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## Contractual capacity in private international law

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

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

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

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

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

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

## 4.2 EUROPE

### 4.2.1 Austria

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

1 See paragraph 4.8.

2 See Neels (2001: 707) on cumulative reference rules and the view of Van der Keessel (1961: *Praelectiones* 104 (*Th* 42)).

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

4 Paragraph 4.2.7.

5 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I) (“the Rome I Regulation”). This provision was preceded by Article 11 of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 (80/934/EEC) (Rome Convention).

6 Austrian Private International Law Act (1978). See the translation by Palmer (1980: 197-221).

7 Chapter 2 concerns the law of persons and § 12 deals with legal capacity and the capacity to act.

8 § 9 of the code.

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

#### 4.2.2 Belarus

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

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

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

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

10 Schwimann (2001: 53-54).

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

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

13 for instance, consent of guardians.

14 Verschraegen (2012: 3).

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

16 Article 1103 of the code.

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

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

#### 4.2.3 Belgium

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

“§ 1. Except in matters where the present statute provides otherwise, the law of the State whose nationality that person has governs the status and capacity of a natural person.

Belgian law governs the capacity if the foreign law leads to the application of Belgian law.

The capacity acquired according to the law that is applicable by virtue of part 1 and 2 will not be lost as a result of a change in nationality.

§ 2. Incapacities concerning a specific legal relationship are governed by the law applicable to that legal relationship.”

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

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

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

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

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

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

#### 4.2.4 Bulgaria

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

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

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20 See, in general, Erauw (2002: 145-161).

21 note 5.

22 unless the contract was concluded before 17 December 2009, when the Rome Convention (note 5) would apply.

23 Article 3 of the Rome I Regulation (note 5).

24 Bulgarian Private International Law Code (2005). German translation in *Rabels Zeitschrift für ausländisches und internationales Privatrecht / The Rabel Journal of Comparative and International Private Law* (2007: 457-493). See, in general, Jessel-Holst (2007: 375-385).

25 Article 50 is titled "Geschäftsfähigkeit" in the German translation, Article 51 "Erworbene Rechts- und Geschäftsfähigkeit" and Article 52 "Kaufmännische Geschäftsfähigkeit".

26 for instance, the *lex patriae*.

27 Article 50(2).

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

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

#### 4.2.5 Czech Republic

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

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

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

Further, § 31 of the Act contains specific conflicts provisions concerning bills of exchange and cheques.<sup>33</sup> The provision stipulates:

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

28 Part Four is titled: “Provisions Concerning Individual Types of Private-Law Relations” and Title I refers to “Legal Capacity”. Paragraph 29 is titled: “Natural Persons”.

29 Act on Private International Law (2012).

30 English translation at <http://www.brizatrubic.cz/files/scany-clanku/Translation-Czech-PIL.pdf>.

31 as in § 31 of the Act which is discussed below.

32 *ibid.*

33 Paragraph 31 is titled: “Bill of Exchange and Cheque Capacity”.



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

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

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

#### 4.2.6 Estonia

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

- "(1) The law of the state of residence of a natural person applies to his or her passive and active legal capacity.
- (2) A change of residence shall not restrict the active legal capacity already acquired.
- (3) If a person entered into a transaction although pursuant to the law of the state of his or her residence the person does not have active legal capacity or his or her active legal capacity has been restricted, such person shall not rely on his or her incapacity if the person would have had active capacity pursuant to the law of the state where he or she entered into the transaction. Such provision does not apply if the other party was or should have been aware of the lack of active capacity of the person.

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

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

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

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

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

#### 4.2.7 France

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

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

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

37 Also see Delaume (1961: 118).

38 Van Rooyen (1972: 113).

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

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

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

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

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

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

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

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

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

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

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

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

45 note 5.

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

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

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

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

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

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

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

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

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

Of course, the *Lizardi*-inspired rule in the Rome Convention and the Rome I Regulation apply to contracts wherever concluded.<sup>55</sup>

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

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

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

56 Batiffol and Lagarde (1983: par 490).

57 Batiffol and Lagarde (1983: par 491).

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

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

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

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

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

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

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

#### 4.2.8 Germany

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

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

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

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

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

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

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

68 See paragraph 4.2.13.

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

expanded through the conclusion of marriage: "Dies gilt auch, soweit die Geschäftsfähigkeit durch Eheschließung erweitert wird."<sup>70</sup>

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

78 note 5.

79 note 5. See Chapter 5, paragraph 5.3.1.

80 MünchKommBGB/Spellenberg (2010: 1040, 1742 and 1744); Staudinger/Hausmann (2013: 1, 20 and 601-604).

81 MünchKommBGB/Spellenberg (2010: 1746-1747); Reithmann/Martiny/Hausmann (2010: 1913); Staudinger/Hausmann (2013: 604-605, 626 and 630-631). See, however, section 22(2) and Section 23(c) of the South African Electronic Communications and Transactions Act 25 of 2002 (discussed in Chapter 2, paragraph 2.2.4): the law of presence will not necessarily coincide with the law of conclusion of the contract.



ity of every possible contractant. The protection of normal legal interaction, specifically daily commercial activities, and the aim of legal certainty both indicate the need for an exception to the application of the *lex patriae*.<sup>82</sup> The application of the *lex loci contractus* is preferred on the following basis: the *locus contractus* is *ab initio* known; the application of the *lex loci contractus* is foreseeable; the *lex loci contractus* is geographically the best system to govern; both contractants intentionally participated in legal interaction in the *locus contractus*; and application of the *lex loci contractus* protects trust in the law of the country of contracting.<sup>83</sup> The intention of § 12 is clearly the protection of the *bona fide* counterpart<sup>84</sup> who is also not negligent. This is already clear from the title of the provision: “Schutz des anderen Vertragsteils”.<sup>85</sup>

For § 12 to be applicable, the incapable person must be a natural person. The capable party may either be a natural or a juristic person.<sup>86</sup> However, the *Bundesgerichtshof*, in a decision in 1998, refers to the possibility of the analogous application of § 12 to incapable juristic persons.<sup>87</sup> The court did not find it necessary to decide this point as the requirements for § 12 were in any event not complied with.

Paragraph 12 is an “allseitige Kollisionsregel”<sup>88</sup> in that it applies irrespective in which country the contract was concluded.<sup>89</sup> As such, the German rule differs from the position in French private international law.<sup>90</sup> The parties must be present in the same country at the conclusion of the contract. Their nationality, domicile and habitual residence are irrelevant.<sup>91</sup> Short-term presence, including presence on “verkehrstechnische Gründen” (for instance, meeting at an airport) and even coincidental presence will be sufficient.<sup>92</sup> The parties must be present in the same country, not necessarily in the same town or in each other’s presence.<sup>93</sup> The relevant moment in time is the conclusion of the contract.<sup>94</sup>

82 Staudinger/Hausmann (2013: 20, 601, 603, 605 and 612).

83 Staudinger/Hausmann (2013: 605).

84 MünchKommBGB/Spellenberg (2010: 1745); Reithmann/Martiny/Hausmann (2010: 1913); Staudinger/Hausmann (2013: 603-604).

85 Translated at [www.gesetze-im-internet.de/englisch\\_bgbeg/index.html](http://www.gesetze-im-internet.de/englisch_bgbeg/index.html) as “Protection of the other party”.

86 Staudinger/Hausmann (2013: 607-609).

87 BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; [www.unalex.eu](http://www.unalex.eu).

88 Also see paragraph 4.2.7 on bilateral and unilateral conflicts rules.

89 Kegel and Schurig (2000: 493); Staudinger/Hausmann (2013: 601, 602 and 625).

90 See paragraph 4.2.7.

91 Kegel and Schurig (2000: 480); Staudinger/Hausmann (2013: 626 and 633).

92 Staudinger/Hausmann (2013: 626).

93 Staudinger/Hausmann (2013: 625-626). Error in respect of the presence of the parties at the time of conclusion is irrelevant: Staudinger/Hausmann (2013: 629-630). See Reithmann/Martiny/Hausmann (2010: 1913-1914) and Staudinger/Hausmann (2013: 626-629) on distance contracts and the position where the parties make use of agents.

94 Staudinger/Hausmann (2013: 31, 50 and 629).

Paragraph 12 is an alternative reference rule in the sense that, in the circumstances as described, the party invoking incapacity will nevertheless be held to possess capacity if he or she has such in terms of either the *lex patriae* or the *lex loci contractus*.<sup>95</sup> The relevant party cannot at will invoke either the *lex patriae* or the *lex loci contractus* as the governing legal system.<sup>96</sup> Paragraph 12 does not play a role when the incapable party has no capacity in terms of both the *lex patriae* and the *lex loci contractus* (the relevant party will then not be bound to the contract). Paragraph 12 is also not applicable when the relevant party has capacity in terms of the *lex patriae*, whether or not capacity exists in terms of the *lex loci contractus* (the party invoking incapacity will be bound to the contract). However, § 12 will be relevant if the party invoking incapacity has no capacity in terms of the *lex patriae* but would have such in terms of the *lex loci contractus*, provided that the requirements of this paragraph are satisfied.<sup>97</sup> It follows that § 12 is irrelevant when the *lex patriae* and the *lex loci contractus* are the same law. This indeed happened in a case which came before the *Bundesgerichtshof* in 2004, resulting in two related decisions,<sup>98</sup> both dealing with the one factual scenario of a mentally incapable German director of a Swiss company. The court did not even refer to § 12 EGBGB as German law was both the *lex patriae* and the *lex loci contractus*.<sup>99</sup> The issue was held to be governed by the *lex patriae* in terms of the first sentence of § 7(1).

The *lex loci contractus* does not apply (and therefore only the *lex patriae* will govern) when the capable party was aware of the incapacity in terms of the *lex patriae* or should have been aware thereof. The onus to prove that the capable party had knowledge of the incapacity or was negligent in not being aware of the incapacity rests on the incapable party.<sup>100</sup> The *Oberlandesgericht* of Hamm<sup>101</sup> decided in 1995 that the capable party would clearly not be able to invoke § 12 as the minor's date of birth was included in the contract. In the circumstances, the capable party was deemed to have been aware of the incapacity in terms of the *lex patriae*.<sup>102</sup>

95 Staudinger/Hausmann (2013: 606 and 635-636).

96 Staudinger/Hausmann (2013: 636).

97 Cf Staudinger/Hausmann (2013: 635-637).

98 BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; [www.openjur.de/u/344496.html](http://www.openjur.de/u/344496.html).

99 Cf MünchKommBGB/Spellenberg (2010: 1043 n 35). German law was also the law applicable to the contract.

100 Staudinger/Hausmann (2013: 635).

101 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; [www.unalex.eu](http://www.unalex.eu). See Staudinger/Hausmann (2013: 631).

102 However, it seems that the minor would have lacked capacity in terms of both relevant legal systems as Germany and Spain adhere to the majority age of 18. See Staudinger/Hausmann (2013: 75 and 81).

Some commentators are of the opinion that the content of negligence in this regard should be determined by German law<sup>103</sup> but others argue that § 12 should be interpreted along the lines of Article 13 of the Rome I Regulation.<sup>104</sup> In any event, negligence will be readily found to be present in respect of important transactions and when valuable goods are involved (for instance, buying and selling immovable property versus goods for daily living) and also when a merchant, rather than a private person, concludes a contract.<sup>105</sup> The *Bundesgerichtshof* found in 1998 that even slight negligence<sup>106</sup> would be sufficient to exclude the protection of the capable party in § 12.<sup>107</sup> This case concerned a German company which neglected to obtain legal advice on whether a Yugoslavian company<sup>108</sup> would have capacity to conclude a transnational contract;<sup>109</sup> the German company could therefore not invoke § 12.<sup>110</sup>

The alternative application of the *lex loci contractus* does not apply to contracts concerning family and succession law, nor to these involving immovable property situated outside of Germany. This is provided for in the last sentence of § 12: “Dies gilt nicht für familienrechtliche und erbrechtliche Rechtsgeschäfte sowie für Verfügungen über ein in einem anderen Staat belegenes Grundstück.”<sup>111</sup>

There are conflicting decisions of the German courts on the law applicable to the consequences of incapacity, for example, the voidness or voidableness of the contract. According to a decision of the *Oberlandesgericht* of Düsseldorf in 1994, the law applicable to the contract governs the consequences of incapacity.

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103 Staudinger/Hausmann (2013: 633). But see Staudinger/Hausmann (2013: 602), arguing in favour of a European-oriented interpretation of § 12 of the EGBGB.

104 Reithmann/Martiny/Hausmann (2010: 1913). Cf. MünchKommBGB/Spellenberg (2010: 1744-1745).

105 Reithmann/Martiny/Hausmann (2010: 1880 and 1915); Staudinger/Hausmann (2013: 27, 604 and 634).

106 “leichte Fahrlässigkeit”. Also see Reithmann/Martiny/Hausmann (2010: 1914-1915). Cf. MünchKommBGB/Spellenberg (2010: 634).

107 BGH (23.04.1998) IPRax 1999 104; NJW 1998 2452; [www.unalex.eu](http://www.unalex.eu).

108 See the text at note 87 on the possible analogous interpretation of § 12 to incapable juristic persons.

109 The court takes a rather optimistic view of public bodies being able and willing to provide expeditious expert opinions on intricate legal questions: the capable party should have telephonically contacted the German ministry of trade, the Yugoslavian mission in Germany, the German mission in Yugoslavia or the chamber of commerce in Croatia.

110 It is unclear whether mere knowledge of the foreign nationality of the counterpart is sufficient to require the capable party to be alert: see Staudinger/Hausmann (2013: 634-635).

111 Translated at [www.gesetze-im-internet.de/englisch\\_bgbeg/index.html](http://www.gesetze-im-internet.de/englisch_bgbeg/index.html) as “This does not apply to legal transactions under family law and the law of succession neither to dispositions relating to immovable property situated in another country.”

ity<sup>112</sup> but the *Oberlandesgericht* of Hamm decided in 1995<sup>113</sup> that the *lex patriae* should govern. The first view<sup>114</sup> seems to be closer to Article 12(1)(e) of the Rome I Regulation, providing that all consequences of the nullity of contract are governed by the (putative) proper law of the contract,<sup>115</sup> as well as Article 10(1) of the Rome II Regulation,<sup>116</sup> which determines that a claim for unjust enrichment closely related to a contractual relationship between the parties will be governed by the law (putatively) applicable to the contract.<sup>117</sup> However, the majority of the German authors favour the application of the *lex patriae* to determine the consequences of invalidity for the purposes of internal German private international law.<sup>118</sup> The following arguments are advanced: (a) The existence of capacity and the consequences of the absence of capacity cannot be separated; they should be governed by the same legal system. (b) Application of the *lex patriae* provides protection to the incapable party and should therefore also govern the consequences of the absence of capacity.<sup>119</sup> The German commentators surprisingly do not refer to the related February and March 2004 decisions of the *Bundesgerichtshof* in this regard.<sup>120</sup> The first of these merely states that the consequences of incapacity were governed by German law: “Die Rechtsfolgen der Handlungs- bzw. Geschäftsunfähigkeit richteten sich nach deutschem Recht.” However, German law was the *lex patriae* of the incapable director of a Swiss company, the *lex loci contractus* and the law applicable to the contract.<sup>121</sup> In the second of the twin decisions, the *Bundesgerichtshof*, referring to the cases above and to doctrine, expressly leaves the relevant question open:

“Ob sich die Rechtsfolgen fehlender Geschäftsfähigkeit ebenfalls nach dem sogenannten Wirkungsstatut ... oder nach dem Personalstatut des Geschäftsunfähigen gemäß Art. 7 EGBGB ... beurteilen, kann dahingestellt bleiben, da auch nach dieser Vorschrift aufgrund der deutschen Staatsangehörigkeit des Direktors der P. AG deutsches Recht Anwendung findet.”<sup>122</sup>

112 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755.

113 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144; www.unalex.eu.

114 Also see MünchKommBGB/Birk (2010: 1565-1566).

115 “The law applicable to a contract by virtue of this Regulation shall govern in particular ... the consequences of nullity of the contract.”

116 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations (the Rome II Regulation).

117 “If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.”

118 Kegel and Schurig (2000: 492); Kropholler (2006: 318); Staudinger/Hausmann (2013: 43-45). *Contra* MünchKommBGB/Birk (2010: 1565-1566).

119 See, for example, Staudinger/Hausmann (2013: 43-44).

120 BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) www.openjur.de/u/344496.html.

121 BGH (03.02.2004) NJW 2004 1315.

122 BGH (30.03.2004) www.openjur.de/u/344496.html.

In summary it may be stated that in German private international law, the *lex patriae* and, in certain circumstances, the *lex loci contractus* are applied to contractual capacity. The law (putatively) applicable to the contract is not a relevant legal system. In particular, the law chosen by the parties to govern their contract does not play any role. For instance, a minor cannot choose another law that would have been applicable to provide him or her with capacity.<sup>123</sup> This is also clear from the decision of the *Oberlandesgericht* of Hamm in 1995,<sup>124</sup> where a German minor had agreed to Spanish law governing the contract. The choice of law was held to be ineffective and German law applied as the *lex patriae*.<sup>125</sup>

The doctrine of public policy may be utilised to exclude an otherwise applicable legal system; this also applies in the context of contractual capacity. If, for instance, the *lex patriae* or the *lex loci contractus* were to consider a 10 year old as an adult, the law of nationality would be excluded. Of course, the fact that there is a different age of majority in the applicable legal system compared to that in the *lex fori* is no reason to exclude the foreign law. It is probably also not against public policy to have a (slightly) different age of majority for boys and girls.<sup>126</sup> However, having different rules in respect of capacity for clearly adult women compared to these for men, or different rules for people of minority religions, may indeed infringe the *ordre public*.<sup>127</sup>

#### 4.2.9 Greece

Contractual capacity in the Greek Civil Code is addressed in Articles 7 and 9.<sup>128</sup> Article 7 contains the general provision that contractual capacity is governed by the *lex patriae*. Article 9 states that if a foreigner lacks contractual capacity in terms of his *lex patriae*, he is deemed to have such capacity in as far as he would have it in terms of Greek law. In other words, capacity in this case shall be determined by the *lex fori*. The latter provision applies neither in the context of family and succession law nor in respect of real agreements concerning foreign immovable property. Contractual capacity in Greek private international is therefore in general governed by both the *lex patriae* and the *lex fori*.

123 Staudinger/Hausmann (2013: 32).

124 OLG Hamm (23.11.1995) IPRspr 1995 7; NJW-RR 1996 1144.

125 German law was also the *lex loci contractus*. Also see note 98.

126 In some Latin American countries the majority age for girls is 12 and for boys 14. See Staudinger/Hausmann (2013: 27).

127 See MünchKommBGB/Birk (2010: 1563); and Staudinger/Hausmann (2013: 20-21 and 640).

128 Greek Civil Code (1940). See Riering (1997: 19). Article 7 in the German translation is titled: "Geschäftsfähigkeit" and Article 9 "Geschäftsfähigkeit des Ausländers im Inland".

#### 4.2.10 Hungary

Chapter II of the Hungarian Private International Law Code<sup>129</sup> contains the following relevant provisions in respect of contractual capacity, namely § 10 [1], § 11(1), § 15 [1], [2] and [3].

Paragraph 10 [1] of the code reads: “The legal capacity, capacity to act, personal status and personal rights of the individual shall be determined according to his personal law.” Contractual capacity of an individual is therefore generally governed by his or her personal law. “Personal law” refers to the *lex patriae* as § 11 [1] reads: “The citizenship of the individual shall determine his personal law.”<sup>130</sup> Paragraph 11 [1] further provides that, once contractual capacity has been obtained, it shall not be affected by a subsequent change in citizenship (nationality).

Paragraph 15 [1]-[3] of the code contains the rules applicable to foreigners and provides the following:

- “[1] Unless a rule of law requires otherwise, legal capacity, capacity to act, personal rights, property rights, and obligations of foreign citizens ... shall be governed by the same law which applies to Hungarian residents.
- [2] A foreign citizen, who has either a limited capacity or no capacity to act under his personal law, shall be considered to have that capacity to act in property law transactions concluded in Hungary, for the purpose of securing the necessities of everyday life, if he would have such capacity to act under Hungarian law.
- [3] A foreign citizen, who has either no capacity or limited capacity to act under his personal law, but would have the capacity to act if Hungarian law were applied, shall be considered to have that capacity to act in his other property law transactions if the legal consequences of the transaction shall take place in Hungary.”

Paragraph 15 [2] and [3] refer specifically to foreigners lacking (or possessing limited) contractual capacity according to their *lex patriae* but having such according to the *lex fori*, and draws a distinction between transactions relating to essential and non-essential property. The *lex loci contractus* / *lex fori* governs contractual capacity where a transaction is concluded in Hungary and relates to essential property (the necessities of everyday life).<sup>131</sup>

129 Hungarian Private International Law Code (1979). See Gabor (1980: 63-113). Chapter II has the title “Persons” and concerns the individual as a legal subject. See, in general, Burián (1999: 157-187).

130 See Mádl and Vékás (1998: 121-125 and 132-135).

131 See Mádl and Vékás (1998: 132-135). According to the authors, the *lex loci contractus* (read: *lex fori*) is applied for practical purposes. They state at 134: “Given the large volume of international personal transactions in our time, to ascertain whether a foreign buyer is somewhere subject to a law restricting his disposing capacity to a greater extent than Hungarian law does would be an unrealistic requirement, one impossible to meet in retail trade.”

In respect of contracts relating to non-essentials, the *lex loci solutionis* / *lex fori* shall govern provided that the performances in terms of the agreement are effected in Hungary. Paragraph 15[2] and [3] do not provide for contracts concerning necessities concluded abroad and those involving non-necessities having its consequences abroad. In these instances, the *lex patriae* shall apply as § 15[1] refers to § 10[1], which must be read with § 11[1].

Contractual capacity in Hungarian private international law is thus governed by the *lex patriae* and, in particular circumstances,<sup>132</sup> the *lex fori* (*lex fori* / *lex loci contractus* or *lex fori* / *lex loci solutionis*).

#### 4.2.11 Italy

Article 23 (sub-articles 1, 2 and 4) in Chapter II<sup>133</sup> of the Italian Statute on Private International Law<sup>134</sup> deals with contractual capacity and reads as follows:

- “1. An individual’s national law determines his/her capacity to perform legal acts....
2. With respect to contracts made between persons who are in the same State, a person having legal capacity under the law of the State in which the contract is made may invoke an incapacity deriving from his/her national law only if the other contracting party, at the time of contracting, knew of such incapacity or was ignorant of it through his/her own fault.
4. The [limitation] of paragraph 2 ... shall not apply to acts relating to family relations or to succession by reason of death nor to acts relating to rights in real property located in a State other than that in which the act is carried out.”

Sub-article 1 of Article 23 states the general rule that the contractual capacity of an individual is governed by the *lex patriae*. Sub-article 2 provides an exception to the general rule which is applied where the contractants conclude a contract in the same country. A contractant having capacity according to the *lex loci contractus* may invoke his or her incapacity in terms of his or her *lex patriae* only where the other contractant, at the time of contracting,

132 See Mádl and Vékás (1998). At page 122-123 the authors discuss the origin of the application of the *lex patriae* to contractual capacity in civil-law countries. This is compared to the application of the *lex domicilii* in the common-law countries (123-124). The authors submit that the latter legal system is more appropriate for modern purposes. The authors further discuss the emergence of the application of the law of the country of habitual residence, gaining impetus from the work of the Hague Conference on Private International Law (124-125).

133 Article 23 refers specifically to the “Capacity of Individual to Act” and Chapter II is titled “Capacities and Rights of Individuals”.

134 Italian Statute on Private international Law (1995). For a translation, see Montanari and Narcisi (1997: 35). See, in general, Ballarino and Bonomi (2000: 99-131); and Mengozzi (2007: pars 240-245).



knew of the incapacity, or was ignorant thereof through his or her fault.<sup>135</sup> Sub-article 4 states that the exception in paragraph (sub-article) 2 does not apply to contracts concerning family or succession issues or to immovable property situated in a country outside of the *locus contractus*.<sup>136</sup>

In Italian private international law, contractual capacity is therefore governed by the *lex patriae* and, in particular circumstances, by the *lex loci contractus*.

#### 4.2.12 Lithuania

Articles 1.16 and 1.17 in Book 1, Part 1, Chapter 2, Section 2 of the Civil Code of the Republic of Lithuania<sup>137</sup> contain the provisions relating to contractual capacity in private international law.<sup>138</sup> Article 1.16<sup>139</sup> provides the following:

- “1. Civil active capacity of foreign citizens ... shall be governed by the laws of their state of domicile.
2. If such persons have no domicile or it cannot be determined with certainty, their legal active capacity shall be determined in accordance with the laws of the state within the territory of which these persons formed a relevant transaction.
3. If a person has residence in more than one state, the law of the state with which he is the most closely connected shall apply.
4. The ascertainment of incapacity or limited capacity of foreign citizens ... shall be governed by the laws of the Republic of Lithuania.
5. A change of domicile shall not affect civil active capacity if that capacity was acquired prior to the change of domicile.”

According to Article 1.16,<sup>140</sup> the *lex domicilii* shall govern contractual capacity in respect of foreigners. There seems to be no corresponding provision for the citizens of Lithuania. Where foreign citizens have no domicile, or if it is not ascertainable, contractual capacity shall be governed by the *lex loci contractus*. In situations where persons have multiple residences, the law of the country having the closest connection with the “individual” shall apply as the law of domicile. The determination of incapacity or limited capacity of foreign citizens shall be governed by the private international law of the *lex fori*.<sup>141</sup> Once capacity has been acquired, a subsequent change in domicile is irrelevant.

135 Also see Mengozzi (2007: pars 241 and 243).

136 Also see Mengozzi (2007: par 245).

137 Civil Code of the Republic of Lithuania (2000) per [http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc\\_e?p\\_id=245495](http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_e?p_id=245495).

138 See, in general, Mikelenas (2005: 161-181).

139 This article is titled: “Civil active capacity of foreign citizens and stateless persons”.

140 This summary is written on the assumption that the concepts translated as “domicile” and “residence” are not synonymous.

141 Also see Mikelenas (2005: 167-168).

Article 1.17<sup>142</sup> contains a prohibition to invoke incapacity and reads as follows:

- “1. A party to a transaction who is incapable under the law of the state of his domicile may not invoke his incapacity if he was capable under the law of the state in which the transaction was formed, unless the other party was or should have been aware of the first party’s incapacity under the law of the state of the latter’s domicile.
2. Provisions of paragraph 1 of this Article shall not apply to family law and the law of succession, as well as to real rights.”

Article 1.17 seems to apply to citizens and non-citizens of Lithuania. The article by implication provides for the application of the *lex loci contractus* where a contractant lacks capacity in terms of his or her *lex domicilii* but would have such in terms of the *lex loci contractus*. The latter contractant would only be able to rely on his or her incapacity if the co-contractant was or should have been aware of the incapacity in terms of his or her *lex domicilii*. However, Article 1.17(1) applies neither to issues relating to family and succession law, nor to transactions involving real rights.

In Lithuanian private international law, therefore, the *lex domicilii* and, in particular circumstances, the *lex loci contractus* govern contractual capacity.

#### 4.2.13 the Netherlands

The new Book 10 of the Dutch Civil Code<sup>143</sup> on private international law contains provisions on the contractual capacity of natural persons in respect of minority and in respect of the required consent of spouses and partners.<sup>144</sup> Article 11(1) of Book 10 determines that, whether a natural person is a minor and whether he or she has the capacity to perform legal acts, is determined by his or her *lex patriae*.<sup>145</sup>

According to Article 11(2), the *Lizardi*-inspired rule in Article 13 of the Rome I Regulation<sup>146</sup> is of corresponding application in respect of the legal capacity

142 Article 1.17 is titled “Prohibition to invoke incapacity”.

143 Book 10 entered into force on 1 January 2012.

144 For the purposes of this study, the current author leaves aside the internal Dutch distinction between “handelings(on)bevoegdheid” and “handelings(on)bekwaamheid”. In English, both concepts are assimilated under the broad notion of “contractual (in)capacity”. Compare Article 13 of the Rome I Regulation, which refers to “handelingsbekwaamheid en handelingsbevoegdheid” in Dutch and to “capacity” in English. Cf Article 1(2) (a): “bevoegdheid” and “legal capacity”, respectively.

145 The notion of *semel maior, semper maior* is generally accepted in the Netherlands: see Asser/Vonken (2013: 120-122); Ten Wolde (2013: 122); and Vonken (2015: 5990).

146 note 5. Van Rooij and Polak (1987: 280) provide the following alternative formulation of the *Lizardi* rule: “In commercial transactions, a person cannot rely on his national law, under which his capacity to engage in commercial transactions is limited, if he acted in another State where his capacity is unlimited and if the other party justifiedly relied on the law of the latter State.”

of a natural person in the case of bilateral or multilateral legal acts<sup>147</sup> that fall outside the scope of the Regulation.<sup>148</sup> Unlike Article 11(1), the latter provision does not seem to be limited to minority as a ground for incapacity.<sup>149</sup> Accordingly, the views of the Dutch authors on the *Lizardi* rule<sup>150</sup> are discussed in Chapter 5 in the context of Article 13 of the Rome I Regulation.<sup>151</sup>

Applied to a scenario of spouses A and B, Article 40 determines that the question of whether spouse A requires the consent of spouse B for concluding a legal act, and what the consequences are if consent was not acquired, is governed by the law of the country of the habitual residence of spouse B at the time of the legal act.<sup>152</sup> This issue is classified as one of contractual capacity in Dutch law<sup>153</sup> and was inserted to protect the non-contracting spouse.<sup>154</sup>

Article 68 determines that the question of whether the one partner (A) under a registered partnership requires the consent of the other partner (B) for concluding a legal act, and what the consequences are if consent was not acquired, is governed by the law of the Netherlands if the other partner (B)

<sup>147</sup> “meerzijdige rechtshandelingen”.

<sup>148</sup> Also see Article 154.

<sup>149</sup> See Asser/Vonken (2013: 122). For the view that the *Lizardi* rule also applied in the context of Article 3 of the *Wet Conflictenrecht Huwelijksbetrekkingen* (WCHb), the predecessor of the current Article 40, see Polak (1988: 580-581) and Reinhartz (1997: 516-524). Cf Strikwerda (2012: 140): “onzekere kwestie” but, for today, see Strikwerda (2015: 145): “De onder de Wet Conflictenrecht Huwelijksbetrekkingen onzekere kwestie of en in hoeverre de wederpartij bij onbekendheid met de onbevoegdheid van de handelende echtgenoot zich kan beroepen op de zgn. Lizardi-regel ..., is met de invoering van Boek 10 van het Burgerlijk Wetboek opgelost: ingevolge het bepaalde in artikel 10:11 lid 2 BW ... staat buiten twijfel dat de Lizardi-regel niet alleen kan worden ingeroepen bij kwesties van handelingsonbekwaamheid, maar ook bij kwesties van handelingsonbevoegdheid....” See Ten Wolde (1994: 1064) in general on the WCHb.

<sup>150</sup> See, in particular, Asser/Kramer/Verhagen (2015: 19-20, 440-441 and 600-602); Asser/Vonken (2013: 126-129); Strikwerda (2015: 89-90 and 145); Ten Wolde (2013: 121-125); and Vonken (2015: 5991-5993 and 6053).

<sup>151</sup> Chapter 5, paragraph 5.3.1.

<sup>152</sup> This rule applies irrespective of which law applies to the personal and proprietary consequences of the marriage: see Article 41. Cf Article 39 in respect of expenses incurred to maintain the common household.

<sup>153</sup> See Asser/Vonken (2013: 125); and Reinhartz (1997: 216-219 and 516). The issue could also constitute a separate conflicts category (of a proprietary nature): see Asser/Vonken (2012: 91-92). In German law, the requirement of consent does not refer to capacity but forms part of the proprietary consequences of marriage. See paragraph 4.2.8.

<sup>154</sup> Asser/Vonken (2012: 99); Strikwerda (2015: 145); Ten Wolde (2013: 144-145); and Vonken (2015: 6052). See Reinhartz (1997: 514 and 517) in respect of Article 3 WCHb. See Asser/Vonken (2013: 125) on the *ordre public* exception in this regard. For a detailed discussion of the relationship between Article 40 and the substantive provisions of Article 88 and 89 of Book 1 of the Dutch Civil Code, see Asser/Vonken (2012: 99-102). Also see Vonken (2015: 6052-6053).

was habitually resident in the Netherlands at the time of the legal act.<sup>155</sup> The *ratio* for applying Dutch law in this instance is probably that many other legal systems do not recognise the institution of a partnership as an alternative to marriage. Article 68 does not provide for the situation that the other partner (B) was not habitually resident in the Netherlands at the time. It is unclear whether a residual *lex patriae* approach should be followed here, referring to the national law of the partner that concluded the legal act,<sup>156</sup> or whether the law applicable to the patrimonial consequences of partnership should be applied.<sup>157</sup>

At least the following is therefore clear in Dutch private international law: The *lex patriae* applies to the contractual capacity of a minor. Whether spouse A requires the consent of spouse B for concluding a contract, and what the consequences are if consent was not acquired, are governed by the law of the country of the habitual residence of spouse B at the time of conclusion of the contract. Whether the one partner under a registered partnership needs the consent of the other partner for concluding a contract, and what the consequences are if consent was not acquired, are governed by Dutch law (the *lex fori*) if the other partner was habitually resident in the Netherlands at the time of the conclusion of the contract. In all these cases (minors, spouses and partners), the *lex loci contractus* will be of alternative application in the type of scenario envisaged in the *Lizardi*-inspired rule in the Rome I Regulation. This is the position in respect of all bilateral and multilateral legal acts even if the Regulation is not otherwise applicable. The *lex loci contractus* may therefore in specific circumstances be applicable in addition to the *lex patriae* (minors), the law of habitual residence (spouses) and the *lex fori* (registered partners).

#### 4.2.14 Portugal

The relevant provisions of the Civil Code of Portugal<sup>158</sup> are Articles 25, 28, 29 and 31(1).<sup>159</sup> Article 25 stipulates that the contractual capacity of an individual is governed by his or her “personal law”, subject to the specific rules

155 This rule applies irrespective of which law applies to the personal and proprietary consequences of the registered partnership: see Article 69. Reinhartz (1997: 526-528) proposed a similar rule in respect of marriages. Cf Article 67 in respect of expenses incurred to maintain the common household.

156 Cf Article 11(2); Asser/Vonken (2013: 117, 122 and 128); Strikwerda (2015: 89-90); and Van Rooij and Polak (1987: 212 and 280). But Article 6 of the *Wet Algemene Bepalingen* (which contained support for the *lex patriae* and, although formulated unilaterally, was generally interpreted in a bilateral sense) is revoked by Article 3 of Book 10. See Asser/Vonken (2013: 63).

157 See Reinhartz (1997: 526-528).

158 Civil Code of Portugal (1966). See the translation in Riering (1997: 108).

159 Article 25 is titled: “Âmbito da lei pessoal”, Article 31 “Determinação da lei pessoal”, Article 28 “Desvios quanto às consequências da incapacidade” and Article 29 “Maioridade”. See, in general, Neuhaus and Rau (1968: 500-512); and Vicente (2007: 257-275).

that shall be discussed below. “Personal law” is described in Article 31(1) of the code as the *lex patriae*.

Article 28(1) contains a provision which resembles the *Lizardi* rule<sup>160</sup> in French private international law, as it stipulates that a contractant lacking capacity in terms of his or her *lex patriae* may not invoke such incapacity if he or she concluded the contract in Portugal and he or she would have possessed such capacity in terms of Portuguese law.

Article 28(2) determines that the exception in Article 28(1) does not apply where the co-contractant had knowledge of the incapacity. Further, the exception applies neither in the context of family and succession law nor to contracts in respect of immovable property situated outside of Portugal.

Article 28(3) contains limited support for the *lex fori* in cases where contracts are concluded in a foreign country (*ie* not in Portugal). The *lex loci contractus* must then be applied in as far as its rules correspond with those in Portugal.

Lastly, Article 29 states that a change in personal law does not influence status or contractual capacity.

Portuguese private international law therefore provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus* / *lex fori*.

#### 4.2.15 Romania

In the Romanian Private International Law Code<sup>161</sup> contractual capacity is addressed in Chapter II, Section 1, Articles 11, 15 and 17.<sup>162</sup> Article 11 provides for the application of the *lex patriae* to capacity subject to the specific provisions contained in Article 17. Article 15 stipulates that contractual capacity obtained in terms of a previous *lex patriae* shall not be influenced by a subsequent change in nationality.

Article 17 provides that a contractant who lacks capacity or possesses limited capacity in terms of the *lex patriae* or the law of habitual residence may not rely on this fact against his or her counterpart who *bona fide* believed him or her to have full capacity on the basis of the *lex loci contractus*. In other words, the *lex loci contractus* shall apply in these instances. The rule contained in Article 17, however, neither applies in the context of family or succession law, nor to contracts in respect of the transfer of immovable property.

<sup>160</sup> *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

<sup>161</sup> Romanian Private International Law Code (1992). See *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1994: 534-572) for a German translation.

<sup>162</sup> Chapter II concerns natural persons and Section 1 refers specifically to personal status.

Thus, in Romanian private international law, contractual capacity is governed by the *lex patriae*, the law of habitual residence and, in particular circumstances, the *lex loci contractus*.

#### 4.2.16 Russia

The relevant provisions of the Civil Code of the Russian Federation are contained in Chapter 67,<sup>163</sup> more specifically, Articles 1195 (1), 1197 (1) and (2) and 1201.<sup>164</sup>

Article 1195 (1) states that “[t]he personal law of natural person shall be the law of the country of which the person is a citizen”. “Personal law” therefore refers to the *lex patriae*.<sup>165</sup>

Article 1197 of the code reads as follows:

- “1. The civil dispositive capacity of a natural person shall be determined by his/her personal law.
2. A natural person who does not have civil dispositive capacity according to his/her personal law shall have no right to refer to his/her lacking dispositive capacity if he/she has dispositive capacity at the place where the deal was made, except for the cases in which the other party knew or was obviously supposed to know of the lack of dispositive capacity.”

According to sub-article 1, the contractual capacity of a natural person shall be determined by the *lex patriae*. Sub-article 2, however, provides that an individual who lacks capacity in terms of the *lex patriae* may not rely on this incapacity if he or she would have such according to the *lex loci contractus*. If the counterpart knew or was ignorant of the fact due to negligence, the incapacity may nevertheless be relied upon.<sup>166</sup> The rule therefore implies the application of the *lex loci contractus* in specific instances.

Article 1201 provides the following:

“The natural person’s right to pursue entrepreneurial activity as an individual entrepreneur ... shall be determined by the law of the country where the natural person is registered as an individual entrepreneur. If this rule cannot be applied due to lack of a compulsory registration the law of the country of the main place of business shall apply.”

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163 Civil Code of the Russian Federation (2001). English translation available at <http://www.russian-civil-code.com/PartIII/SectionVI/Subsection1/Chapter67.html>. See Šarčević and Volken (2002: 352-353). The title of Chapter 67 is “The law governing determination of the legal status of persons”. See, in general, Lebedev *et al* (2002: 117-144).

164 Article 1195 concerns the personal law of natural persons and Article 1197 concerns the law governing the determination of the civil dispositive capacity of a natural person. Article 1201 deals with the capacity of an individual to pursue entrepreneurial activities.

165 Also see Lebedev *et al* (2002: 126). See, further, Vorobieva (2012: 148, 151 and 152).

166 Also see, Lebedev *et al* (2002: 126-127). See, further, Vorobieva (2012: par 151).

The article therefore provides a rule regarding the capacity of an individual entrepreneur. Capacity in this case shall be governed by the law of the country of registration as entrepreneur. If registration is not compulsory, the law of the main place of business shall apply.

Therefore, the *lex patriae* and, in specific circumstances, the *lex loci contractus* are applied to contractual capacity in Russian private international law.<sup>167</sup> In the case of individual entrepreneurs, either the law of the country of registration or the main place of business is applied.

#### 4.2.17 Slovakia

The private international law rules concerning contractual capacity of natural persons in Slovakia are contained in § 3 of the Private International Law and International Procedural Law Act.<sup>168</sup> According to § 3(1), contractual capacity is governed by the *lex patriae*.<sup>169</sup> § 3(2) contains the rules relating to the contractual capacity of foreigners and, in this regard, a distinction is drawn between contracts concluded in and outside Slovakia. Where a foreigner concludes a contract in Slovakia, his or her contractual capacity shall be governed by the *lex loci contractus* and the *lex patriae*, in the sense that the foreigner will be bound to the contract if he or she possesses capacity in terms of any one of these two systems.<sup>170</sup> Where the contract is concluded outside of Slovakia, contractual capacity shall be governed by the *lex patriae* and not the *lex loci contractus*.

Some specific conflicts provisions are also contained in the Act Concerning Bills of Exchange and Cheques.<sup>171</sup> In terms of the Act, the contractual capacity of an individual to assume liability in respect of a bill of exchange shall be governed by the *lex patriae*. Where the private international law of the *lex patriae* indicates the applicability of another legal system, *renvoi* must be applied.<sup>172</sup> The same rule applies to cheques: the contractual capacity of an individual to acquire liability on a cheque is governed by the *lex patriae* (but *renvoi* must be applied).<sup>173</sup>

167 See, further, Sotbarn (2010: 329) for the text of Article 11(a) of the Kiev Treaty, determining that the contractual capacity of an entrepreneur is governed by the law of the state where the entrepreneur is registered.

168 Private International Law and International Procedural Law Act (1963). This legislation was also applicable in the Czech Republic prior to the enactment of the current Act on Private International Law (2012) (Riering (1997: 299-301)).

169 Pauknerová (2007: par 90).

170 Also see Riering (1997: 299).

171 No 191/1950 Coll as amended.

172 Section 91 of Part I of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.

173 Section 69 of Part II of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.



Therefore, according to Slovakian private international law, contractual capacity is governed by the *lex patriae* and, in particular circumstances, the *lex loci contractus* / *lex fori*. Contractual capacity in respect of cheques and bills of exchange is governed by the *lex patriae*. There is also a specific rule relating to *renvoi* which applies in respect of bills of exchange and cheques, in terms of which the law referred to by the *lex causae*'s private international law shall apply.

#### 4.2.18 Slovenia

In terms of Article 13(1) of the Private International Law and Procedural Act of the Republic of Slovenia,<sup>174</sup> the contractual capacity of Slovenian citizens in foreign countries must be determined by the *lex patriae*.<sup>175</sup> According to Article 13(2) of the Act, a natural person who lacks capacity in terms of the *lex patriae* shall be regarded as possessing capacity if he or she has such under the law of the country where the obligation arose – the *lex loci contractus*. Lastly, Article 13(4) states that the exception in Article 13(2) shall not apply to issues relating to family and succession relationships.

Thus, in Slovenian private international law, the *lex patriae* and the *lex loci contractus* are applied to contractual capacity on an equal level.<sup>176</sup>

#### 4.2.19 Spain

The first part of Article 9.1 of the Spanish Civil Code<sup>177</sup> provides the following in relation to contractual capacity: "The personal law which corresponds to natural persons is determined by their nationality. This law governs capacity and civil status, family rights and obligations and succession by death."<sup>178</sup> Thus, the general rule regarding contractual capacity in the Spanish legal system is that it is governed by the *lex patriae*. Further, in terms of the second sentence of Article 9.1, a change in nationality does not influence majority once this has been acquired.

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174 Private International Law and Procedural Act (1999). German translation in *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (2002: 750-751). See, in general, Puharič (2003: 155-167).

175 Puharič (2003: 160).

176 The position in Macedonian private international law is similar. Article 15 of the Macedonian Private International Law Act (2007) contains the provisions on contractual capacity. This article states that, in general, the capacity of a natural person shall be governed by the *lex patriae*. In addition, Article 15, paragraph 2, provides for the application of the *lex loci contractus* to contractual capacity, which supplements the *lex patriae* in this regard. The sole source available to the current author on Macedonian private international law does not state in which instances the *lex patriae* is so supplemented. See Šarčević (2008: 441-458).

177 Spanish Civil Code (1889-1981).

178 Fernández Arroyo, Martínez and Casas (2002: par 65).

Article 10.8 of the code contains an exception to the application of the *lex patriae*. Fernández Arroyo, Martínez and Casas describe its effect as follows:<sup>179</sup>

“According to the Spanish legal system an onerous contract [concluded]<sup>180</sup> in Spain by a foreigner, who is considered incapable pursuant to his national law, shall be valid if the cause of incapacity is not recognised by the Spanish legislation. This rule will not be applied to contracts relating to [immovable]<sup>181</sup> property situated in a foreign country.”

Thus, a contract concluded in Spain by a foreigner lacking capacity in terms of his or her *lex patriae*, shall be valid if he or she would have contractual capacity in terms of the *lex loci contractus* / *lex fori*.<sup>182</sup> This rule is, however, not applicable to matters involving immovable property situated outside of Spain.

Spanish private international law therefore recognises the application of the *lex patriae* and, in specific circumstances, the *lex loci contractus* / *lex fori* to contractual capacity.

#### 4.2.20 Switzerland

Chapter 2 of the Swiss Federal Statute on Private International Law contains the relevant provisions regarding contractual capacity,<sup>183</sup> specifically Articles 35 and 36.<sup>184</sup>

Article 35 reads: “The capacity [of a natural person] to make juridical acts<sup>185</sup> is governed by the law of his domicile. Once acquired, such capacity is not affected by a change of domicile.” In general, contractual capacity in Swiss law is thus governed by the *lex domicilii*, but is not affected by changes in domicile if once acquired.

179 Fernández Arroyo, Martínez and Casas (2002: par 66).

180 Fernández Arroyo, Martínez and Casas (2002) in par 68 use the word “celebrated”; the Spanish term is “celebrados”.

181 Fernández Arroyo, Martínez and Casas (2002) in par 68 refer to “property” but the original has “inmuebles”.

182 Although the meaning of “onerous contract” is unclear, it is suggested that it may refer to all contracts concluded *quid pro quo* (cf the requirement of valuable consideration in the English common-law).

183 Swiss Federal Statute on Private International Law (1987). Translation by Cornu, Hankins and Symeonides (1989: 204-205). Also see Samuel (1988: 681-695).

184 Article 35 is titled “Principle” and 36 “Security of transaction”.

185 Karrer, Arnold and Patocchi (1994: 60) describe “to act” as the issuing of “transactional declarations of will and other declarations of will or opinion of legal consequences”.

Article 36 further states:

- “1. A party to a juridical act<sup>186</sup> who lacks capacity under the law of the state of his domicile may not invoke this incapacity if he was capable under the law of the state where the act was made, unless the other party knew or should have known of this incapacity.
2. This provision does not apply to juridical acts relating to family law, to succession law, or to real rights in immovables.”

Article 36(1) thus provides for the application of the *lex loci contractus* in addition to the *lex domicilii* in instances where a contractant lacking capacity in terms of the latter has capacity according to the former legal system. The *lex loci contractus* does not apply if the capable contractant knew or should have known of the incapacity in terms of the *lex domicilii*. According to Article 36(2), this rule is neither applicable to family law and the law of succession, nor to issues regarding real rights in immovable property.

Siehr<sup>187</sup> submits that the protection afforded to the capable contractant in terms of Article 36(1) shall only apply where the parties were in each other's physical presence when the contract was concluded. This means that protection shall not be offered to the capable contractant if the contract was, for example, concluded over the telephone.<sup>188</sup> The author suggests in his commentary on Article 36(2) that no protection is offered to the capable party in respect of the specific contracts mentioned<sup>189</sup> because in these circumstances capacity should be ascertained from the relevant documents.<sup>190</sup>

Contractual capacity, according to Swiss private international law is therefore governed by the *lex domicilii* and, in specific circumstances, by the *lex loci contractus*.

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186 See Karrer, Arnold and Patocchi (1994: 61) who comment that these are transactions where rights and obligations are created by a single or several declarations of will, for example, contracts, contracts of partnership, wills and marriage.

187 Siehr (2002: 144-145).

188 Siehr (2002: 145). Also see Karrer, Arnold and Patocchi (1994: 60-61).

189 These are contracts relating to family and succession law, as well as immovable property.

190 Siehr (2002: 145).

#### 4.2.21 Ukraine

The relevant provision of the Ukrainian Private International Law Code is contained in Articles 17, 18(2) and 19.<sup>191</sup> Article 17 states the following:

- “1. The arising and termination of civil legal capacity of a natural person shall be determined by his personal law.
2. Foreigners and stateless persons shall have civil legal capacity in Ukraine equally with citizens of Ukraine, except for instances provided for by a law or by international treaties of Ukraine.”

This provision states that the contractual capacity of natural persons is generally determined by the *lex patriae*. Also, foreigners in the Ukraine without any citizenship shall have the same capacity as Ukrainian nationals unless this conflicts with local or international law. Article 18(2) of the code states that “[t]he grounds and legal consequences of deeming a natural person to lack dispositive legal capacity or the limitation of the civil dispositive legal capacity of a natural person shall be regulated by the personal law of this person”. In other words, *lex patriae* determines the grounds and consequences of a lack of capacity or a limitation thereof.

Article 19(1) contains a specific rule concerning the capacity of an individual entrepreneur. It reads:

“The right of a natural person to effectuate entrepreneurial activity shall be determined by the law of the State in which the natural person is registered as an entrepreneur. In the absence in a State of the requirements concerning obligatory registration the law of the State of the principle place of the effectuation of entrepreneurial activity shall be applied.”

This provision therefore means that capacity shall be governed by the law of the country in which the individual is registered as an entrepreneur. Should there be no requirement of compulsory registration, the law of the country of the main place of business shall apply.

Ukrainian private international law therefore applies the *lex patriae* to contractual capacity. In the case of individual entrepreneurs, either the law of the country of registration or the main place of business is applied.

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<sup>191</sup> Ukrainian Private International Law Code (2005). English translation in Butler (2011). See Dovgert (2007: 131-159). Article 17 relates to the civil legal capacity of natural persons and Article 18 to the civil dispositive legal capacity of natural persons, while Article 19 concerns the capacity of natural persons to perform entrepreneurial activities.

#### 4.3 THE MIDDLE EAST

##### 4.3.1 Azerbaijan

In the Azerbaijani private international law code,<sup>192</sup> Articles 9(1) and 10 are relevant.<sup>193</sup> In terms of Article 10(1) the legal capacity of a natural person is governed by his or her “personal law”. Article 9(1) defines “personal law” as the *lex patriae*. However, Article 10(2) states that contractual capacity is governed by the *lex loci contractus*.

In Azerbaijani private international law different rules therefore apply to legal and contractual capacity. Legal capacity, on the one hand, is governed by the *lex patriae* while contractual capacity, on the other, is governed by the *lex loci contractus*.

##### 4.3.2 Iran

Articles 6, 7, 8, 962 and 963 of the Iranian Civil Code contain the private international law rules relating to contractual capacity.<sup>194</sup> Article 6 states that the Iranian laws of contractual capacity of individuals are applicable to all Iranians, even when they are abroad. This means that the *lex patriae* shall apply to Iranians. Article 7 provides that the same rule (*lex patriae*) shall govern the capacity of foreigners who are in Iran.<sup>195</sup> Article 8 stipulates that the capacity of foreigners to possess or acquire immovable property in Iran shall be governed by the *lex rei sitae*.

Similar to Article 6, Article 962 states that contractual capacity is generally determined by the *lex patriae*.<sup>196</sup> Where, however, a foreigner concludes a contract in Iran, he shall be deemed to possess contractual capacity if he would have such in terms of Iranian law, irrespective of whether he is fully or partially incapacitated according to his *lex patriae*. This means that the *lex loci contractus* / *lex fori* would be applied in this case. This rule does not, however, apply to contracts in respect of family or succession law or in respect of immovable property situated in Iran.<sup>197</sup>

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192 Private International Law Code of Azerbaijan (2000). German translation in *Praxis des Internationalen Privat- und Verfahrensrechts* (2003: 387).

193 Article 9 concerns the personal status of natural persons and Article 10 specifically relates to the rights and capacity of natural persons.

194 Civil Code of Iran (1935). German translation in Kropholler *et al* (1999: 298).

195 within the limitations of existing treaties.

196 Article 963 provides that where spouses have different nationalities, the rights in respect of personal and property issues shall be governed by the husband's *lex patriae*.

197 Civil Code of Iran (1935: Article 962).

In Iranian private international law, as illustrated, the *lex patriae* or the *lex loci contractus* / *lex fori* are generally applied to contractual capacity, but the *lex rei sitae* is applicable in respect of immovable property.

#### 4.3.3 Israel

In terms of § 77 of the Legal Capacity and Guardianship Law,<sup>198</sup> the contractual capacity of a minor or legally incompetent person shall be governed by the *lex domicilii*.<sup>199</sup> There are exceptions to the application of the general principle<sup>200</sup> and the relevant rule reads as follows:

“[A] legal act performed in Israel by a person whose legal capacity is restricted or who has been deprived of capacity, being an act of a kind commonly performed by such persons, or a legal act performed in Israel between such a person and a person who neither knew nor ought to have known of the restriction or deprivation,<sup>201</sup> shall be valid, unless substantial harm was caused thereby to the first-mentioned person or his property.”<sup>202</sup>

Einhorn submits that the exceptions should also apply multilaterally.<sup>203</sup> This would mean that a contractant incapable in terms of his or her *lex domicilii* may not rely on this incapacity if he or she would have had such capacity according to the *lex loci contractus* (whether or not the *locus contractus* is in the country of the forum), unless his counterpart was aware, or should have been aware, of this incapacity at the time of contracting. The *lex loci contractus* would thus apply unless the counterpart is shown to have fault.

The relevant exception is similar to the *Lizardi* rule<sup>204</sup> as applied in various civil-law countries. However, there are two elements of the exception that do not feature in any of the other jurisdictions: (1) the *lex loci contractus* applies as an additional legal system only if the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity;<sup>205</sup> and (2) the *lex loci contractus*<sup>206</sup> does not apply as an additional legal system if the relevant contract caused substantial harm to the person with no or limited contractual capacity.

198 Legal Capacity and Guardianship Law (1962), as in Einhorn (2012: par 125).

199 Einhorn (2012: pars 125-130). The author submits in pars 125-126 that the rule of “once mature, always mature” applies in Israel, which means that a change in domicile does not affect the status of maturity once attained.

200 Einhorn (2012: par 128) refers to those exceptions as “rules of estoppel”.

201 Einhorn (2012: par 128) suggests that “at the time the act was made” should be added.

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

203 Einhorn (2012: par 129).

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

205 This is the multilateral version of the rule. In the unilateral version, *lex loci contractus* must be read as *lex fori*. See Neels (2010: 122-123).

206 *ibid.*

Einhorn further submits that the exception should not apply to contracts relating to family or succession law nor to agreements involving immovable property, because in these cases documents regarding capacity must be submitted and inspected by the counterpart. The latter, she continues, should also not be protected if, at the time of contracting, the incapable contractant was not physically present, thereby creating the impression that he possesses capacity. Where contracts are concluded telephonically, she asserts, the onus shall be on the capable party to make the necessary enquiries regarding capacity.<sup>207</sup> The author adds that the capable contractant should not be allowed to rely on his or her domestic law for protection; however, it has never been suggested that the capable party's *lex domicilii* should be applied to the determination of the capacity of his or her counterpart.<sup>208</sup>

#### 4.3.4 Qatar

Article 11 of the Qatari Civil Code<sup>209</sup> contains the private international law provisions relating to contractual capacity. Generally, contractual capacity of a natural person, in this legal system, is governed by the "personal law". The "personal law" in turn refers to the natural person's nationality, indicating the application of the *lex patriae*. However, the *lex loci contractus* will apply if the following conditions are present:

- a) a foreign contractant, lacking capacity in terms of his or her *lex patriae*, concludes a contract in Qatar;
- b) the contract has to be performed in Qatar;
- c) the reasons for the foreign contractant's incapacity in terms of the *lex patriae* are not readily ascertainable; and
- d) the foreign contractant would have possessed the relevant capacity in terms of the internal law of Qatar.

Najm<sup>210</sup> explains that the exception amounts to the application of a rule that resembles that pronounced in the *Lizardi* decision,<sup>211</sup> albeit in a different manner. She correctly points out that the rule is incomplete as it does not provide what the position would be should a Qatari, lacking capacity in terms of his or her *lex patriae*, conclude a contract outside Qatar where he or she possesses such capacity. The rule therefore "diminishes its international effect, limiting it to the preservation of the stability of internal commerce".<sup>212</sup>

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207 Einhorn (2012: par 130).

208 Cf the position in Quebec, discussion in paragraph 4.5.3.

209 Civil Code of Qatar (2004), as in Najm (2006: 249-266).

210 Najm (2006: 442).

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

212 Najm (2006: 442).



From the discussion it thus emanates that the *lex patriae* and, in specific circumstances, the *lex fori* / *lex loci contractus* / *lex loci solutionis* are applied to contractual capacity in Qatari private international law.

#### 4.3.5 Syria

In Syrian private international law, the provision relating to contractual capacity is contained in Article 12(1) of the Civil Code.<sup>213</sup> In terms of this provision, contractual capacity is governed by the *lex patriae*. An exception to this rule exists when a commercial contract<sup>214</sup> is concluded in Syria where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae* but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account in the particular circumstances identified. The exception resembles the *Lizardi* rule,<sup>215</sup> although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the intention clearly is that the *lex loci contractus* will be applied.

Therefore, in Syrian private international law, the *lex patriae* is applied to contractual capacity and, in particular circumstances, the *lex loci contractus* / *lex fori* / *lex loci solutionis*.

#### 4.3.6 Turkey

Article 8 in Section II of the 1982 Turkish statute on private international law<sup>216</sup> determined as follows:

“The capacity of persons to have rights and to act is governed by their national law.

If a foreigner has no capacity under his national law but has capacity under Turkish law, he is bound by legal transactions entered into in Turkey. This provision is not applicable to family and inheritance law and transactions creating real rights in immovables located in a foreign country.

A person who has attained the age of majority under his national law shall not lose majority with a change of nationality....”

In terms of this article, contractual capacity is generally governed by the *lex patriae*. If, however, a foreigner lacks capacity according to his or her *lex patriae*, but would have such in terms of Turkish law, and the contract is con-

213 Civil Code of Syria (1949). German translation in Kropholler *et al* (1999: 771).

214 “une transaction d’ordre pécuniaire”.

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

216 as translated by Ansay and Schneider (1990: 152). See, in general, Ansay and Schneider (1990: 139-151). Section I of the statute is titled “The Conflict of Laws Rules” and Article 8 “Capacity”.

cluded in Turkey, the *lex loci contractus* / *lex fori* shall govern. The exception shall not be applicable to contracts involving family law, the law of succession and real rights concerning immovable property situated outside Turkey. Further, contractual capacity obtained by majority under a foreigner's *lex patriae* shall continue irrespective of a subsequent change in nationality.

Tekinalp *et al*<sup>217</sup> explain that the *lex patriae* rule governed both the degree and conditions of capacity.<sup>218</sup> "Degree" concerns the difference between full capacity, full incapacity, limited capacity and limited incapacity, while "the conditions of capacity" relate to the age of majority and the capacity to make reasonable judgments.<sup>219</sup>

According to the authors, the substitution of the *lex loci contractus* / *lex fori* for the *lex patriae* in the second paragraph of Article 8, was based on the principle of legal certainty. They are of the opinion that the following were the requirements for the relevant exception to apply:<sup>220</sup> (i) the person involved should have no capacity under his *lex patriae*; (ii) the contract must have been concluded in Turkey; (iii) the contract must have been concluded by the parties in each other's presence; and (iv) the nature of the contract should be appropriate.<sup>221</sup> It is, however, submitted by the current author that number (iii) above was not a requirement since physical (actual) presence is not mentioned in paragraph two of Article 8.

The 1982 statute has been replaced by the 2007 private international law code.<sup>222</sup> The relevant sections are contained in Part 1, Chapter 2, Article 9 (sub-articles 1-3)<sup>223</sup> of the code:

- "(1) The capacity to have rights and duties and to act shall be governed by the national law of the person concerned.
- (2) Any person who does not have capacity pursuant to her/his national law, shall be bound by the legal transaction she/he has carried out, provided she/he has capacity to act pursuant to the law of the country where the transaction has been carried out. This provision shall not apply to transactions relating to family and inheritance law and to real rights on immovable property in another country.
- (3) Majority attained pursuant to the national law of the person shall not be terminated due to change of nationality."

217 Tekinalp, Nomer and Odman (2001: par 156-167).

218 Tekinalp, Nomer and Odman (2001: par 159).

219 *ibid.*

220 Tekinalp, Nomer and Odman (2001: par 169).

221 This refers to the fact that transactions relating to family or inheritance law and those pertaining to immovable property situated outside of Turkey were excluded by Article 8.

222 Private International Law Code of Turkey (2007). English translation in *Yearbook for Private International Law* (2007: 583-604). The code entered into force on 12 December 2007. See in general, Tekinalp (2007: 313-341).

223 Part 1 is titled: "Private International Law", chapter 2 concerns the "Conflict of Law Rules" and Article 9 refers specifically to "Capacity".

In terms of Article 9(1), contractual capacity shall be governed by the *lex patriae*. Article 9(2) states that the *lex loci contractus* shall govern capacity where a contractant lacks such according to his or her *lex patriae* but possesses capacity in terms of the *lex loci contractus*. The *lex loci contractus* shall not be applicable to contracts relating to family and succession law and real rights in immovable property situated outside of the *locus contractus*. According to Article 9(3), where an individual obtains capacity by attaining the age of majority in terms of his or her *lex patriae*, it shall not terminate upon a subsequent change in nationality.

From the discussion it emerges that contractual capacity in Turkish private international law today is governed by the *lex patriae* and the *lex loci contractus* on an equal level.

#### 4.3.7 United Arab Emirates

Article 11 of the Civil Code of the United Arab Emirates contains the provisions regarding contractual capacity.<sup>224</sup> The general rule is that capacity is governed by the *lex patriae*. An exception exists when a commercial contract is concluded in the United Arab Emirates where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae*, but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account. The exception resembles the *Lizardi* rule<sup>225</sup> although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It merely prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is probably that the *lex loci contractus* / *lex fori* will then be applied.

Therefore, according to the private international law of the United Arab Emirates, the *lex patriae* and, in specific circumstances, the *lex loci contractus* / *lex fori* / *lex loci solutionis* are applicable to contractual capacity.

#### 4.3.8 Uzbekistan

Article 1169 of Chapter 71 of the Civil Code of Uzbekistan determines that<sup>226</sup> “[t]he legal capacity and dispositive legal capacity of a natural person shall be determined by his personal law”, which is defined in Article 1168 to be the *lex patriae*. However, “[c]ivil dispositive legal capacity of a natural person with respect to transactions ... shall be determined according to the law of

<sup>224</sup> Civil Code of the United Arab Emirates (1985). Translation in Kropholler *et al* (1999: 996).

<sup>225</sup> *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

<sup>226</sup> Civil Code of the Republic of Uzbekistan (1997). Translation by Butler (1997). Article 1169 deals specifically with the legal capacity and dispositive legal capacity of natural persons.

the country of the place of concluding the transaction". Contractual capacity is therefore governed by the *lex loci contractus*.

The fourth paragraph of Article 1169 determines:

"The legal capacity of a natural person to be an individual entrepreneur and to have the rights and duties connected therewith shall be determined according to the law of the country where the natural person is registered as an individual entrepreneur. In the absence of a country of registration, the law of the country of the principal place of effectuating individual entrepreneurial activity shall be applied."

The capacity of an individual in the context of entrepreneurial activity is therefore determined by the law of the country of registration as entrepreneur. If the relevant person is not so registered, the law of the country of the principle place of entrepreneurial activity shall be applied.

The *lex loci contractus* is therefore the primary applicable legal system in respect of contractual capacity in Uzbekistani private international law. There exists a special rule in respect of an individual entrepreneur for the application of the law of the country of either registration or the principal entrepreneurial activity.

#### 4.4 THE FAR EAST

##### 4.4.1 China

Prior to 2000, China had no specific rules applicable to the contractual capacity of individuals or juristic persons.<sup>227</sup> It could, however, be accepted that China, as the other socialist states and the majority of the civil-law countries, referred to the "personal law" of an individual in addressing the issue, that is: the law of nationality (the *lex patriae*). This legal system would, however, not apply where a foreign contractant lacking contractual capacity according to his or her *lex patriae* concluded a contract with a Chinese citizen. Under these circumstances Chinese law would apply if the foreigner had capacity in terms of this legal system.<sup>228</sup> The law of habitual residence was applicable to Chinese nationals permanently residing abroad.<sup>229</sup>

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227 Chen (1987: 461).

228 It may perhaps be assumed that this rule refers to the situation that the contract was concluded in China and that Chinese law was therefore the *lex loci contractus*, but this is not clear.

229 Chen (1987: 461).

The fourth draft of the Chinese model law on private international law contained the proposed rules relating to contractual capacity in Article 67:<sup>230</sup>

“The capacity to act is governed by the law of the country where a natural person has his domicile or habitual residence.

If a foreigner lacks the capacity to act or has only limited capacity to act under the law of his domicile or habitual residence but possesses the capacity to act under Chinese law, Chinese law applies and the person is deemed to have capacity to act, except legal acts concerning marriage, family, inheritance or disposition of immovable property.”

In terms of the fourth draft of the model law, therefore, capacity was to be governed by both the *lex domicilii* and the law of the country of habitual residence. Where a foreign contractant lacking capacity in terms of the *lex domicilii* or the law of habitual residence had such capacity according to the *lex fori*, the latter legal system would apply. This exception would not be applicable where the contract in issue concerned matrimonial, family or succession law or the alienation of immovable property. In terms of the fourth draft, therefore, the *lex domicilii*, the law of habitual residence and the *lex fori* would govern on an equal basis as far as foreign citizens are concerned.

Article 67 of the sixth draft of the model law on private international law determined in Section 2:<sup>231</sup>

“The capacity to act of a natural person is governed by the law of his domicile or habitual residence.

If a foreigner does a legal act in the territory of the PRC [People’s Republic of China] for which he would have no capacity to act or a limited capacity to act under the law of his domicile or habitual residence, he is deemed to have capacity to act in so far as he would be capable under the law of the PRC, except the legal act relating to family and inheritance or concerning real rights in immovable property.”

Therefore, according to this article, contractual capacity of an individual was in principle to be governed by both the *lex domicilii* and the law of habitual residence. Further, where a foreigner concluded a contract in China while lacking contractual capacity according to his or her *lex domicilii* or the law of habitual residence but possessed capacity in terms of the *lex fori*, then the latter legal system would apply.<sup>232</sup> This would, however, not be the position where the contract related to family law, the law of succession or real rights in immovable property. Also in terms of the sixth draft, therefore, the

230 Liu (2001: 24). Article 67 falls under the second section and refers to “The Capacity to Have Rights and the Capacity to Act”.

231 See *Yearbook of Private International Law* (2001: 349-390). Section 2 is titled “Capacity for Rights and Capacity to Act”, while Article 67 refers specifically to the “Capacity to Act of Natural Person”. Also see, in general, Jin and Guomin (1999: 135-156).

232 Also see Zhu (2007: 283 at 291).

*lex domicilii*, the law of habitual residence and the *lex fori* would govern on an equal basis as far as foreign citizens were concerned. The sixth draft spelled out more clearly that the *lex fori* applied *when the contract was concluded in China*. This was perhaps also the intention of the fourth draft, but was there not stated in so many words.

The current Chinese private international law Act was adopted on 28 October 2010 and entered into force on 1 April 2011.<sup>233</sup> The relevant provision is contained in Chapter Two,<sup>234</sup> Article 12 of the Act, which stipulates:

“Civil competence of a natural person is governed by the law of the place where the person habitually resides.

Where a natural person engaging in civil activities is deemed incompetent pursuant to the law of the place where the person habitually resides but competent according to the law of the place where the act is performed, the law of the place where the act is performed shall be applied, with the exception of those related to marriage, family or succession.”

Contractual capacity of a natural person is thus generally governed by the law of the country of habitual residence.<sup>235</sup> However, if a natural person lacks capacity in terms of the law of habitual residence but is capable under the *lex loci contractus*, then this legal system applies, except where the relevant contract concerns family or succession law. If the contract does not fall under the latter categories, the law of habitual residence and the *lex loci contractus* govern on an equal basis.

From the discussion it is thus clear that contractual capacity of a natural person in Chinese private international law is in general determined by the law of the country of habitual residence and the *lex loci contractus* on an equal basis.

#### 4.4.2 Japan

Prior to 2007, the Japanese private international law provisions were contained in the Act on the Application of Laws of 1898.<sup>236</sup> In terms of Article 3(1) of the Act, the contractual capacity of an individual was governed by the

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233 Chinese Private International Law Act (2010).

234 Chapter Two is titled: “Civil Entities”.

235 The concept of habitual resident has been given content in § 15 of the Interpretation of the Supreme People’s Court of 10 December 2012 (in force as of 7 January 2013). In terms of the paragraph, an individual would be accepted as habitually resident at a particular place if he or she has resided there for at least a year and this place of residence forms the centre of his or her life. For the text of § 15, see “Erläuterungen des Obersten Volksgerichts zu einigen Fragen des ‘Gesetzes der Volksrepublik China über das anwendbare Recht auf zivilrechtliche Beziehungen mit Außenberührung’” (2013: 110). Also see Leibkühler (2013: 89-98) and Tong (2014: 206-211).

236 See Anderson and Okuda (2002: 230). See, in general, Kim (1992: 1-35).

*lex patriae*. According to Article 3(2), the *lex loci contractus* was to apply when a foreigner lacking contractual capacity in terms of his or her *lex patriae* concluded a contract in Japan, where he or she would have had such capacity.<sup>237</sup> Therefore both the *lex patriae* and the *lex loci contractus* / *lex fori* were applicable under the previous position.

On 1 January 2007 the Act on the General Rules of Application of Laws<sup>238</sup> entered into force, revising Japanese private international law. The provisions relating to contractual capacity are contained in (Chapter 3, Section 1) Article 4 of the Act.<sup>239</sup>

- “(1) The legal capacity of a person shall be governed by his or her national law.
- (2) Notwithstanding the preceding paragraph, where a person who has performed a juristic act is of full capacity under the law of the place where the act was done (*lex loci actus*), that person shall be regarded as having full capacity to the extent that at the time of the juristic act, all the parties were situated in a place under the same law.
- (3) The preceding paragraph shall not apply either to a juristic act by family law or succession law, or to a juristic act regarding immovables situated in a place where the law differs from the *lex loci actus*.”

In principle, the contractual capacity of an individual is governed by the *lex patriae*. There is, however, an exception to this rule in terms of sub-article (2): when a contractant was in the same country as his or her counterpart at the time of contracting and had capacity according to the *lex loci contractus* (irrespective of the fact that he or she did not have contractual capacity in terms of the relevant *lex patriae*), the *lex loci contractus* shall apply. The *lex loci contractus* will, however, not apply in respect of contracts relating to family law or the law of succession and those concerning immovable property situated in a country where the law differs from the *lex loci contractus*.

Should a contractant conclude a contract when present in the same country as his counterpart but while lacking capacity in terms of the *lex loci contractus*, the *lex patriae*, being the generally applicable legal system, will apply. The same applies if a party were capable under the *lex loci contractus* but not present in the same country as his or her co-contractant at the moment of contracting.

Therefore, in terms of Japanese private international law, the *lex patriae* and, in specific circumstances, also the *lex loci contractus* are applicable to contractual capacity.

<sup>237</sup> See Takahashi (2006: 311 at 314). See, in general, Okuda (2006: 145-167).

<sup>238</sup> Act on the General Rule of Application of Laws (2006). Translation in *Yearbook for Private International Law* (2006: 427-441).

<sup>239</sup> Chapter 3 is titled “General Rules on Applicable Law”, Section 1 relates specifically to “Persons” and Article 4 to “A Person’s Legal Capacity”.



#### 4.4.3 Macau (China)

The relevant sections of the Civil Code of Macau<sup>240</sup> are found in (Book I, Title 1, Chapter III,<sup>241</sup> Division II, Subdivision I) Articles 24, 27 and 30 (subdivision IV) and Article 46.<sup>242</sup>

Article 24 reads: “The status and capacity of natural persons ... shall be governed by the personal law of the respective subject, without prejudice to the restrictions in this Division.”

Article 27 of the code states as follows:

- “1. Transactions concluded in [Macau]<sup>243</sup> by a person who lacks legal capacity under the applicable personal law shall not be annulled on the ground of such incapacity, if the person would be considered capable under the internal law of [Macau], if it were applicable.
2. This exception no longer exists if the other party was aware of the incapacity or if the transaction is unilateral, pertains to family law or to the law of succession or deals with the transfer of immovables situated outside the territory of [Macau].
3. If the person without legal capacity concludes the transaction outside [Macau], the law of the place where the transaction is concluded shall apply, provided it contains rules identical to those laid down in the preceding paragraphs.”

The relevant provisions of Article 30 read as follows:

- “1. The personal law of a natural person shall be the law of his or her habitual residence.
2. The habitual residence of a natural person shall be deemed the place where he or she has established the effective and stable centre of his/her personal life.”

Article 46, which relates to immovable property, provides that “[t]he capacity to acquire or transfer real rights in immovable property shall also be governed by the law of the country where the property is situated if that law thus provides; otherwise the personal law shall apply”.

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240 Civil Code of Macau (1999). Translated by Marques dos Santos (2000: 343). See, in general, Marques dos Santos (2000: 133-151).

241 Book I is the “General Part”, Title I refers to the rules of law, their interpretation and application, while Chapter III relates to the rights of foreigners and private international law.

242 Division II is titled “Choice of Law Rules”, while Subdivision I concerns the scope and determination of the personal law. Articles 24, 27 and 30 focus on the scope of the personal law, the exceptions with respect to the effects of incapacity and determining the personal law respectively. Subdivision IV relates to the law applicable to property and Article 46 deals with the capacity to acquire or transfer real rights in immovable property.

243 The translated text of the code reads: “Macao”, from the original Portuguese, but the correct English translation is “Macau”.

Article 30 of the Civil Code of Macau forms the basis of Articles 24, 27 and 46, as it describes what is meant by “personal law”, namely the law of the natural person’s habitual residence. It also provides a definition of the concept “habitual residence”. Accordingly, Article 24 in effect states that the contractual capacity of an individual shall in principle be governed by the law of his or her habitual residence.

Article 27 deals with the position of the individual lacking contractual capacity and amounts to a rule resembling that of *Lizardi*.<sup>244</sup> Sub-article (1) states that where a contractant lacking capacity according to his or her law of habitual residence concludes a contract in Macau and is regarded as having such capacity in terms of the internal *lex loci contractus* / *lex fori*, the latter legal system shall apply. Sub-article (2) provides in effect that a contractant may rely on his or her incapacity in terms of his or her law of habitual residence if the counterpart was aware of this. The *Lizardi*-inspired exception does not apply where the contract in question is unilateral, relates to family law, the law of succession or the sale of immovable property situated outside of Macau. Sub-article (3) concerns contracts concluded outside Macau by an individual lacking capacity in terms of his or her law of habitual residence; it determines that the *lex loci contractus* shall apply. There is, however, a proviso that the country of conclusion of the contract should have legal rules identical to that of Macau in terms of subsections (1) and (2).

Article 46 provides that contractual capacity relating to real rights in immovable property shall be governed by the *lex rei sitae* if that law stipulates that the *lex situs* indeed applies. If not, the law of the country of habitual residence shall apply.

Therefore, in terms of the private international law rules of Macau, contractual capacity is governed by the law of habitual residence, while the *lex loci contractus* / *lex fori*, the *lex loci contractus* and the *lex rei sitae* may play a role in specific circumstances.

#### 4.4.4 Mongolia

Article 543(2) and (5) in Chapter 62 of the Mongolian civil code deals with the law applicable to contractual capacity in private international law.<sup>245</sup> According to sub-article 2, the contractual capacity of foreign citizens shall be governed by the *lex patriae*. Sub-article (5) states that capacity of foreign citizens relating to contracts which were concluded in Mongolia shall be governed by the *lex fori*.

<sup>244</sup> *Lizardi v Chaize* Cass req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

<sup>245</sup> Civil Code of Mongolia (2002). See for a translation *Praxis des Internationalen Privat- und Verfahrensrechts* (2003: 381).

As far as foreign citizens are concerned, contractual capacity in Mongolian private international law is therefore governed by the *lex patriae* and, as far as contracts are concluded in Mongolia, by the *lex loci contractus* / *lex fori*.

#### 4.4.5 Philippines

There is only one provision relating to contractual capacity in the private international law section of the Philippine civil code.<sup>246</sup> Article 15 reads: "Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad." This conflicts rule entails that the contractual capacity of citizens of the Philippines is governed by the *lex patriae*, which will also be the *lex fori*.

#### 4.4.6 South Korea

As far as South Korean private international law is concerned, the provisions relating to contractual capacity are to be found in (Chapter 2) Articles 13 and 15 of the Conflict of Laws Act.<sup>247</sup> Article 13 provides the following:

- "(1) A person's capacity to act shall be governed by his *lex patriae*. The same shall apply where the capacity to act is extended by marriage.
- (2) A capacity to act that has been previously acquired shall not be deprived or restricted by a change of nationality."

Article 15 reads:

- "(1) If a person who effects a juridical act and the opposite party are in the same country at the time of the formation of the juridical act, a person who would have capacity under the law of that country cannot invoke incapacity under his *lex patriae*, unless the other party was or could have been aware of his incapacity at the time the juridical act was effected.
- (2) The provisions of paragraph (1) shall not apply to juridical acts under the provisions of the family law or the inheritance law and juridical acts relating to real estate located in a country other than the place where the act was effected."

Contractual capacity, according to Article 13(1), is in principle governed by the *lex patriae*. This legal system also determines whether capacity has been acquired through marriage. According to sub-article (2), once contractual capacity is obtained, it will not be affected by a change in nationality.

<sup>246</sup> Civil Code of the Philippines (1949), in Kropholler *et al* (1999: 712).

<sup>247</sup> Conflict of Laws Act of the Republic of Korea (2001). See Šarčević and Volken (2003: 318). Chapter 2 is titled "Persons" and Article 13 focuses specifically on the capacity to act. Article 14 concerns the "Declaration of Quasi-Incompetence and Incompetence" and Article 15 is titled "Protection of Transactions". See, in general, Suk (2003: 99-141).

Article 15 contains an exception to the application of the *lex patriae* and resembles the *Lizardi* rule.<sup>248</sup> In terms of this article, where a contractant lacking capacity in terms of his or her *lex patriae* concludes a contract with his or her counterpart while present in the same country, the *lex loci contractus* shall apply if he or she has capacity according to the latter legal system. This contractant may nevertheless rely on his or her incapacity if the counterpart was or should have been aware of the legal position in terms of the *lex patriae*. This exception, however, shall neither apply to contracts relating to family and succession law, nor to those concerning immovable property situated outside the country of the *locus contractus*.

As the discussion indicates, contractual capacity in South Korean private international law is governed by the *lex patriae* and, in specific circumstances, by the *lex loci contractus*.

#### 4.4.7 Taiwan

Paragraph 10 in Chapter 2 of the Taiwanese Private International Law Act<sup>249</sup> contains the relevant provisions regarding contractual capacity. This paragraph provides that the contractual capacity of a person shall be governed by the *lex patriae*. Further, a change in nationality by a capable person shall not result in the loss or limitation of contractual capacity. Where a foreign contractant concludes a contract in Taiwan (“the Republic of China”), while lacking contractual capacity according to his or her *lex patriae* but possessing such in terms of the *lex loci contractus* / *lex fori*, then the latter legal system shall apply. This exception, however, shall apply neither where the contract in issue relates to family and succession law, nor to immovable property located outside Taiwan.

Contractual capacity in Taiwanese private international law is therefore governed by the *lex patriae* and, if the contract was concluded in Taiwan, also by the *lex loci contractus* / *lex fori*.

#### 4.4.8 Thailand

The Thai Act on Conflict of Laws<sup>250</sup> also contains provisions relating specifically to contractual capacity. These are found in Section 10, Chapter II<sup>251</sup> of the Act. This section reads as follows in the English translation:

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

249 Private International Law Act (2010). German translation available at <http://www.mpipriv.de/files/pdf3/ipr-gesetztaiwan2010.pdf>.

250 Act on Conflict of Laws (1938), in Kropholler *et al* (1999: 810); also available at <http://www.judiciary.go.th/eng/LawsEbg1/EE1.html>.

251 Chapter II is titled “Status and Capacity of Persons”.

“The capacity or incapacity of a person is governed by the law of the nationality of such person.

But if an alien does a juristic act in Siam for which he would have no capacity or a limited capacity under the law of his nationality, he is deemed to have capacity for it in so far as he would be capable under Siamese law. This provision does not apply to juristic acts under the Family law and the law of Succession.

In case of juristic act relating to immovable property, the capacity of a person to enter into such juristic act is governed by the law of the place where the immovable property is situated.”

In terms of the first paragraph of Section 10, contractual capacity of an individual is governed by the *lex patriae*. The second paragraph provides for the application of the *lex loci contractus* / *lex fori* where a foreigner, lacking capacity according to his *lex patriae*, concludes a contract in Thailand, where he has such capacity. This rule, however, applies neither to contracts relating to family law nor to the law of succession. Lastly, in terms of the third paragraph, contractual capacity relating to immovable property is governed by the *lex rei sitae*.

In Thai private international law, therefore, contractual capacity is determined by the *lex patriae* and, if the contract was concluded in Thailand, also by the *lex loci contractus* / *lex fori*. The capacity to contract in respect of immovable property is governed by the *lex rei sitae*.

#### 4.4.9 Vietnam

The relevant provisions of the Vietnamese civil code<sup>252</sup> are contained in Article 831, Sections (1) and (2). The English translation reads:<sup>253</sup>

- “(1) The legal capacity of foreigners is determined by the law of the country whose citizens foreigners are (*sic*) except for the cases where this Code or other laws of Vietnam provide otherwise.
- (2) When foreigners create and perform civil transactions in Vietnam their legal capacity shall be determined by Vietnamese law.”

Article 831(1) of the Vietnamese code thus provides that the contractual capacity of foreigners is generally governed by the *lex patriae*. According to Article 831(2), the *lex loci contractus* / *lex fori* / *lex loci solutionis* is applicable where a contract was concluded and the performances rendered in Vietnam. From the text of Article 831, it cannot be deduced, for instance, what the position would be where a foreigner concludes a contract in Vietnam but the

252 Civil Code of the Socialist Republic of Vietnam (1996), in Kropholler *et al* (1999: 1040).

253 Part 7 of the code relates to the “Civil relations with a foreign element” and Article 831 is titled “Legal capacity of foreigners”.

performances are to be effected elsewhere, when the parties contract abroad having the performances rendered in Vietnam (or elsewhere) or when the performance must take place in Vietnam according to the terms of the contract but the performance in actual fact takes place elsewhere. It also does not specify what the position is in respect of citizens of Vietnam.

The *lex patriae* and, in specific cases, the *lex loci contractus* / *lex fori* / *lex loci solutionis* are therefore applicable to contractual capacity in Vietnamese private international law (in as far as foreign citizens are concerned).

#### 4.5 NORTH AMERICA

##### 4.5.1 Louisiana (United States of America)

The provision relating to contractual capacity in the Civil Code of Louisiana,<sup>254</sup> contained in Article 3539,<sup>255</sup> states the following:

“A person is capable of contracting if he possesses that capacity under the law of either the state in which he is domiciled at the time of making the contract or the state whose law is applicable to the contract under Article 3537.”

Article 3537 lists the policies that must be taken into account in determining the proper law of the contract.

It is thus clear that contractual capacity in Louisianan private international law is governed by both the *lex domicilii* (at the conclusion of the contract) and the proper law of the contract.<sup>256</sup>

##### 4.5.2 Oregon (United States of America)

Section 5 of Oregon’s Conflicts Law Applicable to Contracts<sup>257</sup> is specifically titled “capacity to contract”. It reads as follows:

- “(1) A party has the capacity to enter into a contract if the party has that capacity under the law of the state in which the party resides or the law applicable to this issue under section 3, 9 or 10, chapter 164, Oregon Laws 2001.
- (2) A party that lacks capacity to enter into a contract under the law of the state in which the party resides may assert that incapacity against a party that knew or should have

254 Civil Code of Louisiana (1991), in Kropholler *et al* (1999: 1002). See Symeonides (2008a: 128-129). See, in general, Symeonides and Rouge (1993: 460-507).

255 Kropholler *et al* (1999: 1022). Article 3539 is titled “Capacity”.

256 See Symeonides and Rouge (1993: 500).

257 Oregon’s Conflicts Law Applicable to Contracts (2001). Available in Nafziger (2001: 405). See, in general, Nafziger (2001: 391-418). Also see Symeonides (2008a: 130-131). See, in general, Symeonides (2008a: 130-132).

known of the incapacity at the time the parties entered into the contract. If a party establishes lack of capacity in the manner provided by this subsection, the consequences of the party's incapacity are governed by the law of the state in which the incapable party resides."

The Sections 3 and 9 referred to determine how the proper law of a contract must be ascertained, while Section 10 provides various presumptions in this regard in respect of specific types of contracts.<sup>258</sup> The primary rule in Oregon's private international law is therefore clear – contractual capacity is governed by the law of an individual's habitual residence and the proper law of the contract.

Section 5(2) of the code provides that a contractant may rely on his or her incapacity (in terms of the law of his or her residence) where his or her counterpart knew, or should have known of this incapacity at the time of contracting. In such a case, the consequences of the incapacity are governed by the law of the incapable party's residence. No rule is provided for the consequences of incapacity in any other case.

In general, contractual capacity in Oregon's private international law is governed by the law of residence and the proper law of the contract and, in specific circumstances, by the law of residence only.

#### 4.5.3 Quebec (Canada)

The relevant provisions of the Civil Code of Quebec<sup>259</sup> are contained in Book Ten, Title Two, Chapter 1, Division I (Article 3083) and II (Article 3086).<sup>260</sup> Only the first paragraph of Article 3083 is relevant regarding contractual capacity, where it states: "The status and capacity of a natural person are governed by the law of his domicile."

Article 3086 provides the following:

"A party to a juridical act who is incapable under the law of the country of his domicile may not invoke his incapacity if he was capable under the law of the country in which the other party was domiciled when the act was formed in that country, unless the other party was or should have been aware of the incapacity."

258 Section 3 concerns "specific types of contracts governed by Oregon law", Section 9 contains a general rule while Section 10 provides "presumptive rules for specific types of contracts".

259 Civil Code of Quebec (1991). English translation available at <http://ccq.lexum.org/ccq/section.do?lang=en&article=3086>. German translation available in Kropholler *et al* (1999: 331).

260 Book Ten is titled "Private International Law" and Title 2 "Conflict of Laws". Chapter 1 concerns personal status. Division I relates to the general provisions, while Division II (where specific reference is made to "incapacity") concerns special provisions. See, in general, Glenn (1996: 231-268).



Article 3086 contains a principle that resembles the *Lizardi* rule<sup>261</sup> as an incapable contractant (in terms of his or her *lex domicilii*) may not rely on his or her incapacity in terms of the *lex domicilii* if the contract was concluded between the parties in the country of domicile of the counterpart and if he or she would have had capacity in terms of the *lex domicilii* of the latter party. If the counterpart was or should have been aware of the incapacity in terms of the *lex domicilii*, the incapable contractant may indeed rely on his or her incapacity in terms of his or her *lex domicilii*.

Contractual capacity in Quebecian private international law is therefore governed by the *lex domicilii* and, in particular circumstances, by the *lex loci contractus* if the latter coincides with the *lex domicilii* of the other contractant.

#### 4.6 SOUTH AMERICA

##### 4.6.1 Argentina

In Argentina the private international law rules regarding contractual capacity are found in Articles 6-10 of the Civil Code of Argentina,<sup>262</sup> which read as follows:<sup>263</sup>

“The capacity or incapacity of persons domiciled in the territory of the Republic, whether nationals or aliens, shall be judged according to the laws of this Code, even when acts executed or property situated in a foreign country are involved.

The capacity or incapacity of persons domiciled outside the territory of the Republic, whether nationals or aliens, shall be judged according to the laws of their respective domiciles, even when acts executed or property situated in the Republic are involved.

Acts done, contracts made and rights acquired outside the place of a person’s domicile, are governed by the laws of the place where they have taken place; but they shall not be carried out in the Republic, with respect to property situated in its territory, if they do not conform to the laws of the country, which govern the capacity, status and condition of persons.

Incapacities which contravene natural law, such as slavery, or which are penal in character, are merely territorial.

Real property situated in the Republic is governed exclusively by the laws of the country, with respect to its qualification as such, to the rights of the parties, to capacity to acquire it, to the modes of transferring it, and to the formalities which must accompany these acts. Title to real property, therefore, may be acquired, transferred or lost only in conformity with the laws of the Republic.”

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

262 Civil Code of Argentina (1869–1987–1997), in Kropholler *et al* (1999: 77-78).

263 as found in Goldschmidt and Rodriguez-Novás (1966: 9, 28, 47 and 48).

From Articles 6 and 7 it is clear that the *lex domicilii* in principle governs contractual capacity (which is, of course, the *lex fori* in respect of *domicilium* of Argentina). In terms of Article 8, contracts concluded outside the country of domicile are in principle governed by the *lex loci contractus* (with a certain exception). Article 9 provides a public policy exception in that, for instance, incapacities against natural law will not be applied in Argentina. Article 10 determines that contractual capacity in respect of immovable property located in Argentina will be governed by the *lex situs*.

In Argentinean private international law, depending on whether or not the contract is concluded in the country of domicile, the *lex domicilii* or the *lex loci contractus* apply to contractual capacity; in respect of immovable property in Argentina, the *lex situs* applies.

#### 4.6.2 Brazil

There is only one provision regarding contractual capacity in the Brazilian civil code.<sup>264</sup> Article 7 simply states that the contractual capacity of an individual is governed by the law of the country of his or her domicile – the *lex domicilii*.<sup>265</sup>

#### 4.6.3 Mexico

Article 13(II) of the Mexican Civil Code of 1928 simply states that the contractual capacity of a natural person shall be determined by the law of the country of his or her domicile – the *lex domicilii*.<sup>266</sup>

#### 4.6.4 Puerto Rico

The *Projet* for the Codification of Puerto Rican Private International Law<sup>267</sup> was completed in 1991 and introduced to the Puerto Rican legislature in 1992. It has, to date, not been passed into legislation.<sup>268</sup> Irrespective of its ultimate legislative fate, its provisions regarding contractual capacity deserve particular attention. These are contained in Chapter 2 of the *Projet*, specifically Article 39.<sup>269</sup> This article states the following:

“A person is considered capable of contracting if he is capable under either the law of his domicile or the law applicable to this issue under Article 36. When a person lacks capacity under both laws, the consequences of incapacity are governed by the law applicable under Article 36.

264 Introductory Act to the Civil Code of Brazil (1942), in Kropholler *et al* (1999: 108).

265 See Dolinger (2012: 52 and 77).

266 Civil Code of Mexico (1928–1988), in Kropholler *et al* (1999: 527).

267 *Projet* for the Codification of Puerto Rican Private International Law (1991). See, in general, Symeonides (2002: 419–437); Symeonides (1990: 413–447) and Symeonides (2008a: 130).

268 See Symeonides (2002: 419–437) and Symeonides (2014: 12 note 118).

269 Chapter 2 relates to “specific issues” and Article 39 is titled “capacity”.

A party who lacks contractual capacity under the law of his domicile may assert his incapacity against a party who knew or should have known of such incapacity. In this case, the consequences of incapacity are governed by the law of the domicile of the incapable party.”

Article 36 referred to in the first paragraph of Article 39 describes the “general rule” for determining the law applicable to contracts or the proper law of the contract. In terms of this article, the law to be applied would be that of the state that “with regard to the issue in question, has the most significant connection to the parties and the dispute”.<sup>270</sup>

In terms of Article 39, therefore, contractual capacity is governed by both the *lex domicilii* and the proper law of the contract. Where a contractant lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the consequences of the incapacity shall be determined by the proper law. The second paragraph of the article provides that, where a contractant lacks capacity in terms of his or her *lex domicilii*, he or she may invoke this incapacity if the counterpart was or should have been aware of it. The *lex domicilii* will then apply. The effects of incapacity shall also be governed by the incapable contractant’s *lex domicilii*.

The *Projet* therefore applies the *lex domicilii* and the proper law of the contract to contractual capacity. In specific cases, only the *lex domicilii* applies. Specific rules relating to the consequences of incapacity also exist: either the *proper law* or the *lex domicilii* will be applied.

#### 4.6.5 Uruguay

In Uruguayan private international law, Article 2393 of the Civil Code of 1868 is relevant in respect of capacity.<sup>271</sup> It states that the contractual capacity of natural persons<sup>272</sup> shall be governed by the law of the country of their domicile. Idiarte *et al* add that, once capacity has been acquired, it cannot be altered by a subsequent change in domicile.<sup>273</sup> The Uruguayan civil code does not distinguish between the existence and the consequences of capacity. Therefore, both aspects are governed by Article 2393, that is: the *lex domicilii* applies.<sup>274</sup>

<sup>270</sup> See Symeonides (2002: 424-426) for a discussion of Article 36.

<sup>271</sup> Civil Code of Uruguay (1868–1941–1994), German translation in Kropholler *et al* (1999: 909). See, in general on conflicts conventions that are applicable in Uruguay, Idiarte, Pedrouzo and Pereiro (2007: pars 186-197, 198 and 206-223).

<sup>272</sup> Idiarte, Pedrouzo and Pereiro (2007: par 185) define the “capacity to exercise rights” as “the right of the individual to act on his own behalf in order to achieve valid juridical results”.

<sup>273</sup> Idiarte, Pedrouzo and Pereiro (2007: par 187).

<sup>274</sup> Idiarte, Pedrouzo and Pereiro (2007: par 202).

A special conflicts rule relating to capacity exists in two conventions to which Uruguay is a party, drafted under the auspices of the Inter-American Conference on Private International Law: the Inter-American Convention in Matters of Bills of Exchange, Payments and Invoices (CIDIP I) and the Inter-American Convention on Conflicts of Law regarding Cheques (CIDIP II). In both conventions, Article 1 states that the capacity to incur obligations in respect of bills of exchange or cheques is governed by the “law of the place in which the obligation is contracted”. In other words, the *lex loci contractus* shall apply.

Contractual capacity in Uruguayan private international law is therefore governed by the *lex domicilii* and, in certain cases governed by regional conventions, by the *lex loci contractus*.

#### 4.6.6 Venezuela

Articles 16-19 of the Venezuelan Act on Private International Law<sup>275</sup> contain specific provisions relating to contractual capacity:

“The existence, status and capacity of persons are governed by the law of their domicile.

The change of domicile does not restrict any acquired capacity.

A person subject to incapacity under the provisions of the preceding articles acts validly if he/she is deemed capable by the law governing the substance of the act.

Limitations on capacity, established by the law of the domicile, which are based upon differences of race, nationality, religion or class shall not be effective in Venezuela.”

According to Articles 16 and 17, contractual capacity is governed by the *lex domicilii* and capacity, once acquired, is not influenced by changes in domicile. In terms of Article 18, a contractant who lacks capacity according to his *lex domicilii*, but has such capacity according to the proper law of the contract, shall be regarded as having contractual capacity. Article 19 contains a provision relating to public policy as it states that limitations on contractual incapacity in terms of the *lex domicilii* shall be ineffective in Venezuela if they are based on discrimination on the basis of race, nationality, religion or class.<sup>276</sup>

Contractual capacity in Venezuelan private international law is therefore governed by both the *lex domicilii* and the proper law of the contract on an equal level.

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275 Venezuelan Act on Private International Law (1998). *Yearbook of Private International Law* (1999: 343-344). See, in general, Parra-Aranguren (1999: 103-117). The text may also be found at [http://www.analitica.com/bitbliblioteca/congreso\\_venezuela/private.asp](http://www.analitica.com/bitbliblioteca/congreso_venezuela/private.asp). Also see, in general, Fernandez Arroyo (2005: 109-115).

276 Staudinger/Hausmann (2013: 21). Also see Parra-Aranguren (1999: 112).

## 4.7 AFRICA

## 4.7.1 Algeria

Article 10 in Chapter II<sup>277</sup> of the Civil Code of Algeria<sup>278</sup> contains the private international law provisions regarding contractual capacity. The article states that the contractual capacity of Algerians is governed by Algerian law even when they are in another country. In other words, in the case of Algerian citizens, capacity shall be determined by the *lex patriae*. There is no provision in the Civil Code in respect of non-Algerians. Article 10 also provides an exception to this rule – when a contract is concluded in Algeria, where it shall have its effects, and one of the contractants lacks capacity in terms of the *lex patriae*, the grounds of which are concealed and not readily ascertainable, the incapacity shall have no influence on the consequences of the contract. The exception resembles the *Lizardi* rule,<sup>279</sup> although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is probably that the *lex loci contractus* / *lex fori* should be applied. Therefore, in Algerian private international law the *lex patriae* (at least in respect of Algerians) and, in specific cases, the *lex loci contractus* / *lex fori* govern contractual capacity.

## 4.7.2 Angola

In Angola<sup>280</sup> the private international law rules regarding contractual capacity are those that apply in Portugal since the Portuguese Civil Code was introduced there in 1977.<sup>281</sup> This means that Angolan private international law provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus* / *lex fori*.<sup>282</sup>

## 4.7.3 Burkina Faso

The private international law rules relating to contractual capacity in Burkina Faso are contained in Chapter II, Articles 1017 and 1018 of the Civil Code.<sup>283</sup> Article 1017 states that the general contractual capacity of a natural person is governed by the *lex patriae*. This law also applies where capacity is extended by the conclusion of marriage. Further, the elimination and limita-

277 Chapter II is titled “Des conflits de lois dans l’espace”.

278 Civil Code of Algeria (1975), in Kropholler *et al* (1999: 26).

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

280 Civil Code of Angola (1966), in Kropholler *et al* (1999: 36).

281 Civil Code of Portugal (1966). Translation in Riering (1997: 108). Also see Kropholler *et al* (1999: 37 note 2).

282 See the discussion of Portuguese private international law in par 4.2.14.

283 Code on the Law of Persons and the Family (1989), in Kropholler *et al* (1999: 141-142). Chapter II of the code is titled “Des conflits de lois dans l’espace”.

tion of the general contractual capacity is governed by the *lex patriae* of the natural person whose capacity is in question. The applicable *lex patriae* in respect of contractual capacity also governs the legal consequences of the intended contract.

Article 1018 contains an exception as it provides that, when a contract between natural persons is concluded while both parties are present in the same state, the incapable party may not invoke his or her incapacity in terms of the law of another state or on the grounds of an official measure<sup>284</sup> in another state, unless the counterpart was aware or should have been aware of the incapacity. In other words, the *lex loci contractus* shall apply in this case. This rule, however, applies neither to contracts relating to family law nor to immovable property situated outside Burkina Faso.

Therefore, in the private international law of Burkina Faso, the *lex patriae* and, in particular circumstances, the *lex loci contractus* are applied to contractual capacity.

#### 4.7.4 Egypt

The only provision relating to contractual capacity in the Egyptian civil code is contained in Article 11.<sup>285</sup> In terms of this article, contractual capacity is governed by the *lex patriae*. An exception to this rule exists when a contract is concluded in Egypt and where it will also have its effect: if one of the parties is a foreigner lacking contractual capacity in terms of the *lex patriae*, but this incapacity is concealed and not readily ascertainable, such incapacity is not taken into account. The exception resembles the *Lizardi* rule,<sup>286</sup> although it does not expressly provide for a legal system to be substituted for the *lex patriae*. It only prescribes that, in specific circumstances, the incapacity in terms of the *lex patriae* must not be taken into account. However, the assumption is, probably, that the *lex loci contractus* / *lex fori* will be applied. Therefore, in Egyptian private international law, the *lex patriae* is applied to contractual capacity and in particular circumstances, the *lex loci contractus* / *lex fori*.

#### 4.7.5 Mozambique

As is the case in Angola, the private international law rules regarding contractual capacity in Mozambique<sup>287</sup> are those that apply in Portugal, since the Civil Code of Portugal was introduced there in 1975.<sup>288</sup> As such, Mozam-

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284 for instance, a court order.

285 Civil Code of Egypt (1948), in Kropholler *et al* (1999: 14).

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

287 Civil Code of Mozambique (1966), in Kropholler *et al* (1999: 566).

288 Civil Code of Portugal (1966). Translation in Riering (1997: 108). See Kropholler *et al* (1999: 567 note 2).

bican private international law provides for the application of the *lex patriae* and, in particular circumstances, the *lex loci contractus* / *lex fori*.<sup>289</sup>

#### 4.7.6 Tunisia

Article 40 in Chapter II of the Tunisian Civil Code contains the provisions relevant to contractual capacity.<sup>290</sup> Generally, the contractual capacity of natural persons is governed by the *lex patriae*. The article further provides that a contractant who concludes a contract in a country where he or she possesses capacity, is precluded from asserting his or her incapacity in terms of the *lex patriae* or the law of the country where he or she is established or conducting business, unless his or her counterpart was aware of this incapacity at the time of contracting or ought to have knowledge thereof. By implication, in these instances, the *lex loci contractus* shall apply. The *lex patriae* and, in particular circumstances, the *lex loci contractus* are therefore applicable to contractual capacity in Tunisian private international law.

#### 4.8 SUMMARY

In summary, 30 of the 53 jurisdictions discussed (in other words, almost 57%) apply the *lex patriae* to contractual capacity as a legal system of departure.<sup>291</sup>

<sup>289</sup> See the discussion of Portuguese private international law in par 4.2.14.

<sup>290</sup> Private International Law Code (1998), in Kropholler *et al* (1999: 854). Chapter II is titled: "Droit des personnes".

<sup>291</sup> Algeria (Civil Code of Algeria (1975: Chapter II, Article 10)); Angola (Civil Code of Angola (1966: Articles 25 and 31(1))); Austria (Austrian Private International Law Act (1978: Chapter 2, § 9)); Belarus (Civil Code of the Republic of Belarus (1999: Article 1104(1))); Bulgaria (Bulgarian Private International Law Code (2005: Article 50(1))); Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Egypt (Civil Code of Egypt (1948: Article 11)); France (French Civil Code (1804–2004: Article 3)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); Hungary (Hungarian Private International Law Code (1979: Chapter II, § 10[1] and § 11[1])); Iran (Civil Code of Iran (1935: Articles 6 and 962)); Italy (Italian Statute on Private International Law (1995: Chapter II, Article 23(1))); Japan (Act on the General Rules of Application of Laws (2006: Article 4(1))); Mongolia (Civil Code of Mongolia (2002: Chapter 62, Article 543(2))); Mozambique (Civil Code of Mozambique (1966: Articles 25 and 31(1))); Portugal (Civil Code of Portugal (1966: Article 25 and 31(1))); Qatar (Civil Code of Qatar (2004: Article 11)); the Philippines (Civil Code of the Philippines (1949: Article 15)); Romania (Romanian Private International Law Code (1992: Chapter II, Article 11)); Russia (Civil Code of the Russian Federation (2001: Chapter 67, Article 1195(1))); Slovakia (Private International Law and International Procedural Law Act (1963: § 3(1))); South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1))); Spain (Spanish Civil Code (1889–1981: Article 9.1)); Syria (Civil Code of Syria (1949: Article 12(1))); Taiwan (Private International Law Act (2010: Chapter 2, § 10)); Thailand (Act on Conflict of Laws (1938: Section 10)); Tunisia (Private International Law Code (1998: Article 40)); the Ukraine (Ukrainian Private International Law Code (2005: Article 17(1))); the United Arab Emirates (Civil Code of the United Arab Emirates (1985: Article 11)); and Vietnam (Civil Code of the Socialist Republic of Vietnam (1996: Article 831(1))).



Jurisdictions such as Argentina,<sup>292</sup> Brazil,<sup>293</sup> Israel,<sup>294</sup> Lithuania,<sup>295</sup> Mexico,<sup>296</sup> Quebec,<sup>297</sup> Switzerland<sup>298</sup> and Uruguay<sup>299</sup> in general utilise the *lex domicilii* to govern contractual capacity. Some jurisdictions, as Estonia<sup>300</sup> and Macau,<sup>301</sup> employ the law of the country of habitual residence in this regard. The *lex loci contractus* is applied as point of departure in Azerbaijan<sup>302</sup> and Uzbekistan,<sup>303</sup> while in Belgium<sup>304</sup> the proper law of the contract plays this role. In Louisiana's Civil Code,<sup>305</sup> and according to the Puerto Rican *Projet*,<sup>306</sup> the *lex domicilii* and the proper law of the contract apply to contractual capacity in the alternative. In Oregon<sup>307</sup> contractual capacity is governed by the law of the country of residence and the proper law of the contract on an equal level. Dutch private international law follows a differentiated approach in that dissimilar legal systems are in principle applied to the contractual capacity of minors, spouses and registered partners, namely the *lex patriae*, the law of habitual residence and the *lex fori* respectively.<sup>308</sup> In Greek, Slovenian and Turkish private international law, contractual capacity is governed by the *lex patriae* and another legal system on an equal level. In Greece,<sup>309</sup> the *lex patriae* applies together with the *lex fori* but in Slovenia<sup>310</sup> and Turkey<sup>311</sup> it governs together with the *lex loci contractus*. Similar provisions exist in Czech, Venezuelan and Chinese private international law. In Venezuela<sup>312</sup> the *lex domicilii* and the proper law of the contract apply on an equal level; in China<sup>313</sup> and the Czech Republic,<sup>314</sup> the law of habitual residence and the *lex loci contractus*.

292 Civil Code of Argentina (1869–1987–1997: Article 6).

293 Introductory Act to the Civil Code of Brazil (1942: Article 7).

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

295 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).

296 Civil Code of Mexico (1928–1988: Article 13(II)).

297 Civil Code of Quebec (1991: Book Ten, Chapter 1, Article 3083).

298 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).

299 Civil Code of Uruguay (1868–1941–1994: Article 2393).

300 Estonian Private International Law Act (2002: § 12(1)).

301 Civil Code of Macau (1999: Chapter III, Articles 24 and 30).

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

303 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).

304 Belgian Private International Law Code (2004: Chapter II, Article 34 § 2).

305 Civil Code of Louisiana (1991: Article 3539).

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

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

308 Book 10 of the Dutch Civil Code (2012: Articles 11(1), 40 and 68).

309 Greek Civil Code (1940: Articles 7 and 9).

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

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

312 Venezuelan Act on Private International Law (1998: Articles 16 and 18).

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

314 Act on Private International Law (2012: Part Four, Title I, § 29).

Many jurisdictions, which in principle apply the *lex patriae*, the *lex domicilii* and/or the law of (habitual) residence to contractual capacity, utilise the *lex loci contractus* in addition, but only if one or more of the following conditions are present:

- 1 the contract in question was concluded in the forum state;
- 2 the parties to the contract were present in the same country at its conclusion;
- 3 the forum state is the country where performance is to be effected; and
- 4 the absence of fault on the part of the capable contractant.<sup>315</sup>

Condition 4 requires further explanation. Fault plays differentiated roles in the context of the additional application of the *lex loci contractus*. First, the presence of fault may function as an exception to the applicability of the *lex loci contractus*. The line of argumentation in these cases entails three steps. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)): namely the *lex patriae* and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3 referred to above and as prescribed by the *lex fori*'s private international law, are present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant. Fault exists where the latter contractant was aware of the counterpart's incapacity (in terms of the latter's personal law)<sup>316</sup> at the conclusion of the contract, or was not aware thereof as a result of negligence. The existence of fault therefore leads to the non-application of the *lex loci contractus*. This method of argumentation will be referred to as the three-step model. It may be illustrated with reference to the conflicts rules on capacity in jurisdictions such as Burkina Faso, Germany and South Korea as an example. In these jurisdictions, the personal law, the *lex patriae*, in principle applies to capacity (step 1).<sup>317</sup> If a contractant lacks capacity in terms of this legal system, the *lex loci contractus* may be applied. The *lex loci contractus* will apply in Burkina Faso,<sup>318</sup> Germany<sup>319</sup> and South Korea<sup>320</sup> when the parties were present in the same country at the moment of conclusion of the contract (condition 2 listed above) (step 2). If the capable contractant was aware of the incapacity of his or her counterpart in terms of this individual's *lex patriae*, or was not aware thereof as a result of negligence, the *lex loci contractus* does not apply; the issue is again governed solely by the *lex patriae* (step 3).

315 On the possible requirement that the capable contractant must be a French national to invoke the *lex loci contractus*, see the discussion in paragraph 4.2.7.

316 the *lex patriae*, the *lex domicilii* or the law of habitual residence.

317 Burkina Faso (Code on the Law of Persons and the Family (1989: Chapter II, Article 1017)); Germany (Introductory Act to the Civil Code (1994: § 7(1))); and South Korea (Conflict of Laws Act of the Republic of Korea (2001: Article 13(1)).

318 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).

319 Introductory Act to the Civil Code (1994: § 12).

320 Conflict of Laws Act of the Republic of Korea (2001: Article 15(1)).

Secondly, the *absence* of fault may play the role of a requirement which must be fulfilled for the *lex loci contractus* to be applied. The line of argumentation here entails only two steps. Step 1: the application of the law or legal systems that are applicable in principle (the default legal system(s)): namely, the *lex patriae*, and/or the *lex domicilii* and/or the law of (habitual) residence. Step 2: the additional application of the *lex loci contractus* where one or more of conditions 1 – 3,<sup>321</sup> referred to above and prescribed by the *lex fori*'s private international law are fulfilled *and* fault is absent on the part of the capable contractant. Fault is absent where the contract assertor, at the time of the conclusion of the contract, was not aware of the incapacity of the other party and the non-existence of the knowledge of the incapacity was not due to negligence. Fault is therefore absent when two requirements are met: (i) the contract assertor must *bona fide* have believed that the incapacitated contractant indeed had full capacity to contract; and (ii) a reasonable person in the position of the contract assertor would not have known of the incapacity, for instance, where a contractant's incapacity is not reasonably ascertainable (where the incapacity is concealed). The absence of fault therefore leads to the application of the *lex loci contractus*. This method of argumentation will be referred to as the two-step model. It may be illustrated with reference to the conflicts rules on capacity in jurisdictions such as Egypt and Qatar as an example. In these jurisdictions, the personal law, the *lex patriae*, in principle applies to capacity.<sup>322</sup> If a contractant lacks capacity in terms of this legal system, the *lex loci contractus* may possibly be applied. In both these jurisdictions the *lex loci contractus* will apply where the contract was concluded in the forum state (condition 1), which is also the country where performance in terms of the contract is to be effected (condition 3) and fault, on the part of the capable contractant, is absent (condition 4) (step 2).<sup>323</sup>

In some jurisdictions, the presence of only one of the conditions listed above is sufficient for the application of the *lex loci contractus* in addition to the default legal system(s). For example, jurisdictions such as Belarus,<sup>324</sup> Iran,<sup>325</sup> Mongolia,<sup>326</sup> Slovakia,<sup>327</sup> Spain,<sup>328</sup> Taiwan<sup>329</sup> and Thailand<sup>330</sup> utilise the *lex loci contractus* in addition to the personal law if the contract was concluded

321 But see the discussion on Romanian private international law, paragraph 4.2.15.

322 Qatar (Civil Code of Qatar (2004: Article 11)); and Egypt (Civil Code of Egypt (1948: Article 11)).

323 Qatar (Civil Code of Qatar (2004: Article 11)); and Egypt (Civil Code of Egypt (1948: Article 11)).

324 Civil Code of the Republic of Belarus (1999: Article 1104 (3)).

325 Civil Code of Iran (1935: Article 962).

326 Civil Code of Mongolia (2002: Chapter 62, Article 543(5)).

327 Private International Law and Procedural Law Act (1963: § 3(2)).

328 Spanish Civil Code (1889–1981: Article 10.8).

329 Private International Law Act (2010: Chapter 2, § 10).

330 Act on Conflict of Laws (1938: Section 10).

in the forum state – condition 1. Similarly, in Japanese<sup>331</sup> private international law, the *lex loci contractus* applies in addition to the personal law where the parties to the contract were in the same country at its conclusion – condition 2.

In certain jurisdictions, the absence of fault on the part of the capable contractant (condition 4) is sufficient for the application of the *lex loci contractus*. In Romania,<sup>332</sup> the absence of fault is the sole requirement for the *lex loci contractus* to be applied (within the context of the two-step model). In Estonian,<sup>333</sup> Lithuanian,<sup>334</sup> Russian<sup>335</sup> and Tunisian<sup>336</sup> private international law, the presence of fault would indicate the non-application of the *lex loci contractus*. The formulation of the rule in these jurisdictions veers towards the three-step model. A more appropriate formulation for these legal systems to adopt would be to determine that the *lex loci contractus* applies unless fault is present on the part of the capable contractant. The provisions regarding fault in Oregon's<sup>337</sup> private international law and the Puerto Rican *Projet*<sup>338</sup> in effect also amount to the use of the three-step model, although not in the context of the additional application of the *lex loci contractus*. The presence of fault would here lead to the non-application of the proper law of the contract.

A number of jurisdictions apply the *lex loci contractus* in addition to the default legal system(s) only where two of the conditions listed above are present. Jurisdictions such as Angola,<sup>339</sup> Israel,<sup>340</sup> Macau,<sup>341</sup> Mozambique<sup>342</sup> and Portugal<sup>343</sup> apply the *lex loci contractus* only where conditions 1 and 4 (in the context of the three-step model in respect of the absence of fault) are present. The effect thereof is the application of a conflicts rule that resembles the one pronounced in *Lizardi*<sup>344</sup> for purposes of French private international law. The *lex loci contractus* / *lex fori* is therefore applied where a contractant, incapable in terms of his or her personal law, concluded a contract in the forum state, where he or she would have had contractual capacity. However, the *lex loci contractus* shall not be applied where the counterpart was or should have been aware of the incapacity at the moment of contracting, in other words, where fault is present on the part of the capable contractant.

331 Act on the General Rules of Application of Laws (2006: Article 4(2)).

332 Romanian Private International Law Code, Chapter II, Article 17.

333 Estonian Private International Law Act (2002: § 12(3)).

334 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.17(1)).

335 Civil Code of the Russian Federation (2001: Chapter 67, Article 1197(2)).

336 Private International Law Code (1998: Article 40).

337 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).

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

339 Civil Code of Angola (1966: Article 28(2)).

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

341 Civil Code of Macau (1999: Chapter III, Article 27(2)).

342 Civil Code of Mozambique (1966: Article 28(2)).

343 Civil Code of Portugal (1966: Article 28(2)).

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

One should, however, take note that the *Lizardi* case also referred to the French nationality of the capable contractant in this regard. The position in France today may well be that, if the Rome Convention<sup>345</sup> or the Rome I Regulation<sup>346</sup> are not applicable, the capable party may only invoke the protection of the *Lizardi* rule if he or she is a French national.<sup>347</sup>

The provisions in the codes of Angola,<sup>348</sup> Macau,<sup>349</sup> Mozambique<sup>350</sup> and Portugal<sup>351</sup> are also of interest here, as these jurisdictions, apart from employing the *Lizardi* rule in respect of contracts concluded in the forum state, in addition apply the *lex loci contractus* where contracts are concluded outside the forum state but the *lex loci contractus* has rules that correspond with those of the *lex fori*.

Two conditions are also required in jurisdictions such as Bulgaria,<sup>352</sup> Burkina Faso,<sup>353</sup> Germany,<sup>354</sup> Italy,<sup>355</sup> the Netherlands,<sup>356</sup> Quebec,<sup>357</sup> South Korea<sup>358</sup> and Switzerland,<sup>359</sup> but here reference is made to conditions 2 (that the parties be in the same country at the conclusion of the contract) and 4 (in the context of the three-step model in respect of the absence of fault). The *lex loci contractus* is applied where a contractant, incapable in terms of his or her personal law, concluded a contract with his counterpart while present in the same country, where the incapable party would have possessed contractual capacity. However, the *lex loci contractus* shall not be applied where the counterpart was or should have been aware of the incapacity at the moment of contracting, in other words, where fault is present on the part of the capable contractant. Two conditions are also required in Vietnamese private international law, namely, conditions 1 and 3 (that the forum state is also the country where the relevant performance is to be effected).<sup>360</sup>

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345 note 5.

346 *ibid.*

347 See paragraph 4.2.7.

348 Civil Code of Angola (1966: Article 28(3)).

349 Civil Code of Macau (1999: Chapter III, Article 27(3)).

350 Civil Code of Mozambique (1966: Article 28(3)).

351 Civil Code of Portugal (1966: Article 28(3)). The law in Angola, Macau and Mozambique is modelled on Portuguese law for historical reasons.

352 Bulgarian Private International Law Code (2005: Article 50(2)).

353 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).

354 Introductory Act to the Civil Code (1994: § 12).

355 Italian Statute on Private International Law (1995: Chapter II, Article 23(2)).

356 Book 10 of the Dutch Civil Code (2012: Article 11(2)).

357 Civil Code of Quebec (1991: Book Ten, Chapter 1, Article 3086).

358 Conflict of Laws Act of the Republic of Korea (2001: Article 15(1)).

359 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 36(1)).

360 Civil Code of the Socialist Republic of Vietnam (1996: Article 831(2)). It is not clear which performance is referred to, payment or the characteristic performance.

Some jurisdictions, such as Algeria,<sup>361</sup> Egypt,<sup>362</sup> Qatar,<sup>363</sup> Syria<sup>364</sup> and the United Arab Emirates,<sup>365</sup> apply the *lex loci contractus* in addition to the primary applicable legal system(s) only when three conditions are present, namely, conditions 1, 3<sup>366</sup> and 4 (in the context of the two-step model in respect of the absence of fault).

Jurisdictions such as Argentina,<sup>367</sup> Israel<sup>368</sup> and Lithuania<sup>369</sup> apply the *lex loci contractus* in addition to the default legal system(s) in situations not covered by the conditions listed above. In Argentinean private international law, the *lex loci contractus* is applied to capacity only where contracts are concluded outside the forum state, while in Israel it applies when the relevant legal act is of a kind commonly performed by a person with no or limited contractual capacity. In Lithuania, on the other hand, the *lex loci contractus* is utilised when foreign citizens have no domicile.

Hungarian private international law is unique in that the *lex loci contractus* only governs capacity when the contract is concluded in the forum state and relates to essentials. However, when performance in terms of the contract is to be effected in Hungary and the agreement relates to non-essentials, the *lex fori* / *lex loci solutionis* is to be applied.<sup>370</sup>

In certain jurisdictions, the additional application of the *lex loci contractus* (together with the default legal system(s)) is not applicable to particular types of contracts. In all these jurisdictions the *lex loci contractus* does not apply in addition to the personal law when the contract in question concerns family law or the law of succession. In Chinese, Slovenian and Thai private international law, the limitation regarding family or succession law is the only limitation in this regard.<sup>371</sup> Some jurisdictions apply further limitations.

361 Civil Code of Algeria (1975: Chapter II, Article 10).

362 Civil Code of Egypt (1948: Article 11).

363 Civil Code Qatar (2004: Article 11).

364 Civil Code of Syria (1949: Article 12(1)).

365 Civil Code of the United Arab Emirates (1985: Article 11).

366 Here as well, it is not clear which performance is referred to, payment or the characteristic performance.

367 Civil Code of Argentina (1869–1987–1997: Article 7).

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

369 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(1)).

370 Hungarian Private International Law Code (1979: Chapter II, § 15[2] and [3]).

371 China (Chinese Private International Law Act (2010: Chapter Two, Article 12)); Slovenia (Private International Law and Procedural Act (1999: Article 13(4))); and Thailand (Act on Conflict of Laws (1938: Section 10)).



In Angola,<sup>372</sup> Burkina Faso,<sup>373</sup> Estonia,<sup>374</sup> Germany,<sup>375</sup> Italy,<sup>376</sup> Macau,<sup>377</sup> Mozambique,<sup>378</sup> Portugal,<sup>379</sup> South Korea<sup>380</sup> and Taiwan,<sup>381</sup> the *lex loci contractus* shall also not apply if the contract in question concerns immovable property situated abroad. Bulgarian,<sup>382</sup> Israeli<sup>383</sup> and Swiss<sup>384</sup> private international law determines that the *lex loci contractus* shall not apply if the relevant contract relates to real rights in respect of immovable property in general. In Turkish<sup>385</sup> private international law, on the other hand, the added limitation concerns contracts involving real rights in respect of immovable property situated abroad.<sup>386</sup> In Lithuanian<sup>387</sup> private international law, the additional limitation relates to contracts involving real rights in general, while in Romania<sup>388</sup> it deals with the transfer of immovable property. The added limitation in Japanese<sup>389</sup> private international law concerns contracts relating to immovable property situated in a country where the law regarding immovables differs from the *lex loci contractus*. Israeli private international law is unique in this regard in that<sup>390</sup> the *lex loci contractus* will not apply as an additional legal system where the relevant contract caused substantial harm or prejudice to the person with no or limited contractual capacity.<sup>391</sup>

Some jurisdictions have specific rules regarding the capacity of an individual to perform entrepreneurial activities. In all of these jurisdictions (Belarus,<sup>392</sup> Bulgaria,<sup>393</sup> Russia,<sup>394</sup> the Ukraine<sup>395</sup> and Uzbekistan),<sup>396</sup> the law of the country of registration as an entrepreneur governs capacity as the primary legal system. Different legal systems are applicable in the absence of such

372 Civil Code of Angola (1966: Article 28(2)).

373 Code on the Law of Persons and the Family (1989: Chapter II, Article 1018).

374 Estonian Private International Law Act (2002: § 12(4)).

375 Introductory Act to the Civil Code (1994: § 12).

376 Italian Statute on Private International Law (1995: Chapter II, Article 23(4)).

377 Civil Code of Macau (1999: Chapter III, Article 27(2)).

378 Civil Code of Mozambique (1966: Article 28(2)).

379 Civil Code of Portugal (1966: Article 28(2)).

380 Conflict of Laws Act of the Republic of Korea (2001: Article 15(2)).

381 Private International Law Act (2010: Chapter 2, § 10).

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

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

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

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

386 A similar provision exists in Greek private international law but there the limitation relates to the additional application of the *lex fori* and not the *lex loci contractus*.

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

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

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

390 Perhaps apart from the limitation submitted by Einhorn (2012: par 129).

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

392 Civil Code of the Republic of Belarus (1999: Article 1104(4)).

393 Bulgarian Private International Law Code (2005: Article 52).

394 Civil Code of the Russian Federation (2001: Article 1201).

395 Ukrainian Private International Law Code (2005: Article 19).

396 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).



a country of registration. In jurisdictions such as Belarus,<sup>397</sup> Russia,<sup>398</sup> the Ukraine<sup>399</sup> and Uzbekistan,<sup>400</sup> the law of the country shall apply where the principle or major entrepreneurial activities are effected, while in Bulgaria<sup>401</sup> the law of the country governs where the core establishment is situated.

A number of jurisdictions such as Angola,<sup>402</sup> Austria,<sup>403</sup> Belgium,<sup>404</sup> Bulgaria,<sup>405</sup> Estonia,<sup>406</sup> Germany,<sup>407</sup> Hungary,<sup>408</sup> Lithuania,<sup>409</sup> Mozambique,<sup>410</sup> Portugal,<sup>411</sup> Romania,<sup>412</sup> South Korea,<sup>413</sup> Spain,<sup>414</sup> Switzerland,<sup>415</sup> Turkey,<sup>416</sup> Uruguay<sup>417</sup> and Venezuela<sup>418</sup> have a specific conflicts rule that, once an individual has obtained contractual capacity, subsequent changes in his or her personal law shall not affect this capacity.

Specific rules relating to the consequences of contractual incapacity exist in some jurisdictions. Although some uncertainty exists on the issue in Austrian law, the consequences of incapacity would probably be governed by either the *lex patriae* or the proper law of the contract.<sup>419</sup> There is a strong indication in French law that the *lex patriae* would govern in this regard.<sup>420</sup> Authority exists in German private international law for the application of the *lex patriae*<sup>421</sup> or the proper law of the contract<sup>422</sup> to the consequences of

397 Civil Code of the Republic of Belarus (1999: Article 1104(4)).

398 Civil Code of the Russian Federation (2001: Article 1201).

399 Ukrainian Private International Law Code (2005: Article 19).

400 Civil Code of the Republic of Uzbekistan (1997: Chapter 71, Article 1169).

401 Bulgarian Private International Law Code (2005: Article 52).

402 Civil Code of Angola (1966: Article 29).

403 as submitted by Schwimann (2001: 53-54).

404 Belgian Private International Law Code (2004: Chapter II, Article 34 § 1).

405 Bulgarian Private International Law Code (2005: Article 51).

406 Estonian Private International Law Act (2002: § 12(2)).

407 Introductory Act to the Civil Code (1994: § 7(2)). Also see Kegel and Schurig (2000: 493); Kropholler (2006: 318); Reithmann/Martiny/Hausmann (2010: 1877); and Staudinger/Hausmann (2013: 49 and 52-53).

408 Hungarian Private International Law Code (1979: Chapter II, § 11[1]).

409 Civil Code of the Republic of Lithuania (2000: Chapter 2, Article 1.16(5)).

410 Civil Code of Mozambique (1966: Article 29).

411 Civil Code of Portugal (1966: Article 29).

412 Romanian Private International Law Code (1992: Chapter II, Article 15).

413 Conflict of Laws Act of the Republic of Korea (2001: Article 13(2)).

414 Spanish Civil Code (1889-1981: Article 9(1)).

415 Swiss Federal Statute on Private International Law (1987: Chapter 2, Article 35).

416 Private International Law Code of Turkey (2007: Chapter 2, Article 9(3)).

417 as submitted by Idiarte, Pedrouzo and Pereiro (2007: par 187).

418 Venezuelan Act on Private International Law (1998: Article 17).

419 Schwimann (2001: 54).

420 Batiffol and Lagarde (1983: par 490).

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

422 OLG Düsseldorf (25.11.1994) IPRax 1996 199; NJW-RR 1995 755. Cf BGH (03.02.2004) NJW 2004 1315; BGH (30.03.2004) openJur 2012 56548; www.openjur.de/u/344496.html.

incapacity. In terms of the Puerto Rican *Projet*, where an individual lacks capacity in terms of both the *lex domicilii* and the proper law of the contract, the latter governs the consequences of incapacity. However, where an individual is able to rely on his or her incapacity in terms of the *lex domicilii* (due to the fault of the capable party), the consequences of the incapacity shall be governed by the *lex domicilii* of the incapable contractant.<sup>423</sup> A similar approach is followed in Oregon,<sup>424</sup> but there, the consequences are governed by the law of residence instead of the *lex domicilii*. In some jurisdictions (Burkina Faso<sup>425</sup> and the Ukraine),<sup>426</sup> a specific provision refers to the primary legal systems to govern the consequences of incapacity. Uruguayan doctrine is to the same effect.<sup>427</sup> Most legal systems do not have a specific rule about the consequences of incapacity.

Some jurisdictions apply specific rules to the contractual capacity of an individual to assume liability in respect of bills of exchange (including cheques). In the Czech Republic<sup>428</sup> and Slovakia,<sup>429</sup> the *lex patriae* governs the issue in general. In Czech law, the *lex loci contractus* may in certain circumstances be applied as an additional governing system.<sup>430</sup> However, in both jurisdictions, *renvoi* must be applied where the private international law of the *lex patriae* refers to another legal system.<sup>431</sup> In contrast, Uruguayan private international law determines that capacity in respect of bills of exchange (including cheques) is in general governed by the *lex loci contractus*.<sup>432</sup>

Specific rules concerning the capacity to conclude contracts relating to immovable property have emerged in some jurisdictions.<sup>433</sup> In Argentina<sup>434</sup> and Iran,<sup>435</sup> the *lex rei sitae* governs capacity relating to immovable property situated in the forum state. In Thai private international law, the *lex rei sitae* applies in respect of immovable property situated in either the forum state

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

424 Oregon's Conflicts Law Applicable to Contracts (2001: Section 5(2)).

425 Code on the Law of Persons and the Family (1989: Chapter II, Article 1017).

426 Ukrainian Private International Law Code (2005: Article 18(2)).

427 Civil Code of Uruguay (1868–1941–1994: Article 2393).

428 Act on Private International Law (2012: Part Four, Title I, § 31(1)).

429 Section 91 of Part I of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll and Section 69 of Part II of the Act Concerning Bills of Exchange and Cheques No 191/1950 Coll.

430 Act on Private International Law (2012: Part Four, Title I, § 31(2)).

431 The Czech Republic (Act on Private International Law (2012: Part Four, Title I, § 31(1)) and Slovakia (Act Concerning Bills of Exchange and Cheques No. 191/1950 Coll, Sections 69 and 91).

432 Article 1 in both CIDIP I and II (*supra*).

433 In certain jurisdictions, the additional application of the *lex loci contractus* together with the default legal system is not employed where the relevant contract concerns immovable property. See the text at notes 370–391.

434 Civil Code of Argentina (1869–1987–1997: Article 10).

435 Civil Code of Iran (1935: Article 8).

or abroad.<sup>436</sup> In Macau,<sup>437</sup> capacity in respect of immovable property shall be governed by the *lex rei sitae* if that law so stipulates; otherwise, the law of habitual residence shall apply.

Some jurisdictions have specific provisions on disregarding contractual incapacity in terms of a *prima facie* applicable foreign legal system on the basis of public policy. In Argentina, incapacity will be disregarded when it contravenes natural law or when it is of a punitive character.<sup>438</sup> A similar provision exists in Venezuelan private international law: limitations on capacity shall not be recognised if they are based on differences in race, nationality, religion or class.<sup>439</sup> In other countries, the general provision on public policy (*ordre public*) may be invoked.<sup>440</sup> According to German authors, having different rules in respect of capacity for adult women compared to that of men, or different rules for members of minority religions, may indeed infringe the *ordre public*.<sup>441</sup> The French position on the matter is that foreign law can only be excluded on the basis of public policy when the content of this law is incompatible with French civilization or legislative policies. A different age of majority in the foreign law is, however, not a sufficient reason to apply the doctrine of public policy.<sup>442</sup>

To conclude, in this chapter the conflicts provisions regarding capacity in a variety of codes from Europe, the Middle East, the Far East, North America and Africa are examined; an exercise comprising the study of 53 jurisdictions in total. From the investigation it emerged that the majority of jurisdictions applied the *lex patriae* to capacity as a point of departure. The remainder applied legal systems such as (in order of occurrence in this overview) the *lex domicilii*, the law of the country of habitual residence, the *lex loci contractus* and the proper law of the contract. In some jurisdictions, a combination of the mentioned legal systems applied in the alternative as a point of departure, while in others, they are applicable on an equal level. As inspired by the all-important French decision *Lizardi v Chaize*,<sup>443</sup> jurisdictions that in principle apply the *lex patriae*, the *lex domicilii* or the law of habitual residence, would employ the *lex loci contractus* as an additional applicable legal system where certain conditions are satisfied. Some jurisdictions apply the *lex loci contractus* where merely one condition is met, demonstrating partial adherence to *Lizardi*, while others would only do so when conditions identi-

436 Act on Conflict of Laws (1938: Section 10).

437 Civil Code of Macau (1999: Chapter III, Article 46).

438 Civil Code of Argentina (1869–1987–1997: Article 9).

439 Venezuelan Act on Private International Law (1998: Article 19). See Staudinger/Hausmann (2013: 21).

440 See, in general, Collins *et al* (eds) (2012b: 1871) and Forsyth (2012: 120ff) on the role of public policy in private international law.

441 See MünchKommBGB/Birk (2010: 1563); Staudinger/Hausmann (2013: 20–21 and 640).

442 Batiffol and Lagarde (1983: par 491).

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

cal to these in *Lizardi* are satisfied. Of course, there are also jurisdictions that require the fulfilment of supplementary conditions. But some jurisdictions apply the *lex loci contractus* as the additional legal system in situations not related to the *Lizardi* decision. Many jurisdictions would not apply the *lex loci contractus* as an additional legal system where the contract in question involves family law or the law of succession. Divergent approaches exist in this regard where the contract involves immovable property. Atypical rules also emerged in certain jurisdictions such as those relating to the capacity of individuals to perform entrepreneurial activities; those concerning the consequences of contractual incapacity; the contractual capacity of an individual to assume liability in respect of bills of exchange; and the exclusion of the rules in respect of capacity in terms of a *prima facie* applicable foreign legal system on the basis of public policy. A more common occurrence, on the other hand, is the rule that once an individual obtained contractual capacity, subsequent changes in his or her personal law are inconsequential to this capacity. Lastly, the codes of only a few jurisdictions expressly provide for a separate rule in respect of the capacity to conclude contracts relating to immovable property.

