Morris and Collins,[413] Diwan and Diwan,[414] Forsyth,[415] Hahlo and Kahn,[416] Kahn,[417] Mortensen,[418] O'Brien,[419] Pitel and Rafferty,[420] Schoeman, Roodt and Wethmar-Lemmer,[421] Van Rooyen[422] and Walker.[423] There are also Australian,[424] English,[425] Indian[426] and South African[427] decisions where it was held that the *lex situs* should govern capacity in respect of immovable property.

The *lex situs* also plays a role in respect of capacity in a number of codified jurisdictions where the relevant contract involves immovable property. For example, the *lex rei sitae* governs capacity relating to immovables situated in the forum state in Argentina[428] and Iran,[429] while in Thailand it applies to immovable property situated in the forum state or abroad.[430] In Macau,

402 J Voet (1829: *Commentarius* 4.4.8).
403 Huber (1768: *HR* 1.3.45) but see Huber (1768: *HR* 1.3.40).
404 Van der Keessel (1961: *Praelectiones* 103 (*Th* 42)).
405 Agbede (2004: par 75).
406 Agrawal and Singh (2010: par 201).
407 Anton and Beaumont (1990: 604); and Beaumont and McEleavy (2011: 940-942).
408 Briggs (2014: 583).
409 Clarence Smith (1952: 471).
410 Clarkson and Hill (2011: 474).
411 Collier (2001: 267).
412 Davies, Bell and Brereton (2010: 669).
413 Collins *et al* (eds) (2012b: 1332).
414 Diwan and Diwan (1998: 407).
415 Forsyth (2012: 338).
416 Hahlo and Kahn (1975: 624-625).
417 Kahn (1991: 128). Also see Edwards and Kahn (2003: par 333).
418 Mortensen (2006: 460).
419 O'Brien (1999: 551).
420 Pitel and Rafferty (2010: 326).
421 Schoeman, Roodt and Wethmar-Lemmer (2014: par 114).
422 Van Rooyen (1972: 126).
423 Walker (2011: 618); Walker (2005: § 31.4d); and see Walker (2006: 517).
424 *Gregg v Perpetual Trustee Company* (1918) 18 SR (NSW) 252.
425 *Bank of Africa, Limited v Cohen* [1909] 2 Ch 129.
426 *Nachiappa Chettiar v Muthu Karuppan Chettiar* AIR 1946 Mad 398.
427 *Ferraz v d'Inhaca* 1904 TH 137.
428 Civil Code of Argentina (1869–1987–1997: Article 10).
429 Civil Code of Iran (1935: Article 8).
430 Act on Conflict of Laws (1938: Section 10).

capacity in respect of immovable property is governed by the *lex situs* if that law so stipulates; otherwise, the law of habitual residence shall apply.[431]

In some codified jurisdictions, the application of the *lex rei sitae* is merely implied. In Angola,[432] Mozambique,[433] Portugal,[434] Spain[435] and Taiwan,[436] the *lex loci contractus* is applied to capacity, in addition to the personal law, in circumstances where, *inter alia*, the relevant contract was concluded in the forum state. The *lex loci contractus* would not apply, however, where the relevant contract involves immovable property situated abroad. Therefore, the personal law and (if the relevant requirements are met) the *lex loci contractus* shall apply to capacity where the immovable property is situated in the forum state. As the *lex loci contractus* would also be the *lex fori / lex situs*, contractual capacity in respect of immovable property situated in the forum state is governed by the personal law and the *lex loci contractus / lex fori / lex situs*. If the requirements for the application of the *lex loci contractus* are not met, only the personal law applies.

In many jurisdictions, the *lex situs* plays no role at all. In Bulgaria,[437] Greece,[438] Israel,[439] Romania[440] and Switzerland,[441] the personal law governs the capacity to conclude a contract involving immovable property. This is the case as the legal system that applies in addition to the personal law shall not apply when the relevant contract involves immovables. In Bulgaria,[442] Israel,[443] Romania[444] and Switzerland,[445] the extra legal system is the *lex loci contractus* but in Greek private international law the *lex fori* plays this role.[446]

In Burkina Faso,[447] Italy[448] and South Korea,[449] the *lex loci contractus* applies in conjunction with the personal law where, *inter alia*, the relevant contract was concluded between parties who were in the same country at the moment

431 Civil Code of Macau (1999: Chapter III, Article 46).
432 Civil Code of Angola (1966: Articles 25, 31(1), 28(1) and 28(2)).
433 Civil Code of Mozambique (1966: Articles 25, 31(1), 28(1) and 28(2)).
434 Civil Code of Portugal (1996: Articles 25, 31(1), 28(1) and 28(2)).
435 Spanish Civil Code (1889–1981: Article 9.1 and 10.8).
436 Private International Law Act (2010: Chapter 2, § 10).
437 Bulgarian Private International Law Code (2005: Article 50(3)).
438 Greek Civil Code (1940: Article 9).
439 Legal Capacity and Guardianship Law (1962).
440 Romanian Private International Law Code (1992: Chapter II, Article 17).
441 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(2)).
442 Bulgarian Private International Law Code (2005: Article 50(2)).
443 Legal Capacity and Guardianship Law (1962). See discussion by Einhorn (2012: pars 128-129).
444 Romanian Private International Law Code (1992: Chapter II, Article 17).
445 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)).
446 Greek Civil Code (1940: Article 9).
447 Code on the Law of Persons and the Family (1989: Chapter II, Articles 1017 and 1018).
448 Italian Statute on Private International Law (1995: Chapter II, Article 23(1), (2) and (4)).
449 Conflicts of Laws Act of the Republic of Korea (2001: Articles 13(1), (2), 15(1) and (2)).

of contracting. This legal system is excluded where the relevant contract involves immovables situated outside of the *locus contractus*. Consequently, if the contract concerns immovable property within the *locus contractus* and the requirements for the application of the *lex loci contractus* are met, the personal law and the *lex loci contractus* will apply. If these requirements are not met, only the personal law applies. Also, if the contract deals with immovables outside of the *locus contractus*, the personal law will apply.

In Turkey,[450] the *lex loci contractus* and the personal law apply on an equal level. The *lex loci contractus* shall not apply where the relevant contract concerns immovable property abroad. The personal law and the *lex loci contractus* shall therefore apply where the contract involves immovables within Turkey. Where the immovable property is situated abroad, the personal law applies.

In Estonian[451] private international law, the *lex loci contractus* applies in addition to the personal law only where there is no fault on the part of the capable contractant. The *lex loci contractus* will not apply where the contract relates to immovable property situated abroad. Contractual capacity in respect of immovable property in Estonia will therefore be governed by the personal law and the *lex loci contractus*, if no fault was present on the part of the contract assertor. If such fault was present, only the personal law applies. The personal law will also govern exclusively in respect of immovable property situated abroad.

A unique rule exists in Japanese private international law: the *lex patriae* and the *lex loci contractus* apply to capacity involving immovable property, except when this property is situated in a country where the law is dissimilar to that of the *lex loci contractus*. In that case, only the *lex patriae* will apply.[452]

The *lex situs* plays a prominent role under the Restatement (Second). The capacity of parties to conclude contracts involving immovable property is in principle governed by § 198 of the Restatement (Second).[453] This rule is applied in conjunction with § 189 which states that the validity of a contract to transfer interests in immovables shall, in the absence of a choice of law by the parties, be governed by the *lex situs*.[454] Therefore, § 198 ((1) and (2)) should be read with § 187 in as far as immovable property is concerned. Where the contractants elected the law applicable to their contract, as envis-

450 Private International Law Code of Turkey (2007: Chapter 2, Article 9(1), (2) and (3)).
451 Estonian Private International Law Act (2002: § 12(1), (3) and (4)).
452 Act on the General Rules of Application of Laws (2006: Article 4(3)).
453 See the American Law Institute (1971: 634) for commentary on this paragraph.
454 See McDougal, Felix and Whitten (2001: 579). "Validity" has a broader scope – see the American Law Institute (1971: 587).

aged in § 187,[455] this legal system will govern. However, where they have not done so, the *lex situs* shall apply and not the objectively determined proper law. The latter legal system may nevertheless be applicable where, for example, the contract would be invalid according to the *lex situs* but valid in terms of the objectively determined proper law.[456] The proper law shall not apply, however, where the value of protecting the parties' expectations is outweighed by the interest of the *situs* state in applying its invalidating rule. Also, if a state other than that indicated by the objectively determined proper law or the *lex situs* has a substantial interest in having its law applied, then the law of this state shall govern.[457]

The application of the *lex situs* has been subject to considerable criticism. Authors such as Clarkson and Hill[458] and O'Brien,[459] with reference to capacity to conclude contracts involving *foreign* immovable property, submit that there is no justification for applying a different rule for capacity to conclude a contract relating to immovables than that applied in respect of any other contract. Consequently, the objective proper law should determine capacity in respect of (foreign) immovable property instead of the *lex situs*.[460] Sykes and Pryles hold the view that the proper law of the contract (subjectively or objectively determined) should govern capacity in this regard.[461] According to Pitel and Rafferty, the capacity to conclude a contract involving foreign immovable property should be governed by the proper law of the contract rather than the *lex situs*, since the latter legal system is not always the proper law of the contract in respect of immovables.[462]

The current author submits that the positive aspects of the application of the *lex situs* outweigh the critique that it is sometimes subjected to. As the property is immovable, the state where the property is situated has a natural interest in contracts concerning such property.[463] Also, because immovable property is the subject matter of the contract, the parties would reasonably expect the *lex situs* to govern several issues arising from the contract. Application of the *lex rei sitae* promotes the choice-of-law values of certainty, predictability, uniformity of decision and simplicity in determining the applicable law.[464]

455 The American Law Institute (1971: 561).
456 The American Law Institute (1971: 588).
457 *ibid.*
458 Clarkson and Hill (2011: 474-476).
459 O'Brien (1999: 551-553).
460 with particular reference to *Bank of Africa, Limited v Cohen* (*supra*: 135 and 143). *Cf* Cheng (1916: 75, 78-79 and 81).
461 Sykes and Pryles (1991: 618), with particular reference to *Bank of Africa, Limited v Cohen* (*supra*: 135 and 143).
462 Pitel and Rafferty (2010: 327).
463 The American Law Institute (1971: 588). Also see Cheng (1916: 78) and Hill (2014: 143).
464 *ibid.*

The *lex situs* is therefore retained in the proposal below as an applicable legal system to govern capacity in contracts involving immovables.

The *lex situs* should not be applied exclusively, as this may be impractical. This may be illustrated in the situation where a capable Scottish domiciliary of 16 years of age[465] enters into a contract of sale in respect of immovable property situated in South Africa. In terms of South African law, he would lack capacity as he is not yet 18 years of age.[466] If one is obliged to apply the *lex rei sitae*, the law of South Africa, in respect of this scenario, the contract would be invalid merely because of a lack of capacity in that country. There is, however, no reason why the *lex domicilii*[467] (and the law of habitual residence) should not also be taken into consideration in this regard. The present author therefore submits that the *lex rei sitae* should not apply to capacity in respect of immovable property exclusively but should be included in the alternative reference rule as proposed below.

6.2.8 The *lex fori* / the law of the forum

The *lex fori* features as the sole primarily applicable legal system in the Philippines,[468] while in Greece, it governs capacity on an equal level with the *lex patriae*.[469] The *lex fori* also plays a role in Dutch private international law. Whether partner A under a registered partnership requires the consent of partner B for concluding a contract, and what the consequences are if consent of B was not acquired, are governed by Dutch law (the *lex fori*) if partner B was habitually resident in the Netherlands at the time of the conclusion of the contract.[470]

465 See http://en.wikipedia.org/wiki/age_of_majority.
466 Section 17 of the Children's Act 38 of 2005, which entered into force on 1 July 2007.
467 See Cheng (1916: 81 and 82). The author in fact states (1916: 128): "Capacity to make contracts relating to immovables is, according to popular opinion, to be determined by the *lex situs*; but on the examination of the authorities, it may, and, in principle, it should, be governed by the *lex domicilii* without any exception."
468 Civil Code of the Philippines (1949: Article 15).
469 Greek Civil Code (1940: Articles 7 and 9).
470 Book 10 of the Dutch Civil Code (2012: Article 68).

In Algeria,[471] Angola,[472] Belarus,[473] Egypt,[474] France,[475] Iran,[476] Israel,[477] Macau,[478] Mongolia,[479] Mozambique,[480] Portugal,[481] Qatar,[482] Slovakia,[483] Spain,[484] Syria,[485] Taiwan,[486] Thailand,[487] the United Arab Emirates[488] and Vietnam,[489] the *lex loci contractus* is applied to capacity when the contract in question is concluded in the forum state. Applying the *lex loci contractus* in this context comes down to the application of the *lex fori*. Something similar applies in Hungary both in respect of contracts relating to essentials and non-essential goods.[490] Where a transaction is concluded in Hungary and relates to essential goods (the necessities of everyday life), the *lex fori / lex loci contractus* governs contractual capacity.[491] Where a transaction relates to non-essentials and the performances in terms of the agreement are effected in Hungary, the *lex fori / lex loci solutionis* shall govern.[492]

Application of the *lex fori* may be fortuitous, lacking any necessary connection with the contractants[493] or the substance of the contract. It is therefore not supported by any of the common-law authors on the subject and there is no case law from the common-law world that suggests its application. Indeed, the application of the *lex fori* may be the result of a narrow focus on national law and a parochial approach to private international law. The *lex fori* will therefore not feature as an applicable legal system to govern capacity in the proposals to be made below.

471 Civil Code of Algeria (1975: Chapter II, Article 10).
472 Civil Code of Angola (1966: Article 28(1)).
473 Civil Code of the Republic of Belarus (1999: Chapter II, Article 34).
474 Civil Code of Egypt (1948: Article 11).
475 French Civil Code (1804–2004: Article 3).
476 Civil Code of Iran (1935: Article 962).
477 Legal Capacity and Guardianship Law (1962: § 77). See Einhorn (2012: par 128).
478 Civil Code of Macau (1999: Chapter III, Article 27(1)).
479 Civil Code of Mongolia (2002: Article 543(5)).
480 Civil Code of Mozambique (1966: Article 28(1)).
481 Civil Code of Portugal (1996: Article 28(1)).
482 Civil Code of Qatar (2004: Article 11).
483 Private International Law and International Procedural Law Act, § 3(2).
484 Spanish Civil Code (1889–1981: Article 10.8).
485 Civil Code of Syria (1949: Article 12(1)).
486 Private International Law Act (2010: Chapter 2, § 10).
487 Act on Conflict of Laws (1938: Section 10).
488 Civil Code of the United Arab Emirates (1985: Article 11).
489 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)).
490 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).
491 Hungarian Private International Law Code (1979: Chapter II, § 15[2]). Also see Mádl and Vékás (1998: 132-135).
492 Hungarian Private International Law Code (1979: Chapter II, § 15[3]).
493 However, also see paragraph 6.4.

6.3 Consequences of incapacity

According to Batiffol and Lagarde, the law applicable to the consequences of contractual incapacity in French law, for example, the invalidity of a contract, must be governed by the *lex patriae*.[494] The position in German private international law, however, remains unclear. There is authority for the application of the *lex patriae*[495] and the putative proper law of the contract[496] in this regard. Reithmann believes that the *in favorem negotii* principle applies in this context as well. If, for instance, a contract is void in terms of the *lex patriae*[497] but voidable according to the *lex loci contractus*, the contract must be deemed to be voidable.[498] According to the Puerto Rican *Projet*,[499] where an individual lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the latter governs the consequences of incapacity. However, where an individual is able to rely on his or her incapacity in terms of the *lex domicilii* (due to the fault of the capable party), the consequences of this incapacity shall be governed by the *lex domicilii* of the incapable contractant.[500] In Oregon,[501] if the capable party can rely on the law of residence, due to the counterpart's fault, the consequences of the incapacity are governed by the law of residence. No specific rule is provided for other cases.

Most legal systems do not specifically identify a legal system to govern the consequences of incapacity.[502] The idea is probably that the legal system governing capacity in general would also apply in this context. However, capac-

494 Batiffol and Lagarde (1983: par 490).

495 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu; Kegel and Schurig (2000: 492); Kropholler (2006: 318); Staudinger/Hausmann (2013: 43-45). *Contra* MünchKommBGB/Birk (2010: 1565-1566).

496 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755. But see BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; www.openjur.de/u/344496.html. For the Netherlands, see Asser/Kramer/Verhagen (2015: 601-602); and Asser/Vonken (2013: 123).

497 as the primarily applicable legal system in German private international law – see Chapter 4, paragraph 4.2.8.

498 Reithmann/Martiny/Hausmann (2010: 1918). It may be deduced that the contract would also be deemed voidable where it is void in terms of the *lex loci contractus* but merely voidable according to the *lex patriae*. It follows that the contract would be deemed as void or voidable where it is such in terms of both legal systems.

499 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Articles 36 and 39).

500 *Projet* for the Codification of Puerto Rican Private International Law (1991: Chapter 2, Article 39).

501 Oregon's Conflict Laws Applicable to Contracts (2001: Section 5(2)).

502 *Cf* Article 5(a) of the 1986 Hague Convention which excludes "the consequences of nullity or invalidity of the contract resulting from the incapacity of a party". The distinction made by Huber and Van der Keessel between status and the consequences of status (including the applicability of rules relating to capacity which are linked to that status) (see Chapter 2, paragraph 2.3) is not relevant here. That distinction is employed to determine the validity of the contract. In the current paragraph, the search is for the legal system to govern the consequences of the contract being invalid (for instance, restitution).

ity may be governed by two or more systems. If an individual is incapable in terms of two or more of the relevant legal systems, the question must be answered as to which one of these would determine the consequences of the incapacity, for instance whether the parties must effect restitution of performances made in terms of the void or voidable contract.[503]

The personal law of the incapable contractant is closely connected to the relevant party. It will depend on the specific system which of the personal laws should be seen as the primary system in this context (often the *lex domicilii* in common-law countries and the *lex patriae* in civil-law jurisdictions). The putative objective proper law of the contract, again, is closely connected to the would-be contract and the situation as a whole; on the other hand, no contract in actual fact came into existence. A possible *via media* in this regard would be the proposal in the Puerto Rico *Projet*.

However, restitution, as probably the most important consequence of incapacity, is seen either as a contractual matter or an issue of enrichment in the context of contracts (whether valid, void or voidable) and both are governed by the (putative) proper law of the contract.[504] In the context of incapacity, the reference should naturally be to the *putative* objective proper law.[505] It will therefore be submitted in paragraphs 6.6 and 6.7 that the consequences of incapacity must be governed by the putative objective proper law of the contract.[506]

503 Article 1(4) of the proposal in paragraph 6.7 will influence the question of whether the contract is void or merely voidable. Schwenzer, Hachem and Kee (2012: 206-209) distinguish between the following consequences of incapacity: the contract may be voidable, valid only with ratification, unenforceable or void.

504 See Collins *et al* (eds) (2012b: 2307-2308 and 2316-2318); and Forsyth (2012: 315-365). See, in general, Panagopoulos (2000). *Cf* Article 10(1) of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (Rome II).

505 See paragraph 6.2.6.

506 Although the capacity of natural persons is excluded from the ambit of the Hague Principles on Choice of Law in International Commercial Contracts (2015) (see Article 1(3)(a)) it may be noted that Article 9(1)(e) of the Principles determine that the law chosen by the parties shall also govern the consequences of the invalidity of a contract. Also see paragraph 9.9-9.10 of the Commentary to the Draft Hague Principles on Choice of Law in International Commercial Contracts of September 2014. *Cf* Article 12(1)(e) of the Rome I Regulation (note 108); Article 10(1) of the Rome II Regulation (note 504); and Article 14(*e*) of the Inter-American Convention on the Law Applicable to International Contracts (CIDIP V) (Mexico City Convention).

6.4 Underlying interests and the protection of both parties in the proposal

As indicated above, it may be said that certain conflicts rules are designed to protect the incapable contractant while others would benefit the counterpart.[507] The application of, for example, the personal law (*lex patriae*, the law of habitual residence and the *lex domicilii*) would favour the incapable party and application of the *lex loci contractus* would protect the local merchant. This is, however, not always the case as the application of the personal law may be disadvantageous to the contractant invoking incapacity and the *lex loci contractus*, indeed to his or her advantage. All depends on the content of the relevant legal system.

Be that as it may, some legal systems are, in the abstract, closer connected to the one contractant than to the other and application thereof can therefore in that particular and limited sense be said to be to the advantage of the relevant person. The most obvious example would be the personal law of the incapable person, which is clearly most closely connected to that party.

In the scenario that the incapable party buys goods at the establishment of the creditor, the *lex loci contractus* is closer connected to the capable party. However, the *lex loci contractus* is not necessarily closer connected to the capable party; all depends on the particular facts on the case. For instance, two natural persons, or a representative of a juristic person[508] and a natural person, may conclude a contract in a third country, to which neither of them has a close connection.

Application of the putative subjective proper law is potentially in conflict with the interests of incapable parties as they might bestow or inflict capacity on themselves, merely by agreeing to a choice of law in a contract, which they would not otherwise possess.

Application of the putative objective proper law of the contract cannot be said to be closer connected to any of the parties and therefore, in the abstract, to their advantage; it is the legal system that could be said to be closest connected to the contract itself rather than to any one of the parties.

The *lex fori*, again, is obviously most closely connected to the country where the relevant court with jurisdiction is situated. In many cases, this will be the country of residence or domicile of one of the parties. As this could be either party, the application cannot in the abstract be linked to the interests of one of them. The same applies in respect of the *lex situs*, which is clearly closely

507 See paragraph 6.1.

508 With regard to agency, see MünchKommBGB/Spellenberg (2010: 1053-1054); and Reithmann/Martiny/Hausmann (2010: 1913-1914).

linked to the relevant property, but not necessarily closer to, for instance, the buyer or the seller of immovable property.

The reasonable expectations of the parties, as one aspect of their abstract interests, would probably indicate, in respect of both parties, the *lex loci contractus* (that is, if the parties were physically present in the country of the conclusion of the contract)[509] and, in the case of immovable property, the *lex situs*. The subjective proper law is not referred to here as any expectation of the parties that this legal system governs capacity would be unreasonable. The incapable party may perhaps expect the personal law to apply. Probably neither party would have the objective proper law or the *lex fori* in mind in this regard.

In the context of an alternative reference rule, the abstract advantage of having a system with a close connection to a particular party applied is furthermore reduced by the simultaneous application of other legal systems. The abstract protective effect of the application of one system may be neutralised by the alternative application of another.

The proposal in paragraphs 6.6 and 6.7 indeed entails a rather extensive alternative reference rule employing, at least in certain circumstances, three (in the case of immovable property) or four (in all other cases) different legal systems.[510] If the natural person invoking his or her incapacity has contractual capacity in terms of any one of these legal systems, he or she must be held to possess such capacity. The rule is result-oriented or outcome-based in that it favours the existence of capacity in respect of the contract in question; it is based on an underlying policy favouring the validity of contracts (*favor negotii*),[511] capacity being a prerequisite of validity. The rule is therefore based on the principle of preferential treatment or the *Günstigkeitsprinzip*.[512] This principle has been employed in particular in respect of formalities in private international law of contract[513] but also in international family and succession law.[514] As is clear from the discussion in previous chapters, the vast majority of legal systems employ some form of alternative reference rule

509 *Cf* Asser/Kramer/Verhagen (2015: 278-279); and Asser/Vonken (2013: 126).

510 In the context of a regional instrument, the *lex patriae* might have to be added to the list (see paragraph 6.2.4); then there would be four or five alternatively applicable legal systems.

511 See MünchKommBGB/Spellenberg (2010: 1040).

512 See Neels (2001: 704-709); Schröder (1996); Symeonides (2000: 25-29, 38 and 48-60); and Symeonides (2014: 245-289).

513 Article 13 of the Mexico City Convention (CIDIP V); Article 11 of the Rome I Regulation (note 108); Act on the General Rules of Application of Laws (2006: Article 10) (Japan); Article 3109 of the Civil Code of Quebec of 1991; Conflict of Laws Act of the Republic of Korea (2001: Article 17) (South Korea); Neels (2014: 259); Symeonides (2000: 38 and 50-52); and Symeonides (2014: 135-136; 175-176; 232-234; 256-259).

514 See Neels (2001: 704-709); Symeonides (2000: 56-60); and Symeonides (2014: 245-289).

in respect of the contractual capacity of natural persons.[515] The starting point is justified by the aim of the facilitation of international contracting, which may be seen as a prerequisite for inclusive economic growth and therefore the alleviation of poverty, particularly so in an emerging jurisdiction.

The employment of an alternative reference rule favours a finding that capacity existed and, as such, is to the advantage of the capable party where he or she seeks to uphold the contract.[516] The premise underlying this rule must therefore be balanced or mitigated by converse considerations concerned with the protection of the incapable individual. The proposal in paragraphs 6.6 and 6.7 attempts to balance the respective abstract interests of both parties.

The starting point of utilising an alternative reference rule in this context is counterbalanced by a safety net in the protection of the party invoking incapacity with the following features:

(1) The putative proper law subjectively determined is not part of the legal systems listed in the rule.
(2) The application of the systems other than the personal law are restricted, namely:
    (a) the *lex loci contractus* only applies where the contract was concluded by the parties in each other's physical presence or is of a recurrent nature in respect of reasonably essential goods;
    (b) the *lex loci contractus* and the putative objective proper law are not applicable if the capable contractant was aware of the counterpart's incapacity in terms of the personal law or was unaware thereof as a result of negligence; [517] and
    (c) the *lex loci contractus* and the putative objective proper law do not apply to contracts relating to family law or the law of succession or to contracts in respect of immovable property (although the *lex situs* would apply in respect of immovable property in addition to the relevant personal laws).

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515 Only jurisdicitions such as the Ukraine (Ukrainian Private International Law Code (2005: Article 17 and 18(2)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Brazil (Introductory Act to the Civil Code of Brazil (1942: Article 7)); Mexico (Civil Code of Mexico (1928–1988: Article 13(II))); Uruguay (Civil Code of Uruguay (1868–1941–1994: Article 2393)); Azerbaijan (Private International Law Code of Azerbaijan (2000: Article 10(2))); and Uzbekistan (Civil Code of Uzbekistan (1997: Chapter 71, Article 1169)) apply one legal system in this regard (the *lex patriae*, the *lex domicilii* and the *lex loci contractus* respectively). Also see Symeonides (2014: 259-260 and 285-286).

516 See Cheng (1916: 70); and MünchKommBGB/Spellenberg (2010: 1040). *Cf* Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)) who appears to have advocated a cumulative reference rule (discussed in Chapter 2, paragraph 2.3).

517 The exception in (b) does not apply to contracts of a recurrent nature in respect of reasonable essential goods.

(3) Only the contractant lacking capacity in terms of any of the applicable legal systems may invoke incapacity.[518]

It is therefore suggested that the proposed rule follows a balanced approach, a *via media* between the abstract interests of the capable party, on the one hand, and the party invoking incapacity, on the other.

6.5 Forms and application of the proposal

The proposals for an arrangement regarding the applicable law in respect of the contractual capacity of a natural person is provided in a twofold form. The proposal appears in narrative form in paragraph 6.6; it may be utilised by the courts in South Africa in terms of the Constitution, which states that the High Courts "have the inherent power to ... develop the common law, taking into account the interests of justice".[519] The proposals could also be considered by courts in the other Roman-Dutch jurisdictions[520] and courts in mixed and common-law jurisdictions in the interpretation, supplementation and development of the rules of private international law.[521] The proposal is provided in codified form in paragraph 6.7. This could be considered by the legislature in South Africa or any other national jurisdiction. It could also be considered for the purposes of regional, supranational or international instruments. More specifically, it is intended to form part of the proposed African Principles on the Law Applicable to International Contracts of Sale and of the African Principles on the Law Applicable to International Commercial Contracts. The Research Centre for Private International Law in Emerging Countries at the University of Johannesburg is in the process of drafting the proposed sets of African Principles. Of course, in that context it may be necessary to make changes to the proposed model so as to obtain wide consensus on its content. One could think here of adding the *lex patriae* to the primary applicable legal systems,[522] as many states in Africa belong to the family of civil-law systems,[523] where the law of nationality often plays an important role in this regard.

518 See paragraphs 6.2.5 and 6.2.6 above. This is the position under Art 11 of the Rome Convention (note 173) and Art 13 of the Rome I Regulation (note 108) in respect of the non-application of the *lex loci contractus* in specific circumstances. See the text at note 205.

519 Constitution of the Republic of South Africa, 1996, Section 173. Also see Sections 8(3)(a) and 39(2) of the Constitution of the Republic of South Africa.

520 Botswana; Lesotho; Namibia; Sri Lanka; Swaziland and Zimbabwe. See Forsyth (2002: 68). Also see Amerasinghe (2002: 287-340).

521 *Cf* the preamble to the Hague Principles on Choice of Law in International Commercial Contracts (2015).

522 However, this may be unconstitutional in South Africa. See paragraph 6.2.4.

523 Sweigert and Kötz (1998: 66-67 and 112-113); and Wood (2007: 451-455).

6.6 Proposal in narrative form

A natural person should be deemed to have had contractual capacity if he or she was competent at the time of conclusion of the contract in terms of the *lex domicilii* or the law of the country of habitual residence. In addition, an individual capable in terms of the *lex loci contractus* would also have contractual capacity but only if (a) he or she and the counterpart were in each other's physical presence at the time of the conclusion of the contract or (b) the contract was of a recurrent nature in respect of reasonably essential goods. A natural person should also be regarded as having had contractual capacity if he was capable according to the putative objective proper law of the contract, that is, the legal system that would be applicable to the contract if he or she and the co-contractant had the relevant capacity at the time of the conclusion of the contract, not taking any express or tacit choice of law into account.

A contractant, deemed to have contractual capacity in terms of the *lex loci contractus* or the putative objective proper law of the contract, yet incapable according to the *lex domicilii* and the law of habitual residence at the time of the conclusion of the contract, may nevertheless rely on such incapacity if the capable counterpart was aware of the incapacity, or was unaware thereof as a result of negligence. This exception does not apply to contracts of a recurrent nature in respect of reasonably essential goods. The incapable contractant under the legal systems mentioned bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity or was unaware thereof as a result of negligence. Whether or not a contractant was negligent in this regard, should be determined by the law of the forum or, if the rule forms part of a regional, supranational or international instrument, in an autonomous manner.

The *lex loci contractus* and the putative objective proper law do not apply where the contract in question concerns family law or the law of succession. As a further exception, in as far as immovable property is concerned, a natural person should be deemed to have had contractual capacity if he or she was competent at the time of concluding the contract in terms of the *lex domicilii*, the law of habitual residence or the *lex rei sitae*.

Where a natural person acts in the course of his or her business activities, the law of domicile and habitual residence shall be the law of his or her principal place of business. The contractual capacity of a natural person that has previously been acquired shall not be affected by a subsequent change in the individual's domicile or habitual residence.

Only the contractant lacking capacity in terms of any of the legal systems referred to shall be entitled to invoke such incapacity. The consequences of

an individual's incapacity shall be governed by the putative objective proper law of the contract.

6.7 Proposal in codified form

Contractual capacity of natural persons

1. Primary rules

(1) A natural person must be deemed to have had contractual capacity if he or she, at the time of concluding the contract, had such capacity in terms of at least one of the following legal systems –
   (a) the law of domicile;
   (b) the law of habitual residence;
   (c) the law of the country where the contract was concluded, provided that:
      (i) the parties to the contract were in each other's physical presence at the time of the conclusion of the contract; or
      (ii) the contract was of a recurrent nature in respect of reasonably essential goods; or
   (d) the putative objective proper law of the contract.

(2) The law of domicile and habitual residence of a natural person acting in the course of his or her business activities shall be the law of his or her principal place of business.

(3) For the purposes of Article 1(1)(d) and Article 4, the putative objective proper law refers to the legal system that would be applicable to a contract if the parties had the relevant capacity at the time of the conclusion of the contract, not taking any express or tacit choice of law into consideration.

(4) Only the party lacking capacity in terms of any of the applicable legal systems may invoke such incapacity.

2. Previously acquired capacity

The contractual capacity of a natural person that has previously been acquired shall not be affected by a subsequent change in the individual's domicile or habitual residence.

3. Exceptions

(1) If the capable contractant was aware of his or her counterpart's incapacity in terms of the legal systems referred to under Article 1(1)(a) or (b) at

the time of the conclusion of the contract, or was unaware thereof as a result of negligence, the legal systems referred to in Article 1(1)(c) and (d) do not apply.

(2) The incapable contractant in terms of the legal systems referred to under Article 1(1)(a) or (b) bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity, or was unaware thereof as a result of negligence.

(3) The exception contained in Article 3(1) does not apply to contracts of a recurrent nature in respect of reasonably essential goods.

(4) Whether a contractant was negligent for the purposes of Article 3, must be determined by the law of the forum.[524]

(5) The legal systems referred to in Article 1(1)(c) and (d) do not apply to contracts relating to family law or the law of succession.

(6) Notwithstanding Article 1(1), a natural person must be deemed to have had contractual capacity in respect of contracts relating to immovable property only if he or she, at the time of concluding the contract, had such capacity in terms of at least one of the following legal systems –
(a) the law of domicile;
(b) the law of habitual residence; or
(c) the law of the country where the immovable property is situated.

(7) Articles 1(2), 1(3), 1(4), 2 and 4 are also applicable in the context of contracts relating to family law, the law of succession or immovable property.

4. Consequences of incapacity

The consequences of incapacity shall be governed by the putative objective proper law of the contract.

524 If the rule forms part of a regional, supranational or international instrument, negligence must be determined in an autonomous manner. Article 3(4) should then be deleted. The relevant instrument should contain a provision similar to Article 7(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG): "In the application of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application…." *Cf* Article 1.6(1) of the UNIDROIT Principles of International Commercial Contracts (2010).