CONTRACTUAL CAPACITY AND THE CONFLICT OF LAWS IN COMMON-LAW JURISDICTIONS (PART 2): AUSTRALASIA, NORTH AMERICA, ASIA AND AFRICA

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SUMMARY

This series of two articles provides a comparative overview of the position in common-law jurisdictions on the conflict of laws in respect of the contractual capacity of natural persons. The comparative study is undertaken in order to provide guidelines for the future development of South African private international law. Reference is primarily made to case law and the opinions of academic authors. The legal position in the law of the United Kingdom, as the mother jurisdiction in Europe, was investigated in part 1.[1] Although Scotland is a mixed civil/common-law jurisdiction, the situation in that part of the United Kingdom was also discussed.

Part 2 deals with the rules and principles of private international law in respect of contractual capacity in Australasia (Australia and New Zealand), North America (the common-law provinces of Canada and the United States of America), Asia (India, Malaysia and Singapore) and Africa (Ghana and Nigeria). This part also contains a comprehensive summary of the legal position in the common-law countries, followed by ideas for the reform of South African private international law in this regard.

3 AUSTRALASIA

3 1 Australia

As is the position in the United Kingdom, the Australian law governing contractual capacity is not settled.[2] There is further a dearth of case law on the issue and the legal systems that are utilised in the English-law context are referred to by the authors – namely, the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.

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1 Fredericks "Contractual Capacity and the Conflict of Laws in Common-Law Jurisdictions (Part I): The United Kingdom" 2018 39(3) *Obiter* 652.

2 The Australian Law Reform Commission *Choice of Law* (1992) 100; Davies, Bell and Brereton *Nygh's Conflict of Laws in Australia* 8ed (2010) 406–407; Nygh *Conflict of Laws in Australia* 5ed (1991) 279; Sykes and Pryles *Australian Private International Law* 3ed (1991) 614; and Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 768.

3 1 1 Australian case law

There are two prominent Australian cases concerning contractual capacity: *Gregg v Perpetual Trustee Company*,[3] which concerned the transfer of rights in respect of immovable property in terms of an antenuptial contract, and *Homestake Gold of Australia v Peninsula Gold Pty Ltd*,[4] which involved the transfer of shares.

3 1 1 (i) *Gregg v Perpetual Trustee Company*[5]

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

The Married Woman's Property Act of Queensland of 1891 came into force before the Smiths were married.[6] Harvey J, relying on the Act, *Re Piercey*[7] and *Murray v Champernowne*,[8] therefore held that "this property became on her marriage her separate estate, and could be dealt with by Mrs Smith accordingly".[9] Harvey J also stated that the confirmation of the ratification by a commissioner *in casu* was irrelevant:

> "No acknowledgement of the deed of confirmation of her marriage settlement was therefore necessary on her part to pass so much of the property as at the date of her marriage was in fact real estate situated in Queensland."[10]

Harvey J arrived at the conclusion that the relevant interests were transferred *in casu* because the "real estate … may be effectively conveyed according to the law of the land where the real estate is situated, and capacity to deal with such an interest is determined by the *lex loci*".[11] From the context it is clear that the "lex loci" here must be read to refer to the *lex situs*.

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3 (1918) 18 SR (NSW) 252.
4 (1996) 20 ACSR 67.
5 *Supra*.
6 The Act entered into force on 1 January 1891 and the Smiths were married on 31 January 1895.
7 [1895] 1 ch 83.
8 [1901] 2 IR 232.
9 *Gregg v Perpetual Trustee Company supra* 256.
10 *Ibid.*
11 *Ibid*.

3 1 1 (ii) *Homestake Gold of Australia v Peninsula Gold Pty Ltd*[12]

This rather complicated decision involved a novel scheme to defeat compulsory acquisition in a takeover by transferring shares to minors. Young J referred to it as the "ham scam case".[13] The minors (or their guardians) would benefit as they would be awarded a small amount of money or (strangely enough) a free ham. The promoters of the scheme, on the other hand, would benefit from having their shares registered in a large number of individual holdings by minors. On 14 August 1995, the Homestake Mining Company ("Homestake Mining") announced that it would make takeover offers to acquire the outstanding shares in the gold mining company Homestake Gold (the plaintiff), as it already owned 81,5 per cent of the ordinary shares in the latter company. On 16 October 1995, the plaintiff's share registry received 918 transfers executed by the defendant, Peninsula, each transferring 100 shares in the capital of the plaintiff. The transferees were all minors. The effect of the registration was that the number of members in Homestake Mining increased by 918 to 4357. Homestake Mining's takeover offer closed on 9 February 1996 and had then become entitled to 99,5 per cent of the paid-up ordinary shares of the plaintiff. As such, Homestake Mining asserted that it had satisfied the requirements for compulsory acquisition, which is allowed in terms of section 701 of the Australian Corporations Law. In the meantime, further share transfers were lodged with the plaintiff's share registry but these were not registered because the transferors were minors and the plaintiff feared that the transfers were not binding on these minors. The issue before the court was precisely the validity of the transfer to the minors in October 1995 and the transfer from them in February 1996 – more particularly, whether the minors had the contractual capacity to ratify or affirm the contracts.

Young J approached the matter from a private international law perspective as the minors were domiciled in Australia, New Zealand and the United Kingdom. He held that the issue of capacity pertains to the domain of the substantive validity of a contract because it determines whether enforceable rights and obligations are to flow from an agreement between contractants. In rejecting the application of the *lex domicilii*, the judge cited the Canadian author McLeod, who submits that the application of the *lex domicilii* is unsatisfactory in modern commerce and should thus be abandoned.[14] The *lex loci contractus*, according to Young J, should also be disregarded because this legal system was only applied in cases involving negotiable instruments[15] or marriage contracts.[16] Although he mentioned Dicey and Morris's Rule 181[17] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[18] that an individual's contractual capacity is governed by

12 *Supra*.

13 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 1.

14 McLeod *The Conflict of Laws* (1983) 491.

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

16 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 8.

17 Collins, Hartley, McClean and Morse (eds) *Dicey and Morris on the Conflict of Laws* 12ed (1993) 1271.

18 Collins, Briggs, Dickinson, Harris, McClean, McEleavy, McLachlan and Morse (eds) *Dicey, Morris and Collins on the Conflict of Laws* 15ed (2012) 1865.

either the proper law or the law of domicile and residence, the court found the most compelling approach to be that advocated by Cheshire and North[19] – that contractual capacity in a commercial context should be regulated by the proper law of the contract objectively ascertained. Indeed, this legal system was applied by the Ontario Court of Appeal in *Charron v Montreal Trust Co*[20] and later by Brightman J in *The Bodley Head Limited v Flegon*.[21] The objective putative proper law, Young J added, is also favoured by modern Australian authors such as Nygh[22] and Sykes and Pryles,[23] as well as by the Canadian conflicts author, McLeod.[24] As a result, he arrived at the conclusion that contractual capacity is to be governed by the objectively ascertained proper law of the contract. He stated: "I believe I should follow the *Charron* case and apply the proper law of contract."[25]

Sychold,[26] however, is of the opinion that *Charron v Montreal Trust Co*,[27] on which Young J heavily relies, is not strong authority, as the court simply assumed that the problem (that is, that separation agreements between spouses were invalid in Quebec at the time) was one of capacity rather than invalidity due to public policy. In addition, the proper law *in casu* was also the *lex fori* and the Ontarian Court of Appeal was clearly reluctant to apply the civil-law rules of Quebec (the law of Quebec was the *lex domicilii*). According to the author, the court in the *Charron* case[28] arbitrarily decided to apply the proper law to capacity as a matter of policy, as advocated by English commentators, instead of following English case law on marital property settlements (where the *lex domicilii* was always applied). Sychold submits that there remains considerable scope for the application of the *lex domicilii* to contractual capacity, particularly in non-commercial contracts in Australian private international law.[29]

3 1 1 (iii) Summary of Australian case law

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

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19 North and Fawcett *Cheshire and North's Private International Law* 12ed (1992) 511.

20 (1958) 15 DLR (2d) 240 (Ontario) 240.

21 [1972] 1 WLR 680.

22 Nygh *Conflict of Laws in Australia* 6ed (1995) 303.

23 Sykes and Pryles *Australian Private International Law* 614. However, these authors, of course, support the objective and subjective proper law – see heading 3 1 2 (iv) below.

24 McLeod *The Conflict of Laws* 490–492.

25 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra* 8.

26 Sychold "Australia" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2007) par 184.

27 *Supra*.

28 *Ibid.*

29 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 184.

3 1 2 The authors and the Australian Law Reform Commission

3 1 2 (i) Davies, Bell and Brereton

According to Davies, Bell and Brereton, contractual capacity should be governed by the proper law of the contract. This approach was, according to them, correctly adopted in a Canadian,[30] an English[31] and an Australian[32] case.[33] One question remains, however: could an incapable contractant acquire capacity by selecting an appropriate law? In other words, is the proper law referred to objectively determined or could it also be subjectively ascertained? These authors are undecided on this issue. They refer to Dicey, Morris and Collins's Rule 209(1)[34] (the predecessor of Rule 228(1) of Dicey, Morris and Collins),[35] who suggest that capacity should be governed by the proper law of the contract objectively ascertained,[36] in contrast to Sykes and Pryles's approach, which endorses giving effect to the choice of the contractants – that is, the proper law of the contract subjectively ascertained.[37] The authors also refer to the view of the Australian Law Reform Commission, which accepts Sykes and Pryles's view and recommends that capacity should be governed by the law of habitual residence and the proper law of the contract (either subjectively or objectively determined).[38]

According to Davies, Bell and Brereton, the capacity to conclude a contract involving immovable property is generally governed by the *lex situs*.[39] This is not the position where the contract is merely one to execute a conveyance or mortgage in the future. The capacity to conclude such contracts can only be governed by the contract's proper law. With reference to *Bank of Africa, Limited v Cohen*,[40] the authors submit that the Australian courts would not enforce a contract for the transfer of an interest in immovables situated abroad if the transferor lacked capacity in terms of the *lex situs*.[41]

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30 *Charron v Montreal Trust Co supra*.
31 *The Bodley Head Limited v Flegon supra*.
32 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra*.
33 Davies *et al Nygh's Conflict of Laws* 406–407.
34 Collins, Morse, McClean, Briggs, Harris, McLachlan and Hill *Dicey, Morris and Collins on the Conflict of Laws* 14ed (2006) 1621, the predecessor of the current Rule 228(1) of Dicey, Morris and Collins (Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865).
35 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.
36 Davies *et al Nygh's Conflict of Laws* 407.
37 Sykes and Pryles *Australian Private International Law* 614, referred to by Davies *et al Nygh's Conflict of Laws* 407.
38 Australian Law Reform Commission *Choice of Law* 101, referred to by Davies *et al Nygh's Conflict of Laws* 407.
39 Davies *et al Nygh's Conflict of Laws* 669.
40 [1909] 2 ch 129.
41 Davies *et al Nygh's Conflict of Laws* 407.

3 1 2 (ii) Mortensen

Mortensen acknowledges that there is common-law authority for the application of the *lex loci contractus* as well as the *lex domicilii* to contractual capacity. However, it is apparent to the author that these legal systems have now been replaced by a rule requiring the application of the putative proper law of the contract.[42] In an Australian context, the author adds, this would be the putative proper law objectively ascertained.[43] The author further supports the application of the *lex situs* to contractual capacity in the context of immovable property.[44]

3 1 2 (iii) Sychold

Sychold is of the opinion that capacity should be governed by either the proper law of the contract or the habitual residence of the incapable party.[45] He rejects the argument that the proper law must be objectively ascertained, independent of any party autonomy. The position should be similar to the situation in respect of the substantive validity of the contract, where party autonomy prevails.[46]

3 1 2 (iv) Sykes and Pryles

Sykes and Pryles concede that, in the common law, the *lex domicilii* may be the governing law in the context of marriage contracts. This legal system should, however, not apply exclusively as this would mean that a contractant would carry the incapacity in terms of the law of domicile with him or her and escape liability in other jurisdictions. Capacity is not status, but merely an accompaniment or result of status, and it should therefore be governed by the law that governs the transaction.[47]

In respect of non-matrimonial contracts, the proper law of the contract should apply, although there is common-law authority favouring the *lex loci contractus* – namely, *Male v Roberts*.[48] At the time of this decision, the authors submit, there was a strong presumption that the *lex loci contractus* was indeed the proper law of the contract. The case is therefore consistent with the view that the proper law of the contract governs capacity.[49] The authors also commend Dicey and Morris's Rule 182[50] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[51] that capacity should be governed by either the proper law of the contract or the personal law, which would

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42 Mortensen *Private International Law in Australia* (2006) 403.

43 Mortensen *Private International Law* 404.

44 Mortensen *Private International Law* 460.

45 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.

46 *Ibid*.

47 Sykes and Pryles *Australian Private International Law* 344.

48 (1800) 3 ESP 163.

49 As decided in *The Bodley Head Limited v Flegon supra* and *Charron v Montreal Trust Co supra*.

50 Collins, Hartley, McClean and Morse (eds) *Dicey and Morris on the Conflict of Laws* 11ed (1987) 1161–1162.

51 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

mean that an individual possesses capacity if he or she has such under either law.

The proper law in this context, according to many English authors,[52] must be determined objectively, independent of any express (or tacit) choice of law, so that a contractant may not confer capacity on him- or herself merely by selecting the law of a favourable country. Sykes and Pryles do not support this view. They submit that there is no justification for differentiating between capacity to contract and, for example, the essential validity of a contract. In the latter case, contractants may deliberately select the law of a country that upholds the validity of the transaction, as opposed to the law of a country that does not. There seems to be no explanation for why the selection of a legal system may be effective for essential validity but not for capacity. They state:

> "[I]f it is not a true private international law case the choice may not be effective in either instance but in a multistate situation where the law of one of the 'connected' states is chosen it is hard to see why the stipulation should be effective as far as essential validity is concerned but denied effect in regard to capacity."[53]

Further, they submit that the problems that may occur in respect of party autonomy in cases of essential validity and capacity are similar; therefore, analogous rules should be employed.[54] It seems that the authors are therefore supportive of the application of the proper law as such. The proper law is determined by a choice of law by the parties (although it is required that a legal system is chosen with a (close) link to the parties or the contract)[55] or, otherwise, in an objective manner.

Sykes and Pryles submit that the Anglo-Australian rule in respect of contracts relating to immovable property is dissimilar to that advocated by some European and American authors – namely, that all issues in this regard are governed by the *lex situs*. Sykes and Pryles assert that contracts involving immovables should, in addition, be governed by the *lex situs* and the proper law of the contract, subjectively or objectively ascertained (the alternative application of the proper law and the *lex situs*).[56]

3 1 2 (v) Tilbury, Davis and Opeskin

Tilbury, Davis and Opeskin expressly support the view that, in the context of a commercial contract, contractual capacity should be governed by the proper law of the contract.[57] The other main alternatives – namely, the *lex domicilii* and the *lex loci contractus* – cannot be justified as comprehensively as the proper law. The cases in which the *lex domicilii* was applied clearly show the influence of choice-of-law rules in matrimonial matters, where domicile is an important connecting factor. Cases in which the *lex loci*

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52 Collins *et al* (eds) *Dicey and Morris* 11ed 1161–1162; and North and Fawcett *Cheshire and North's Private International Law* 11ed (1987) 480.

53 Sykes and Pryles *Australian Private International Law* 614.

54 *Ibid*.

55 *Ibid*.

56 *Ibid*.

57 Tilbury *et al Conflict of Laws* 768.

contractus was applied, on the other hand, show the influence, in a former period, of the *locus contractus* as the determinant of the applicable law in contractual matters.[58] The reason for applying the proper law of the contract,[59] according to the authors, is the impracticality of supposing that the capable contractant has knowledge of his counterpart's incapacity arising under the *lex domicilii*. The proper law referred to here is objectively ascertained, as this will prevent contractants from conferring capacity upon themselves by expressly selecting a foreign legal system.[60]

3 1 2 (vi) The Australian Law Reform Commission

The Australian Law Reform Commission partially supports Dicey and Morris's Rule 182,[61] the predecessor of Dicey, Morris and Collins's current Rule 228.[62] In terms of the Commission's interpretation of Rule 182, capacity according to the *lex domicilii*, the law of habitual residence or the proper law of the contract is sufficient to validate a contract. However, according to the Commission, domicile is an inappropriate connecting factor in a commercial context. The place of residence of the incapable contractant is preferable.[63] The Commission is in favour of the application of the proper law of the contract, which may be subjectively or objectively determined. This view is based on Sykes and Pryles's contention[64] that there is no justification for differentiating between capacity and, for example, essential validity. Contractants may intentionally select the law of a country that upholds the validity of the contract, as opposed to the law of a country that does not. There seems to be no explanation for why the selection of a legal system may be effective for the purposes of essential validity but not for the purposes of contractual capacity. The Commission therefore recommends that capacity in terms of either the alleged incapable contractant's residence or the proper law of the contract should suffice for the validity of a contract.[65]

3 1 2 (vii) Summary of Australian authors and Law Reform Commission

All the Australian authors,[66] as well as the Australian Law Reform Commission,[67] are in favour of the application of the proper law of the

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58 Tilbury *et al Conflict of Laws* 770.

59 As in *The Bodley Head Limited v Flegon supra*, which is discussed in part 1 of this article under heading 2 1 1 1 8.

60 Tilbury *et al Conflict of Laws* 771.

61 Collins *et al* (eds) *Dicey and Morris* 11ed 182; Australian Law Reform Commission *Choice of Law* 101.

62 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

63 Hence, partially supporting Dicey and Morris.

64 Sykes and Pryles *Australian Private International Law* 614, referring to North and Fawcett *Cheshire and North's Private International Law* 11ed 480.

65 The Australian Law Reform Commission *Choice of Law* 101. Also see Tetley *International Conflict of Laws: Common, Civil and Maritime* (1994) 237.

66 Davies *et al Nygh's Conflict of Laws* 407; Mortensen *Private International Law* 404; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185; Sykes and Pryles *Australian Private International Law* 614; and Tilbury *et al Conflict of Laws* 771.

67 The Australian Law Reform Commission *Choice of Law* 101.

contract to contractual capacity. Mortensen[68] employs the technically correct term, "putative proper law", in this regard. The authors have different opinions on how the proper law must be determined. Mortensen[69] and Tilbury, Davis and Opeskin[70] are of the opinion that the proper law must be objectively determined, but Sychold,[71] Sykes and Pryles[72] and the Australian Law Reform Commission[73] would apply the legal system chosen by the parties (the proper law established subjectively) and, only in the absence of such a choice, the proper law objectively ascertained. Sykes and Pryles,[74] however, require that a connected legal system be chosen. Davies, Bell and Brereton[75] do not express an opinion on whether the proper law must be objectively, or may also be subjectively, determined. Sychold[76] and the Australian Law Reform Commission[77] would pair the proper law with the law of habitual residence in the context of an alternative reference rule. Sykes and Pryles,[78] in commending the views of Dicey and Morris[79] would possibly add both the law of habitual residence and the *lex domicilii* to the application of the proper law. None of the Australian authors is in favour of the application of the *lex loci contractus*.

Davies, Bell and Brereton[80] and Mortensen[81] favour the application of the *lex situs* in respect of immovable property. Sykes and Pryles,[82] on the other hand, reject the application of the *lex situs* in respect of immovables in favour of the subjective or objective proper law of the contract, possibly in addition to the *lex domicilii* and the law of habitual residence. As the other authors[83] and the Australian Law Reform Commission[84] do not distinguish between contracts in respect of immovable property and other contracts, they probably also favour the application of the proper law in this regard (whether objectively or also subjectively determined, and whether or not it is linked to the other alternatively applicable legal systems).

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68 Mortensen *Private International Law* 404.
69 *Ibid*.
70 Tilbury *et al Conflict of Laws* 771.
71 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.
72 Sykes and Pryles *Australian Private International Law* 614.
73 The Australian Law Reform Commission *Choice of Law* 101.
74 Sykes and Pryles *Australian Private International Law* 614.
75 Davies *et al Nygh's Conflict of Laws* 407.
76 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.
77 The Australian Law Reform Commission *Choice of Law* 101.
78 Sykes and Pryles *Australian Private International Law* 614.
79 Collins *et al* (eds) *Dicey and Morris* 11ed 1161–1162.
80 Davies *et al Nygh's Conflict of Laws* 669.
81 Mortensen *Private International Law* 460.
82 Sykes and Pryles *Australian Private International Law* 618.
83 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* and Tilbury *et al Conflict of Laws*.
84 The Australian Law Reform Commission *Choice of Law* 101.

3 2 New Zealand

There is no case law from New Zealand dealing specifically with contractual capacity. According to Angelo,[85] capacity will be governed by the law of domicile. The content of domicile is, of course, determined in accordance with the *lex fori*. The author partially cites Rule 209 of Dicey, Morris and Collins[86] (the predecessor of Rule 228(1) of Dicey, Morris and Collins)[87] to the effect that capacity according to the proper law may also be sufficient for the existence of a contract. This implies that there may be scope for the application of the proper law to capacity in the New Zealand context.

4 NORTH AMERICA

4 1 Canada (the common-law provinces)

4 1 1 Charron v Montreal Trust Co[88]

The only common-law Canadian decision concerning contractual capacity is *Charron v Montreal Trust Co*,[89] in which the Ontario Court of Appeal applied the objectively determined proper law of the contract. Peter Charron was originally domiciled in the province of Quebec (Canada) but relocated to Ottawa (Ontario, Canada) in 1906 when he took up employment there. In 1908, he married the plaintiff in Ottawa, where they cohabited until their divorce in 1920. On 21 May 1920, the couple entered into a separation agreement in terms of which Mr Charron was to effect certain payments to the plaintiff. On 1 March 1953, he died in Montreal (Quebec), leaving his entire estate to his five children. It was apparent, however, that for many years prior to Mr Charron's death, no payments were effected in terms of the separation agreement. The plaintiff thus claimed $15 600 against his estate, being the arrears of payments due under the agreement. In defence to this action, it was argued on behalf of Mr Charron's estate, that he lacked the contractual capacity to enter into the separation agreement under the law of his domicile – that is, Quebec.

In the court *a quo*, McRuer CJHC held that the separation agreement was valid and enforceable under Ontarian law and that he did not have to expressly address the issue of capacity.[90] *Charron v Montreal Trust Co* is an appeal by the defendant against the judgment of the Chief Justice that the estate had to effect payment of $15 600 to the plaintiff and carry the costs of the suit.

On appeal, Morden J held that, in respect of marriage and marriage settlements, the *lex domicilii* generally governed capacity. In a Canadian context, however, he continued, there is no clear decision on whether

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85 Angelo *Private International Law in New Zealand* (2012) par 75.
86 Collins *et al* (eds) *Dicey, Morris and Collins* 14ed 1621.
87 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.
88 *Supra*.
89 *Supra*.
90 The court also held that the law of Quebec was not applicable to the separation agreement.

capacity is to be governed by the *lex loci contractus* or *the lex domicilii*.[91] Applying the *lex loci contractus* exclusively is not preferred. If the facts of the case were that the parties were domiciled in Quebec and concluded the contract in Ontario while present there only temporarily, application of the *lex loci contractus* would be incorrect as this would be completely fortuitous.[92] The exclusive application of the *lex domicilii* is also not preferred. In the present case, the parties concluded their marriage in Ontario and resided there until the date of the agreement in question. It would be inappropriate to apply the *lex domicilii* to determine capacity in this instance.[93] The solution to the problem, the court resolved, was to apply the objective proper law of the contract to capacity.[94] The judge stated:

> "[A] party's capacity to enter into a contract is to be governed by the proper law of the particular contract that is the law of the country with which the contract is most substantially connected. In this case there is no doubt that the proper law of the agreement was the law of [Ontario],[95] and by that law, neither party to the agreement lacked the necessary capacity."[96]

Morden J agreed with the Chief Justice's decision that the agreement was valid and enforceable in terms of Ontarian law. The defendant therefore had to effect payment to the plaintiff for the mentioned amount.[97]

According to Rafferty, the proper law referred to in the *Charron* case was the objectively determined proper law, not one chosen by the parties.[98] The reason for this is that contractants may not bestow capacity on themselves by agreeing to apply a different proper law (different from the law with which the contract is most closely connected) having a more favourable rule regarding capacity.

4 1 2 Canadian authors

4 1 2 (i) Pitel and Rafferty

Pitel and Rafferty emphasise that the rules on contractual capacity remain unclear in Canadian private international law.[99] There are, according to the authors, three possibilities in this regard – namely, the *lex loci contractus*, the law of the country of habitual residence and the putative proper law of the contract. It would appear that the authors regard the latter legal system as the most tenable. One question remains: if a contract contains an express choice of law, would a court apply the chosen law to the issue of capacity? The obvious concern is that contractants could elect an applicable law by

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91 *Charron v Montreal Trust Co supra* 244.

92 *Ibid*.

93 *Ibid.*

94 The court referred to Cheshire *Private International Law* 5ed (1957) 221–224; Falconbridge *Essays on the Conflict of Laws* 2ed (1954) 383–385; and Morris *et al* (eds) *Dicey and Morris on the Conflict of Laws* 7ed (1958) 769–774.

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

96 *Charron v Montreal Trust Co supra* 244–245.

97 *Charron v Montreal Trust Co supra* 245.

98 Rafferty (gen ed) *Private International Law in Common-Law Canada: Cases, Text and Materials* 3ed (2010) 756.

99 Pitel and Rafferty *Conflict of Laws* (2010) 281.

which they are capable and, in this way, avoid the restrictions in another country's law. Applying the putative proper law objectively determined may address this concern, but the alternative approach of using the putative proper law, including any express choice, "is probably more adaptable to the various circumstances".[100] This choice would still have to be *bona fide*, legal and consistent with public policy. The authors add that there is still the possibility of a Canadian court applying the law on capacity from another country as a mandatory rule.[101]

It is generally accepted, the authors add, that the *lex situs* governs the capacity to transfer immovable property, as well as the formal and essential validity of such transfers.[102] In this context, the courts would be inclined to use the doctrine of *renvoi* so as to apply the law of the country that the courts of the *situs* would apply and not necessarily the domestic law of the *situs*.[103] It would, after all, be senseless to apply another law, since the courts of the *situs* have ultimate control over the immovable property. A court will usually lack jurisdiction to ascertain title in respect of foreign immovables, so there are few decisions concerning choice of law in this context. Therefore, many of the decisions concerning foreign immovables relate to contracts to transfer the property, rather than the transfer itself. There is a distinction between the contract to transfer the property and the transfer itself, the conveyance. The authors submit that in the case of a contract concerning foreign immovable property, the proper law should govern the contract, instead of the *lex situs*.[104]

4 1 2 (ii) Walker

Walker indicates that, as in England, the possible legal systems to govern contractual capacity in Canadian private international law are the *lex domicilii*, the *lex loci contractus* and the objective proper law of the contract.[105] She does not support the application of the *lex loci contractus* because this legal system may be fortuitous. She apparently does not favour the *lex domicilii* as a general rule, as she remarks that support for this legal system is drawn from cases that did not concern commercial contracts.[106] Application of the *lex domicilii* would also be contrary to the expectations of the parties.[107] However, the author has no objection to the application of the objectively determined proper law.[108] Perhaps the *lex domicilii* may apply in

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100 *Ibid*.

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

102 Pitel and Rafferty *Conflict of Laws* 326.

103 As suggested by Dicey, Morris and Collins (Collins *et al* (eds) *Dicey, Morris and Collins* 14ed 83).

104 Pitel and Rafferty *Conflict of Laws* 327, *contra Bank of Africa, Limited v Cohen supra*.

105 Walker *Castel and Walker: Canadian Conflict of Laws* 6ed (2005) § 31.4d; and Walker *Halsbury's Laws of Canada: Conflict of Laws* (2006*)* 517. In the most recent update issue, she no longer refers to the *lex loci contractus* as a possible governing legal system (Walker 2005 update issue *Castel and Walker: Canadian Conflict of Laws 6ed* (2014) § 31.5b).

106 Walker *Castel and Walker* 6ed § 31.4d.

107 Walker *Castel and Walker* (2005/2014) § 31.5b.

108 *Ibid*.

respect of contracts relating to marriage and the *lex situs* with regard to immovable property.[109]

4 1 2 (iii) Summary of Canadian authors

To summarise, the Canadian authors hold divergent views on contractual capacity. Pitel and Rafferty[110] favour the putative proper law of contract, including an express choice of law if such choice was made *bona fide*, was legal and not inconsistent with public policy. They support the application of the *lex situs* to capacity with regard to contracts involving immovables in general, but in respect of foreign immovable property, they believe the proper law should govern.[111] Walker[112] seems to reject the application of the *lex domicilii* and the *lex loci contractus* in a commercial context but has no objection to the application of the objectively determined proper law. However, she possibly favours the *lex situs* in respect of contractual capacity concerning immovable property.[113]

4 2 United States of America

4 2 1 American case law

In the American common law, there is support for both the *lex domicilii* and the *lex loci contractus* governing contractual capacity.[114] As an illustration, reference is made to the conflicting decisions in *Milliken v Pratt*[115] and *Union Trust Company v Grosman*.[116] Insofar as immovable property is concerned, reference is made to *Polson v Stewart*.[117]

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109 Walker *Halsbury's Laws of Canada: Conflict of Laws* (2011) 618; Walker *Castel and Walker* 6ed § 31.4d; and see Walker *Halsbury's Laws of Canada* (2006) 517.

110 Pitel and Rafferty *Conflict of Laws* 281.

111 Pitel and Rafferty *Conflict of Laws* 326–327.

112 Walker *Castel and Walker* 6ed § 31.4d.

113 Walker *Halsbury's Laws of Canada* (2011) 618; Walker *Castel and Walker* 6ed § 31.4d and see Walker *Halsbury's Laws of Canada* (2006) 517.

114 Clarence Smith "Capacity in the Conflict of Laws: A Comparative Study" 1952 1 *International and Comparative Law Quarterly* 446–471; Symeonides *American Private International Law* (2008) 227–228; and Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 119.

115 125 Mass 374 (1878).

116 245 US 412 (1918).

117 45 NE 737 (1897).

4 2 1 (i) *Milliken v Pratt*[118]

The Pratts were permanent residents of the state of Massachusetts in the United States of America (USA). Mr Pratt, who conducted business in Massachusetts, applied for credit from a partnership established in Maine (USA) to facilitate the purchase of goods from the partnership. The partners would only grant the credit request if Mrs Pratt guaranteed payment. Mr Pratt obtained this guarantee in writing from his wife and mailed it from Massachusetts to the partnership in Maine. After having thus successfully obtained credit, Mr Pratt purchased goods, which the partners shipped from Maine to Massachusetts. However, Mr Pratt failed to pay for the goods and the partnership accordingly instituted an action in Massachusetts for the enforcement of Mrs Pratt's guarantee. At the time of the purchase of the goods, Mrs Pratt lacked the capacity under Massachusetts law to conclude a contract of suretyship but was capable in terms of the law of Maine.

In deciding which legal system to apply to the issue, the court held that the law of the state where the contract was "made"[119] should govern. The court continued, stating that the contract was concluded in Maine as it "was complete when the guarantee had been received and acted on by the plaintiffs at Portland (Maine), and not before".[120] The court therefore ruled in favour of the plaintiffs since the contract of suretyship was valid (and thus binding) according to the law of Maine. In delivering judgment, Gray CJ expressly rejected the application of the *lex domicilii* to contractual capacity:

> "[I]t is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicil of those with whom they deal, and to ascertain the law of that domicil, however remote, which in many cases would not be done without such delay as would greatly cripple the power of contracting abroad at all."[121]

4 2 1 (ii) *Union Trust Company v Grosman*[122]

While the Grosmans, domiciled in Texas (USA), were temporarily in Illinois (USA), Mr Grosman executed two promissory notes in favour of the plaintiff. At the same time, Mrs Grosman concluded a contract of suretyship for payment as part of the same transaction. In terms of the law of Texas, the

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118 *Supra*. See the discussion by Cramton, Currie, Kay and Kramer *Conflict of Laws: Cases-Comments-Questions* 5ed (1993) 17–20; Hay, Weintraub and Borchers *Conflict of Laws* 13ed (2009) 493–496; Lowenfeld *Conflict of Laws: Federal, State, and International Perspectives* 2ed (revised) (2002) 14–17; Simson *Issues and Perspectives in Conflict of Laws: Cases and Materials* 4ed (2005) 24–27; Symeonides, Collins, Perdue and Von Mehren *Conflict of Laws: American, Comparative, International* (1998) 29–32; and Vernon, Weinberg, Reynolds and Richman *Conflict of Laws: Cases, Materials and Problems* 2ed (2003) 255–258.

119 *Milliken v Pratt supra* 375.

120 *Milliken v Pratt supra* 376. See the commentary by Hay *Conflict of Laws* 2ed (1994) 196; Hay *et al Conflict of Laws* 496; and Weintraub *Commentary on the Conflict of Laws* 4ed (2001) 441.

121 *Milliken v Pratt supra* 382. Also see McDougal, Felix and Whitten *American Conflicts Law* 5ed (2001) 495; and Scoles, Hay, Borchers and Symeonides *Conflict of Laws* 3ed (2000) 882.

122 *Supra*.

contract of suretyship would have been void but in the law of Illinois, the contract was valid. The Federal High Court, through Holmes J, thus had to pronounce on which law was applicable.

In addressing the issue, Holmes J upheld Mrs Grosman's reliance on incapacity. The court stated: "It is extravagant to suppose that the [domiciliary] courts … will help a married woman to make her property there liable in circumstances in which the local law says that it shall be free, simply by stepping across a state line long enough to contract."[123] The *lex domicilii* (the law of Texas) was thus applied and the contract was declared void.[124]

4 2 1 (iii) *Polson v Stewart*[125]

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

4 2 1 (iv) Summary of American case law

Milliken v Pratt[126] and *Union Trust Company v Grosman*[127] both concern contractual capacity in respect of contracts of suretyship, yet the courts have taken different views in their judgments. In the former case, the court applied the *lex loci contractus* but in the latter, the *lex domicilii*. Further, American courts, as illustrated in *Polson v Stewart*,[128] may be inclined to apply the *lex domicilii* and not the *lex situs* to capacity cases involving immovable property.

4 2 2 Restatement (Second)

The most important contemporary approach to private international law of contract in the United States is the Restatement (Second), as 23 states follow this approach.[129] Five further states[130] could be added to this total as

123 *Union Trust Company v Grosman supra* 416.

124 See McDougal *et al American Conflicts Law* 495.

125 *Supra*.

126 *Supra*.

127 *Supra*.

128 *Supra*.

129 Alaska; Arizona; Colorado; Connecticut; Delaware; Idaho; Illinois; Iowa; Kentucky; Maine; Michigan; Mississippi; Missouri; Montana; Nebraska; New Hampshire; Ohio; South Dakota; Texas; Utah; Vermont; Washington; and West Virginia. See Symeonides "Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey" 2011 59 *The American Journal of Comparative Law* 300 331. See also Symeonides *American Private International Law* 225. As far as the present author could determine, no distinction is drawn between international and interstate conflict cases.

these adhere to the "significant contacts approach", which is highly comparable to that employed in the Restatement in that it also entails taking a variety of connecting factors into consideration. The discussion on choice-of-law methodology in the United States is therefore limited to the Restatement. There is uncertainty on precisely how the states adhering to these approaches will resolve a particular contract conflict issue. In fact, the Restatement itself, and the courts that follow it, have been described as "equivocal" in designating the applicable law.[131] Nevertheless, the Restatement remains a prominent point of departure for choice-of-law analysis.[132] The Restatement operates as follows: the rule intended to apply to a particular issue appears as the first statement. This is generally followed by a secondary statement setting out the rule that the courts will "usually" apply in given situations.[133]

Paragraph 198 of the Restatement contains the rules applicable to contractual capacity. The primarily applicable rule, § 198(1), states the following: "The capacity of the parties to contract is determined by the law selected by application of the rules of §§ 187–188." [134] The secondary rule, in § 198(2), reads as follows: "The capacity of a party to contract will usually be upheld if he has such capacity under the local law of the state of his domicil."[135]

Paragraph 198(1), the primarily applicable rule, in effect states that contractual capacity is to be governed by the law chosen by the parties, as recognised in § 187,[136] if they have in fact done so. Paragraph 187 relates to an express choice of law by the parties. In terms of § 187(1), the primarily applicable rule of this provision, if the parties elected the law of a certain state to govern a particular issue, which they were entitled to address in their contract, it should be applied. In terms of the secondary statement of this provision, § 187(2), where such an issue could not have been addressed in their contract, such as capacity, formalities and substantial validity,[137] the chosen law is nevertheless applicable, unless it holds no substantial relationship to the parties or the contract and no other grounds exist for its election.[138] This law would not apply where it would be contrary to the policy of a state that has a materially greater interest regarding the particular issue

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130 Arkansas; Indiana; Nevada; North Carolina; and Puerto Rico (the Puerto Rican *Projet* is discussed in Fredericks *Contractual Capacity in Private International Law* (Dr Jur thesis, University of Leiden) 2016 159. See Symeonides 2011 *The American Journal of Comparative Law* 32.

131 Symeonides *American Private International Law* 225.

132 *Ibid*. The American authors generally refer to the discussed case law and the Restatement. See Cramton *et al Conflict of Laws*; Felix and Whitten *American Conflict Laws* 6ed (2011); Hay *et al Conflict of Laws*; Lowenfeld *Conflict of Laws*; McDougal *et al American Conflicts Law*; Scoles *et al Conflict of Laws*; Simson *Issues and Perspectives*; Symeonides *et al Conflict of Laws*; Vernon *et al Conflict of Laws*; and Weintraub *Commentary on the Conflict of Laws*.

133 The American Law Institute *Restatement of the Law Second, Conflict of Laws 2d* (1971) VIII.

134 The American Law Institute *Restatement of the Law Second* 632.

135 *Ibid.*

136 See The American Law Institute *Restatement of the Law Second* 561.

137 The American Law Institute *Restatement of the Law Second* 564.

138 § 187(2)(a).

and which would otherwise be the proper law.[139] Therefore, § 198(1),, in the first place, provides for the application of the subjectively ascertained proper law.[140]

According to the commentary of The American Law Institute, permitting contractants to elect the law to govern the validity of their contract promotes the primary objectives of contract law – namely, the protection of the justified expectations of the parties and the possibility of predicting their contractual rights and duties accurately.[141] Therefore, the applicable law subjectively ascertained secures certainty and predictability. Granting contractants this power of choice is also consistent with the fact that individuals are at liberty to determine the nature of their contractual obligations. This does not make legislators of them. The forum selects the law applicable by applying its own choice-of-law rules. It may use a choice-of-law rule that provides that the law of the state elected by the parties shall be applied to determine the validity of the contract. The law of the state chosen by the parties is applied because this is the outcome demanded by the forum's choice-of-law rule and not on account of the contractants being legislators.[142] The power of choice would obviously enable contractants to evade prohibitions that exist in the state that would otherwise be the proper law of the contract. In American private international law, according to the Restatement, however, the demands of certainty, predictability and convenience enjoy priority in this regard;[143] therefore parties to a contract should have the power to choose the applicable law.

In the absence of such a choice, the proper law, in terms of § 198(1), is to be determined with reference to § 188.[144] According to § 188(1), the primarily applicable rule in this regard, the proper law of a contract shall be the law of the state that has the most significant relationship to the parties and the contract, having particular regard to the relevant factors enunciated in § 6.[145] The connecting factors ("contacts") in terms of the secondary statement (§ 188(2)) to be considered in applying the principles of § 6 to ascertain the proper law (which would be the same or similar in terms of the "significant contacts approach") include: the *locus contractus*; the place of negotiating the contract; the *locus solutionis*; the location of the subject matter of the contract; and the domicile, habitual residence, nationality, place of incorporation and place of business of the contractants. The contacts will have to be evaluated according to their relative importance with regard to the particular issue.[146] Paragraph 198(1) therefore also provides for the

139 § 187(2)(b).

140 See Symeonides *American Private International Law* 228.

141 The American Law Institute *Restatement of the Law Second* 565.

142 *Ibid*.

143 *Ibid*.

144 See The American Law Institute *Restatement of the Law Second* 575. Also see Symeonides *American Private International Law* 228.

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

146 The American Law Institute *Restatement of the Law Second* 575.

application of the objectively determined proper law in the absence of a permissible subjectively determined *lex causae*.

These rules focus on the protection of the justified expectations of the contractants,[147] a factor that is of considerable importance in respect of issues relating to the validity of a contract, such as capacity.[148] Parties to a contract will generally expect the contractual obligations to be binding upon them. The application of the law of a state that would invalidate the contract is undesirable as this would frustrate their expectations. Of course, the law of such a state may nevertheless be applied where the interests of this state, in applying the invalidating rule, substantially outweigh the value of protecting the justified interests of the parties.[149]

Each connecting factor or contact in § 188(2) carries a specific weight in determining the proper law of the contract.[150] According to The American Law Institute, the *locus contractus* on its own is rather insignificant. Where issues involving the validity of the contract are governed by this legal system, it will apply by virtue of the fact that it coincides with other contacts.[151] This suggests that the *lex loci contractus* will generally not apply independently, but that the *locus contractus* is one of the connecting factors to be taken into consideration. In other words, the law of the state where the contract is concluded will govern, for example, where it is also the law of the place of negotiation and the *lex loci solutionis* or the *lex situs* and the law of domicile of the parties. Of course, the *locus contractus* will not be taken into consideration where it is purely fortuitous and holds no relation to the parties or the contract.[152]

According to The American Law Institute, the place of negotiating the contract is a significant connecting factor. This is because the state where the negotiations were held and agreement was reached has an obvious interest in the matter. This connecting factor plays a lesser role where the contractants do not meet personally but enter into negotiations from different states by mail or telephone.[153]

The state where the performance is to be effected has an obvious interest in the nature of the performance and the party who must perform. Where the contractants are to perform in the same state, this state will be so closely related to the contract and the parties that it will normally be the proper law, even in respect of issues not strictly associated with performance. The *locus solutionis* will, however, not be taken into consideration where it is uncertain or unknown at the moment of contracting, or when the performance is to be divided approximately equally between two or more states with different rules on the particular issue.[154] Paragraph 188(3) states that "[i]f the place of

147 The values of certainty, predictability and uniformity of result underlie the need for protecting the justified expectations of the parties. See The American Law Institute *Restatement of the Law Second* 576.

148 The American Law Institute *Restatement of the Law Second* 577.

149 *Ibid*.

150 The American Law Institute *Restatement of the Law Second* 579.

151 The American Law Institute *Restatement of the Law Second* 580.

152 *Ibid*.

153 The American Law Institute *Restatement of the Law Second* 580.

154 *Ibid.*

negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied".[155]

Where the contract involves movable and immovable property, the location of this property is significant. The state where the property is situated will have a natural interest in transactions concerning it. The parties themselves will also regard the location of the property as important. Where the property is the principle subject matter of the contract, it can be assumed that the parties reasonably expected the law of the state where the property is situated to govern numerous issues arising from the contract.[156]

The place of domicile, habitual residence or nationality and the place of incorporation and the place of business of the parties are all factors indicating an enduring relationship to the parties. It may be deduced from the discussion of § 198(2) below that an individual at all times maintains a close relationship with his or her personal law.[157]

The proper law of the contract must be determined with reference to certain presumptions in §§ 189–197.[158] For instance, contracts of sale of movable property (chattels) will usually be governed by the *lex loci solutionis* in respect of delivery.[159]

Paragraph 198(2), which is the secondary statement (in other words, the rule customarily followed by the courts), merely states that where a contractant is capable in terms of his or her domiciliary law, he or she shall be regarded as possessing contractual capacity.[160] Protection of the incapable contractant is the focal point of the rules concerning incapacity.[161] The rationale behind § 198(2) is thus that, in these circumstances, a contractant's law of domicile has determined that he or she is not in need of the protection that a rule of incapacity would provide. He or she should therefore be regarded as capable of commercial interaction.[162] Where a contractant's domiciliary law regards him or her as capable, there can be little reason for the law of another state to apply that would afford him or her protection and would lead to the invalidation of the contract. This would in any event be contrary to the parties' expectations. The rule should only be deviated from in exceptional circumstances – for example, where a contractant is habitually resident in a state where he is incapable but his relationship to the state of his or her domicile is rather insignificant.[163]

Paragraph 198 also applies to contracts involving immovable property. The official commentary in respect of this paragraph states that the "capacity to make a contract for the transfer of an interest ... in land ... is determined by the law selected by application of the rule of this section and of the rules

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155 Except as otherwise stipulated in §§ 189–199 and 203. See The American Law Institute *Restatement of the Law Second* 575.

156 The American Law Institute *Restatement of the Law Second* 581.

157 *Ibid*.

158 The American Law Institute *Restatement of the Law Second* 586–632.

159 § 191, discussed by The American Law Institute *Restatement of the Law Second* 594–600.

160 See Born *International Civil Litigation in United States Courts* (1996) 673. Also see Symeonides *American Private International Law* 228.

161 The American Law Institute *Restatement of the Law Second* 632.

162 *Ibid.*

163 *Ibid.*

of § 189".[164] As such, the contractual capacity of parties to conclude contracts involving immovable property is in principle governed by the provisions in § 198(1) and (2). This rule should be applied in conjunction with § 189, which concerns contracts for the transfer of interests in land. According to § 189, which contains no secondary statement, the validity of a contract to transfer interests in immovables, in the absence of an effective choice of law by the parties, is governed by the *lex situs*.[165] This is interpreted to mean that the provision in § 198(1), read with §§ 187 and 198(2), is applicable to the capacity to conclude contracts relating to immovable property. Where the applicable law has been elected by the parties, as described in § 187, this law governs capacity in respect of immovables. Where the parties have not chosen a legal system to govern the contract, the *lex situs* applies and not the objectively determined proper law. The objective proper law may, however, be applicable in the alternative. For instance, when the contract would be invalid in terms of the *lex situs* but valid according to the objectively determined proper law, then the latter law applies.[166] The objective proper law, however, does not apply where the value of protecting the parties' expectations is outweighed by the interest of the *situs* state in applying its invalidating rule. Also, if a state, other than that indicated by the objective proper law or the *lex situs*, has a substantial interest in having its law applied, then the law of this state is applicable.[167] Therefore, according to the Restatement (Second), the contractual capacity to conclude contracts in respect of immovable property may be governed by the subjectively or objectively ascertained proper law, the *lex domicilii* and the *lex situs*.

Numerous factors justify the rule in favour of the law of the location of the immovable property. These factors closely resemble those discussed under the importance of the *situs* of the subject matter above,[168] except that here the emphasis is on the nature of the property. The state where the property is situated has a natural interest in contracts concerning it, especially since it is immovable in nature.[169] It is also assumed that, because the immovable property is the subject matter of the contract, the parties would expect the *lex situs* to govern several issues arising from the contract. The rule promotes the choice-of-law values of certainty, predictability, uniformity of decision and simplicity in determining the proper law.[170]

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

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164 The American Law Institute *Restatement of the Law Second* 634.

165 See McDougal *et al American Conflicts Law* 579. Although the rule concerns "validity", its scope is broad as it applies to such issues "as whether a married woman has capacity to sell or lease her interests in land" (The American Law Institute *Restatement of the Law Second* 587).

166 The American Law Institute *Restatement of the Law Second* 588.

167 *Ibid.*

168 See the text at fn 155–156.

169 The American Law Institute *Restatement of the Law Second* 588.

170 *Ibid.*

the proper law and the *lex domicilii*). In respect of immovable property, the *lex situs* must be added to the list.[171]

5 THE FAR EAST

5 1 India

As is the position in the other common-law countries discussed above, in India the issue of which law applies to contractual capacity is not clear.[172] It is certain, however, that the choice lies between the *lex domicilii*, the *lex loci contractus*, the proper law of the contract and the *lex situs*.[173]

5 1 1 Indian case law

5 1 1 (i) Early case law

There are two early Indian cases (*Kashibadin v Schripat*[174] and *Lachmi v Fateh*)[175] where the *lex domicilii* was applied by virtue of section 11 of the Indian Contract Act of 1872.

5 1 1 (ii) *TNS Firm, through one of its partners, TNS Chockalingam Chettiar v VPS Mohammad Hussain*[176]

VPS Mohammed Hussain, the first defendant, a merchant conducting business in Colombo (Ceylon – today Sri Lanka), became a client of TNS Firm, the plaintiff, a company in Ceylon, in January 1923. Besides purchasing rice from TNS Firm, the first defendant also entered into loan agreements with the firm. By 1 May 1923, the balance due to the plaintiff exceeded Rs 15 000. The debt was never settled and the plaintiff sued the first defendant for the outstanding amount. The second defendant was included in the proceedings on the grounds that he was the previous endorsee of certain bills of exchange handed to the plaintiff by the first defendant's agents as security. The court *a quo* granted an order against the first defendant but dismissed the suit against the second. The court was convinced that the second defendant was a minor and lacked the capacity to

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171 The legal position in Louisiana and Oregon and the proposal in the Puerto Rico *Projet* is discussed in Fredericks *Contractual Capacity* 156 and 159.

172 Diwan and Diwan *Private International Law: Indian and English* (1998) 523; and Agrawal and Gupta "India" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2003) par 202.

173 Diwan and Diwan *Private International Law* 523 assert that the *lex loci contractus* may also be seen as a possible governing legal system but they discard it as being "least justified on principle."

174 ILR (1891) 19 Bom 697, as referred to by Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202 and Diwan and Diwan *Private International Law* 523.

175 ILR (1902) 25 All 195, as referred to by Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202.

176 AIR 1933 Mad 756.

contract at the time of the transaction. On appeal, the High Court of Madras, per Ramesam J, had to pronounce, *inter alia*, on the issue of the second defendant's capacity – more particularly, whether he was exempt from liability as a result of incapacity.

It was apparent to the court that the second defendant lacked capacity in terms of the law of Ceylon, the *lex loci contractus*, but was capable according to Indian law, the *lex domicilii*. Ramesam J thus had to decide which legal system was applicable to contractual capacity in this context. He held that exception 1 to Dicey's Rule 158 was relevant in this matter.[177] Also, although previously authority predominantly favoured the application of the *lex domicilii* to capacity,[178] "as to ordinary mercantile contracts the preponderance now seems to be the other way".[179] Ramesam J was obviously referring to the application of the *lex loci contractus*. With further reference to *Sottomayer v De Barros (2)*, in which the *lex loci contractus* was applied,[180] he arrived at the conclusion that the second defendant was exempted from liability owing to incapacity under the law of Ceylon. Ramesam J thus applied the *lex loci contractus* to contractual capacity, confirming the decision of the court *a quo*.

5 1 1 (iii) *Nachiappa Chettiar v Muthu Karuppan Chettiar*[181]

In casu, a dispute arose between the Chettiar brothers, Nachiappa and Muthu Karruppan, regarding the alienation of immovable property situated in Ceylon as per a bequest in their father's will. The issue particularly was whether their father, Annamalai Chettiar, had the capacity to dispose of property that belonged to the joint family in favour of one of his sons – namely, the respondent, Muthu Karruppan. In an *obiter dictum*, the High Court of Madras pronounced on the capacity to contract in respect of immovables.

The court, through Rajamannar J, held that it is a well-established rule that "all rights over and in relation to an immovable (land) are, subject to certain exceptions, governed by the law of the country where the immovable is situate (*lex situs*)".[182] Consequently, he added that "a person's capacity to alienate an immovable by sale or mortgage, *inter vivos*, or to devise an immovable, or to acquire, or to succeed to an immovable is governed by the *lex situs*".[183]

5 1 1 (iv) *Technip Sa v Sms Holding (Pvt) Ltd*[184]

In casu, Pal J had to pronounce on whether Technip, a company incorporated in France, had acquired control of South East Asia Marine

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177 Berriedale Keith (ed) *Dicey on The Conflicts of Laws* 4ed (1927) 599.

178 With reference to *Cooper v Cooper* (1888) 13 App Cass 88.

179 *TNS Firm v VPS Mohammad Hussain supra* par 24.

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

181 AIR 1946 Mad 398.

182 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra* par 32.

183 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra* par 33.

184 [2005] 60 SCL 249 SC.

Engineering and Construction Ltd (SEAMEC), a company incorporated in India, in April 2000 or in July 2001. The date of the acquisition was important as this concerned the price of the shares payable to the respondents, the shareholders of SEAMEC. The Supreme Court stated in passing that issues of capacity are in principle governed by the *lex domicilii*, except where the application of this legal system would be contrary to public policy.[185] This is, of course, not binding on lower courts since it is merely *obiter dictum*; it may at most serve as persuasive authority. Although this is the most recent case on the issue of contractual capacity, it is unclear how the *dictum* may influence future decisions.

5 1 1 (v) Summary of Indian case law

Judicial opinion in India regarding the question of which legal system should govern contractual capacity is not uniform. There is support for the application of the *lex domicilii*[186] and the *lex loci contractus*[187] and, for the purposes of immovable property, the *lex situs.*[188] It remains to be seen what the influence on the lower courts will be of the Supreme Court's *obiter dictum* in *Technip Sa v Sms Holding (Pvt) Ltd*[189] in favour of the *lex domicilii*.

5 1 2 Indian authors

5 1 2 (i) Agrawal and Singh

Capacity in respect of non-commercial contracts, according to the authors (who differ from other common-law authority), should be governed by the putative proper law of the contract. Where such a contract relates to immovable property, their view is that the *lex situs* should be applied.[190]

In the case of commercial contracts, capacity may be governed by the *lex loci contractus*, the *lex domicilii*, the proper law of the contract or the *lex situs*.[191] The authors emphasise that there is Indian case law applying the *lex domicilii*[192] and the *lex loci contractus*[193] to capacity (also the *lex situs* in respect of immovables),[194] but not in favour of the application of the proper law doctrine.[195] Indian private international law, the authors add, should be taken as settled on the issue in favour of the *lex loci contractus*. The authors seem to maintain this view despite substantial criticism by other Indian

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185 *Technip Sa v Sms Holding (Pvt) Ltd supra* 4.

186 *Kashibadin v Shripat supra*; and *Lachmi v Fateh supra*.

187 *TNS Firm v VPS Mohammad Hussain supra*.

188 *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*.

189 *Supra*.

190 Agrawal and Singh *Private International Law in India* (2010) par 201.

191 Agrawal and Singh *Private International Law* par 201. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 201.

192 With reference to *Kashibadin v Shripat supra*.

193 With reference to *TNS Firm v VPS Mohammad Hussain supra*.

194 With reference to *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*.

195 Agrawal and Singh *Private International Law* par 202. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 202.

authors of the application of this legal system.[196] For instance, a contractant may evade incapacity by simply concluding the contract in a country where he or she would possess contractual capacity. Also, where the *locus contractus* is temporary, there is no justification in principle for applying the *lex loci contractus*.[197]

5 1 2 (ii) Diwan and Diwan

Diwan and Diwan submit that all the common-law cases (including Indian decisions) that favour the *lex domicilii* involve status, particularly matrimonial status. The *lex domicilii* was then applied to commercial contracts by way of analogy. However, according to the authors, it is generally viewed as entirely unacceptable for the *lex domicilii* to govern capacity in commercial contracts.[198]

The same can be said regarding the *lex loci contractus*, especially when considering the objections to the exclusive application of this legal system. First, a contractant may avoid incapacity simply by selecting a place where he or she is capable. Secondly, the *lex loci contractus* is inadequate where the *locus contractus* is temporary or fortuitous.[199]

The authors find the application of the proper law of the contract, objectively ascertained, to be the most appropriate approach. The proper law should not be subjectively determined as this would allow a contractant to confer capacity upon him- or herself merely by choosing a favourable legal system.[200] The authors concur with Dicey and Morris[201] in this regard that the objective proper law would provide for situations where a contractant is incapable in terms of the *lex loci contractus* but capable according to the *lex loci solutionis*. The authors here refer to the common-law position, where the *lex loci solutionis* (the law of the country of the performance) was usually chosen as the proper law of the contract.[202] The objective-proper-law approach, of course, involves the application of the legal system that has the most substantial connection with the contract and application of which would be "correct on principle and … in accordance with justice and convenience".[203]

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196 Agrawal and Singh *Private International Law* par 203. Also see Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 203.

197 Agrawal and Singh *Private International Law* par 203. Also see Diwan and Diwan *Private International Law* 524; and Agrawal and Gupta in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 203.

198 Diwan and Diwan *Private International Law* 523, referring to Dicey and Morris (undated) 745. The authors are probably referring to Morris *et al* (eds) *Dicey and Morris on the Conflict of Laws* 8ed (1967).

199 Diwan and Diwan *Private International Law* 524, referring to Morris *et al* (eds) *Dicey and Morris* 8ed 744.

200 Diwan and Diwan *Private International Law* 524.

201 Morris *et al* (eds) *Dicey and Morris* 8ed 745.

202 For the position in South African law today, see Fredericks *Contractual Capacity* 7–41.

203 Diwan and Diwan *Private International Law* 524.

The authors submit that the Indian private-international-law rule on capacity in respect of immovable property is clear: the capacity to buy and sell immovable property is governed by the *lex situs* of the property.[204]

5 1 2 (iii) Summary of Indian authors

The views held by the Indian authors are divergent. Diwan and Diwan[205] expressly reject the (exclusive) application of either the *lex domicilii* or the *lex loci contractus* to contractual capacity but support the objective proper law of the contract.[206] According to these authors, it is settled Indian law that the *lex situs* governs capacity in respect of contracts relating to immovable property.[207] Agrawal and Singh,[208] on the other hand, distinguish between non-commercial and commercial contracts. According to them, capacity in respect of non-commercial contracts should be governed by the putative proper law. When a contract relates to immovable property, the *lex situs* applies.[209] In the case of commercial contracts, capacity should be governed by the *lex loci contractus*, despite authoritative criticism in this regard.[210]

5 2 Malaysia

5 2 1 Introduction

As is the position in India and other common-law systems, there is a lack of clarity on the question of which law governs contractual capacity. Nevertheless, according to the authors, the choice of a governing law lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract.[211] It is uncertain what the position is in respect of immovable property.

No reported Malaysian decisions could be found dealing specifically with contractual capacity.[212] Malaysian conflicts authors have, however, expressed some views in this regard.

5 2 2 Malaysian authors

Hickling and Wu believe that, in a Malaysian context, the *lex domicilii* should be disregarded as a possible governing law, but that this is not true in

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

[205] Diwan and Diwan *Private International Law* 523–524.

[206] Diwan and Diwan *Private International Law* 524.

[207] Diwan and Diwan *Private International Law* 407.

[208] Agrawal and Singh *Private International Law* par 201.

[209] *Ibid*.

[210] Agrawal and Singh *Private International Law* par 203.

[211] Hickling and Wu *Conflict of Laws in Malaysia* (1995) 170–171.

[212] Hickling and Wu *Conflict of Laws* do not refer to any cases decided by the Malaysian courts.

respect of the *lex loci contractus*.[213] According to the authors, the latter legal system remains a compelling choice in addressing capacity.[214]

It does seem, however, that the authors in the final instance support the approach enunciated in Dicey and Morris's Rule 147[215] (the predecessor of Rule 228 by Dicey, Morris and Collins)[216] that a contractant should be regarded as having capacity if he is capable in terms of the proper law of the contract, the *lex domicilii* or the law of residence. This view is "liberal and realistic".[217] The authors also refer to Canadian case law, [218] where the proper law of the contract was applied to capacity.[219]

5 3 Singapore

5 3 1 Introduction

No reported Singaporean decisions could be found specifically addressing contractual capacity.[220] Being a common-law system, the choice in the private international law of Singapore nevertheless lies between the *lex domicilii*, the *lex loci contractus* and the proper law of the contract. It is uncertain what the position is in respect of immovable property.[221]

5 3 2 Singaporean authors

In addressing the issue of which legal system should be applied to contractual capacity, the conflicting considerations are the following: as a matter of protection, the *lex domicilii* should govern, but to facilitate contracting, the proper law should be decisive. According to Tan, this conflict is difficult to resolve.[222]

In respect of the proper law as an applicable legal system, the author explains that if an individual may be incapable of concluding a contract by reason of, for instance, minority, it would be arguing in a circle to apply "the proper law of the contract" to determine whether it is void. The circularity may be avoided by applying the putative proper law, as objectively determined.[223]

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213 Hickling and Wu *Conflict of Laws* 170–171.

214 *Ibid* with reference to the early English cases, *Male v Roberts supra* and *Schmidt v Spahn* (1863) Leic 229.

215 Morris (gen ed) *Dicey and Morris on the Conflict of Laws* 10ed (1980) 778.

216 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

217 Hickling and Wu *Conflict of Laws* 171.

218 *Charron v Montreal Trust Co supra*.

219 They also refer to the American decision in *Milliken v Pratt supra*. However, in the discussion above (see heading 4 2 1 (ii)), it was illustrated that the court applied the *lex loci contractus* to the issue of capacity.

220 Tan *Conflict Issues in Family and Succession Law* (1993) 471 does not refer to any decisions of the courts of Singapore.

221 Tan *Conflict Issues* 471.

222 *Ibid*.

223 *Ibid*.

In the final instance, the author supports the approach advocated by Dicey and Morris in Rule 182[224] (now Rule 228 of Dicey, Morris and Collins),[225] which he refers to as "the alternative reference test" – that is, that an individual has capacity if he or she is capable in terms of the (putative) proper law (as objectively determined), the *lex domicilii* or the law of habitual residence.[226]

6 AFRICA[227]

6 1 Ghana

Oppong[228] argues that the proper law should govern contractual capacity in Ghanaian private international law.[229] The application of the *lex domicilii*, the *lex loci solutionis* or the *lex loci actus* may lead to arbitrary results. He states:

> "The most closely connected test takes account of all connecting factors. It is more likely to lead to an outcome consistent with the expectations of the parties."[230]

He argues that, although the courts should take account of the choice of law clause in the contract,

> "it should not be allowed to prevail or exclusively govern the issue of capacity to contract. Allowing choice of law agreements to supersede other connecting factors would enable parties to evade limitations imposed on them by national laws."[231]

It seems that the objectively determined proper law usually has priority over the subjectively determined proper law if they do not coincide, but it remains unclear when account must nevertheless be taken of a choice-of-law clause in these circumstances.

6 2 Nigeria

No reported Nigerian decisions could be found specifically addressing the law applicable to contractual capacity. The Nigerian conflicts author, Agbede, has expressed some views on the issue.[232] He draws a distinction between non-commercial and commercial contracts. He submits that, in the

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224 Collins *et al* (eds) *Dicey and Morris* 11ed 1202–1207.

225 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

226 Tan *Conflict Issues* 472.

227 The legal position in South Africa is discussed in Fredericks *Contractual Capacity* 7–41.

228 Oppong *Private International Law in Ghana* (2012) par 92–94; and Oppong *Private International Law in Commonwealth Africa* (2013) 142.

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

230 Oppong *Private International Law in Ghana* par 94.

231 *Ibid*.

232 Agbede "Nigeria" in Verschraegen (ed) *Private International Law* in Blanpain (gen ed) *International Encyclopaedia of Laws* (2004) par 73.

case of the former, the *lex domicilii* should apply,[233] but in the case of the latter, the proper law of the contract should be the applicable law.[234] It is settled law in Nigeria, he continues, that the contractual capacity for the disposition of interests in immovable property, either *inter vivos* or *mortis causae*, is governed by the *lex rei sitae*.[235]

7 SUMMARY OF THE LEGAL POSITION IN COMMON-LAW JURISDICTIONS

In case law from the common-law countries, as discussed, support (as to which law should govern contractual capacity) may be found for the *lex domicilii*,[236] the *lex loci contractus*[237] and the objective proper law of the contract.[238] In respect of immovable property, the *lex situs*[239] and the *lex domicilii*[240] have been applied. It is apparent that the courts do not draw a clear distinction between commercial and non-commercial matters. For instance, although the *lex domicilii* was applied predominantly in non-commercial matters,[241] there are also two decisions concerning commercial issues where the *lex domicilii* was held to govern capacity,[242] as well as an *obiter dictum* of the Indian Supreme Court in this regard.[243] Also, although the *lex loci contractus* predominantly featured in cases concerning commercial contracts,[244] it was applied in one decision of the English Probate Division that concerned a non-commercial matter.[245] The proper law

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233 According to the author, while this legal system "governs most aspects of capacity to enter into legal relations its application on [the] issue of capacity is not exclusive" (Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75).

234 He also makes the sweeping statement that in civil-law systems "most problems of capacity are governed by a single law – the *lex patriae*" (Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 74). This statement is, however, clearly incorrect, as illustrated in Fredericks *Contractual Capacity* 109–164.

235 Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75, with particular reference to Rule 115 of Dicey and Morris (Collins (gen ed) *Dicey and Morris on the Conflict of Law* 13ed (2000) 958).

236 *Baindail v Baindail* [1946] P 122; *Cooper v Cooper supra*; *De Virte v MacLeod* (1869) 6 SLR 236; *Kashibadin v Schripat supra*; *Lachmi v Fateh supra*; *Obers v Paton's Trustees* (1897) 24 R 719; *Polson v Stewart supra*; *Sottomayor v De Barros (1)* (1877) 3 PD 1; and *Union Trust Company v Grosman supra*. Regard must also be had to the *obiter* remark by Pal J in *Technip Sa v Sms Holding (Pvt) Ltd supra* 4.

237 *Male v Roberts supra*; *McFeetridge v Stewarts & Lloyds Ltd* 1913 SC 773; *Milliken v Pratt supra*; *Sottomayer v De Barros (2) supra*; and *TNS Firm v VPS Mohammad Hussain supra*. Also see the comments by Lord Greene MR in *Baindail v Baindail supra* 128.

238 *Charron v Montreal Trust Co supra*; *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra*; *The Bodley Head Limited v Flegon supra*.

239 *Bank of Africa, Limited v Cohen supra*; *Gregg v Perpetual Trustee Company supra*; and *Nachiappa Chettiar v Muthu Karrupan Chettiar supra*.

240 *Polson v Stewart supra*.

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

242 *Union Trust Company v Grosman supra*; and *Polson v Stewart supra*.

243 *Technip Sa v Sms Holding (Pvt) Ltd supra* 4 per Pal J.

244 *Male v Roberts supra*; *McFeetridge v Stewarts & Lloyds supra*; *Milliken v Pratt supra*; and *TNS Firm v VPS Mohammad Hussain supra*.

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

of the contract (objectively ascertained) was applied in commercial[246] and non-commercial contexts.[247] There is one English decision in which the court refrained from indicating the law applicable to capacity in a commercial context.[248]

The proper law of the contract is by far the most popular legal system to be proposed by the common-law authors, either as the sole legal system or as part of an alternative reference rule in this regard. The term "proper law" in the context of contractual capacity should be understood to refer to the putative proper law. If one of the parties does not have the capacity to conclude a contract, no contract comes into existence. The proper law as applicable to contractual capacity must therefore be the legal system that would be the proper law of the contract if it came into existence. The putative proper law then determines whether the contract is in fact concluded.[249] Only a minority of authors, such as Agrawal and Singh,[250] Rogerson,[251] Crawford and Carruthers,[252] Hill and Chong,[253] Mortensen,[254] O'Brien,[255] Pitel and Rafferty,[256] and Tan[257] employ the technically correct term "putative proper law".

There is a difference of opinion among the authors as to whether the proper law of the contract must be determined objectively or whether a choice of law should be taken into account. Authors such as Carter,[258] Clarkson and Hill,[259] Crawford and Carruthers,[260] Dicey, Morris and Collins,[261] Diwan and Diwan,[262] Hill and Chong,[263] McClean and Beavers,[264] Tilbury, Davis and Opeskin,[265] and Walker[266] are of the opinion that the proper law must be determined objectively. Sychold[267] and the Australian Law Reform Commission[268] would apply the proper law either subjectively or

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246 *Homestake Gold of Australia v Peninsula Gold Pty Ltd supra*; and *The Bodley Head Limited v Flegon supra*.

247 *Charron v Montreal Trust Co supra*.

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

249 See, for e.g., Rogerson *Collier*'s *Conflict of Laws* 4ed (2001) 321.

250 Agrawal and Singh *Private International Law* par 201 in respect of non-commercial contracts.

251 Rogerson *Collier's Conflict of Laws* 321.

252 Crawford and Carruthers *International Private Law in Scotland* 2ed (2006) 437.

253 Hill and Chong *International Commercial Disputes: Commercial Conflict of Laws in English Courts* 4ed (2010) 551.

254 Mortensen *Private International Law* 404.

255 O'Brien *Smith's Conflict of Laws* 319.

256 Pitel and Rafferty *Conflict of Laws* 281.

257 Tan *Conflict Issues* 472.

258 Carter "Contracts in English Private International Law" 1987 57 *British Yearbook of International Law* 23 24.

259 Clarkson and Hill *The Conflict of Laws* 4ed (2011) 250.

260 Crawford and Carruthers *International Private Law* 437.

261 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1869.

262 Diwan and Diwan *Private International Law* 524.

263 Hill and Chong *International Commercial Disputes* 551.

264 McClean and Beevers *Morris The Conflict of Laws* 7ed (2009) 386.

265 Tilbury *et al Conflict of Laws* 771.

266 Walker *Castel and Walker* (2005/2014) § 31.5b.

267 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.

268 The Australian Law Reform Commission *Choice of Law* 101.

objectively determined. This is also the position under the Restatement (Second).[269] According to Rogerson,[270] a choice of law may be taken into account if it was not made in order to confer capacity. Pitel and Rafferty[271] are of the opinion that only an express choice of law may be taken into account; the choice of law must also be *bona fide*, legal and not in contravention of public policy.[272] According to Sykes and Pryles,[273] the parties are only allowed to choose the law of a connected state. Oppong[274] states that a choice of law must be taken into consideration but should not prevail or apply to the matter exclusively.

Various authors favour the sole application of the proper law to contractual capacity (at least insofar as commercial contracts are concerned); they include Agbede,[275] Davies, Bell and Brereton,[276] Diwan and Diwan,[277] Mortensen,[278] O'Brien,[279] Oppong,[280] Pitel and Rafferty,[281] and Tilbury, Davis and Opeskin.[282] However, more writers would apply the proper law as part of an alternative reference rule. A combination of the proper law and the law of domicile is advocated by Carter,[283] Clarkson and Hill[284] and Crawford and Carruthers.[285] This is also the position in the Restatement (Second).[286] Sychold[287] and the Australian Law Reform Commission[288] favour the application of the proper law together with the law of habitual residence. Dicey, Morris and Collins[289] are of the opinion that the proper law should be applied together with "the law of domicile and residence" ("the personal law"). It is not clear whether a person has to be domiciled and resident in the same country for the personal law to apply or whether the law of domicile and the law of residence are both applicable legal systems. This proposal is nevertheless subscribed to by authors such as Hill and Chong,[290]

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269 The American Law Institute *Restatement of the Law Second* § 187 and § 188.

270 Rogerson *Collier's Conflict of Laws* 321.

271 Pitel and Rafferty *Conflict of Laws* 281.

272 Briggs, who supports applying the subjective proper law of the contract, similarly asserts that it could be excluded on the basis of public policy (Briggs *Private International Law in English Courts* (2014) 583, 596, 615–616 and 948–949).

273 Sykes and Pryles *Australian Private International Law* 614.

274 Oppong *Private International Law in Ghana* par 94.

275 Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 74.

276 Davies *et al Nygh's Conflict of Laws* 407.

277 Diwan and Diwan *Private International Law* 524.

278 Mortensen *Private International Law* 404.

279 O'Brien *Smith's Conflict of Laws* 319.

280 Oppong *Private International Law in Ghana* par 94.

281 Pitel and Rafferty *Conflict of Laws* 281.

282 Tilbury *et al Conflict of Laws* 771.

283 Carter 1987 *British Yearbook of International Law* 24.

284 Clarkson and Hill *The Conflict of Laws* 250.

285 Crawford and Carruthers *International Private Law* 437; Angelo *Private International Law* par 75; and Rogerson *Collier's Conflict of Laws* 320–321.

286 The American Law Institute *Restatement of the Law Second* § 198(2), § 187 and § 188.

287 Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185.

288 The Australian Law Reform Commission *Choice of Law* 101.

289 Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

290 Hill and Chong *International Commercial Disputes* 551.

and McClean and Beevers.[291] Hickling and Wu[292] and Tan[293] are in favour of the simultaneous application of the proper law, the law of domicile and the law of habitual residence.

Anton and Beaumont[294] and Agrawal and Singh[295] would apply the *lex loci contractus* as the sole applicable legal system in respect of ordinary commercial contracts.[296] Dicey, Morris and Collins[297] and Clarence Smith[298] add the *lex loci contractus* as an applicable legal system in specific circumstances. According to Dicey, Morris and Collins, this legal system must apply in the alternative (together with the proper law and the law of domicile and residence) if both parties were in the same country at the time of the contract's conclusion, unless fault were present on the part of the contract-assertor in that he or she had been aware of the incapacity in terms of the proper law or the law of domicile and residence, or had not been aware thereof as a result of negligence.[299] Clarence Smith is of the opinion that the *lex loci contractus* should only be applied in the alternative (that is, in addition to the *lex domicilii*) if no fault were present on the part of the contract-assertor in that he or she had not known and could not reasonably have been expected to know that the counterpart was incapable according to his or her *lex domicilii*.[300]

In respect of contractual capacity relating to immovable property, considerable support exists for the application of the *lex situs*.[301] Clarkson and Hill,[302] O'Brien[303] and Pitel and Rafferty[304] draw a distinction between

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[291] McClean and Beevers *Morris The Conflict of Laws* 386; Fawcett, Harris and Bridge *International Sale of Goods in the Conflict of Laws* (2005) 658. Authors such as Angelo *Private International Law* par 75; Carter 1987 *British Yearbook of International Law* 24; and Sykes and Pryles *Australian Private International Law* 614 merely refer to the proposal but do not express any preference.

[292] Hickling and Wu *Conflict of Laws* 171.

[293] Tan *Conflict Issues* 472.

[294] Anton and Beaumont *Private International Law* 2ed (1990) 276. Also see Beaumont and McEleavy *Private International Law AE Anton* 3ed (2011) 491.

[295] Agrawal and Singh *Private International Law* par 203.

[296] Hickling and Wu *Conflict of Laws* 170–171; and Cheng *The Rules of Private International Law* 71 and 128.

[297] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865.

[298] Clarence Smith 1952 *International and Comparative Law Quarterly* 470.

[299] Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865. The statement is made in the context of art 11 of the Rome Convention and art 13 of the Rome I Regulation.

[300] *Ibid.*

[301] Agbede in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 75; Agrawal and Singh *Private International Law* par 201 (but only in respect of non-commercial contracts); Anton and Beaumont *Private International Law* 604; Beaumont and McEleavy *Private International Law* 940; Briggs *Private International Law* 583; Clarence Smith 1952 *International and Comparative Law Quarterly* 471; Clarkson and Hill *The Conflict of Laws* 474; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1332–1333; Davies *et al Nygh's Conflict of Laws* 669; Diwan and Diwan *Private International Law* 407; Mortensen *Private International Law* 460; O'Brien *Smith's Conflict of Laws* 551; Pitel and Rafferty *Conflict of Laws* 326; Rogerson *Collier's Conflict of Laws* 384; Walker *Halsbury's Laws of Canada* (2011) 618; and Walker *Castel and Walker* 6ed § 31.4d. Also see Walker *Halsbury's Laws of Canada* (2006) 517. The courts also applied this legal system in *Bank of Africa, Limited v Cohen supra*; *Nachiappa Chettiar v Muthu Karuppan Chettiar supra*; and *Gregg v Perpetual Trustee Company supra*.

[302] Clarkson and Hill *The Conflict of Laws* 474–476.

[303] O'Brien *Smith's Conflict of Laws* 551–552.

local and foreign immovable property. In the first-mentioned scenario, the *lex situs* must apply but the proper law of the contract[305] should govern capacity in respect of foreign immovables. Sykes and Pryles[306] reject the *lex situs*, as they prefer the application of the proper law (subjectively or objectively determined) to govern capacity in this context. The American Law Institute follows a different approach. In terms of the Restatement (Second), capacity in respect of contracts involving immovables is governed by the subjectively and objectively determined proper law,[307] the *lex domicilii*,[308] as well as the *lex situs*, unless it is clear that the contract should rather be governed by another law – for instance, on the basis of public policy.[309] Many of the authors,[310] as well as the Australian Law Reform Commission,[311] do not make a distinction between contracts in respect of immovables and other contracts. They are therefore presumably of the opinion that the general arrangement with regard to contractual capacity should also apply in respect of immovable property.

8 DEVELOPMENT OF SOUTH AFRICAN PRIVATE INTERNATIONAL LAW

The content of South African private international law of contract in respect of contractual capacity is highly comparable to the position in the common-law countries. Traditionally, both in South Africa and in the common-law systems, the *lex domicilii* and the *lex loci contractus*, as well as the *lex situs* for immovables, have been applied by the courts to questions of contractual capacity. The latest addition to this list has been the (putative objective) proper law of the contract, already accepted in case law from Australia,[312] Canada[313] and the United Kingdom.[314] As indicated,[315] the court in the South African case of *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*[316] would have preferred to apply the (putative objective) proper law to the issue of contractual capacity, rather than the *lex loci contractus*, as the *locus contractus* "could be a matter of pure chance, especially if it is made by letter or telefax or over the telephone,"[317] or could be added by electronic

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304 Pitel and Rafferty *Conflict of Laws* 327.

305 Which may or may not also be the *lex situs*: see Clarkson and Hill *The Conflict of Laws* 474–476.

306 Sykes and Pryles *Australian Private International Law* 618.

307 The American Law Institute *Restatement of the Law Second* § 198(1).

308 The American Law Institute *Restatement of the Law Second* § 198(2).

309 The American Law Institute *Restatement of the Law Second* § 189.

310 Angelo *Private International Law*; Carter 1987 *British Yearbook of International Law*; Crawford and Carruthers *International Private Law*; Hickling and Wu *Conflict of Laws*; Hill and Chong *International Commercial Disputes*; McClean and Beevers *Morris The Conflict of Laws*; Oppong *Private International Law in Ghana*; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws*; and Tan *Conflict Issues*.

311 The Australian Law Reform Commission *Choice of Law*.

312 *Homestake Gold of Australia v Peninsula Pty Ltd supra.*

313 *Charron v Montreal Trust Co supra.*

314 *The Bodley Head Limited v Flegon supra.*

315 See heading 1 of part 1 of this article: Fredericks 2018 *Obiter* 654.

316 2000 (1) SA 167 (W).

317 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172A–B; *Powell v Powell* 1953 (4) SA 380 (W) 383A–C and *Guggenheim v Rosenbaum (2)* 1961 (4) SA 21 (W) 29H–33A.

means.[318] On the facts of the particular case, no definite choice in favour of the proper law was made as the *lex loci contractus* and the proper law were the same legal system.[319] Various South African authors support the proper law as an alternatively applicable legal system.[320]

It must immediately be made clear that application of the putative proper law is not supported insofar as it is based on a purported choice of law by the parties. The parties should indeed never be allowed to confer capacity on themselves by a mere choice of law, as this would undermine the protection of the interests of the incapable party in the relevant personal-law system.[321] This view is generally accepted by common-law[322] and South African authors.[323]

However, there are convincing arguments in favour of the alternative application of the putative *objective* proper law of the contract[324] – that is, the law that would have been the proper law of the contract if the parties had had the relevant capacity at the time of the conclusion of the contract, not

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318 See s 22(2) and s 23(*c*) of the Electronic Communications and Transactions Act 25 of 2002, which will, in a South African court, determine where an electronic contract was concluded, as the *lex fori* determines the content of connecting factors (see *Ex Parte Jones: In re Jones v Jones* 1984 (4) SA 725 (W) and *Chinatex Oriental Trading Co v Erskine* 1998 (4) SA 1087 (C) 1093H; an exception is nationality (Forsyth *Private International Law. The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5ed (2012) 11; Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) par 24; and Vischer "Connecting Factors" in Lipstein (ed) *International Encyclopedia of Comparative Law* (1992) 22). An electronic contract is concluded where acceptance of the offer is received by the offeror (s 22(2)). The acceptance must be regarded as having been received at the offeror's usual place of business or residence (s 23(*c*)). Also see Fredericks *Contractual Capacity* 9–10, 210–211 and 220.

319 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172G–H.

320 Kahn "Conflict of Laws" 2000 *Annual Survey of South African Law* 871 876; Kahn "International Contracts – V: The General Rule in South Africa, and the Issue of Capacity" 1991 20 *Businessman's Law* 126 128; Sonnekus "Handelingsbevoegdheid van Getroudes en die Norme van die Internasionale Privaatreg" 2002 27 *TRW* 145 147–148; and Van Rooyen *Die Kontrak* 126. Schoeman *et al Private International Law* par 115 merely refer to the approach. The (objective) proper law is also the most popular approach with the common-law authors: see headings 2–6 above.

321 Fredericks *Contractual Capacity* 233, 243 and 245.

322 Carter 1987 *British Yearbook of International Law* 24; Clarkson and Hill *The Conflict of Laws* 250; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1869; Crawford and Carruthers *International Private Law* 437; Diwan and Diwan *Private International Law* 524; Fawcett and Carruthers *Cheshire, North & Fawcett Private International Law* 14ed (2008) 751; Hill and Chong *International Commercial Disputes* 551; McClean and Beevers *Morris The Conflict of Law* 386; and Rogerson *Collier's Conflict of Laws* 320. *Contra* The American Law Institute *Restatement of the Law Second* § 187 and § 188; The Australian Law Reform Commission *Choice of Law* 101; Oppong *Private International Law in Ghana* par 94; Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185; and Sykes and Pryles *Australian Private International Law* 614.

323 Edwards and Kahn *LAWSA II.2 Conflict of Laws* (2003) par 333; Forsyth *Private International Law* 337, 338, 340 and 343; Kahn 1991 *Businessman's Law* 128; Schoeman *et al Private International Law* par 107; Van Rooyen *Die Kontrak* 126.

324 As to which other legal systems should apply together with the putative objective proper law in an alternative reference rule, see Fredericks "Personal Laws and Contractual Capacity in Private International Law" 2019 1 *THRHR* 69; Fredericks "The Role of the *Lex Loci Contractus* in Determining Contractual Capacity" 2018 4 *TSAR* 754–770; Fredericks "The *Lex Rei Sitae* and Contractual Capacity in Respect of Immovable Property" 2018 2 *THRHR* 281; and Fredericks *Contractual Capacity* ch 6.

taking any express or tacit choice of law into consideration.[325] The objective proper law of the contract is the law most closely connected to the contract. Application of the objective proper law would allow most aspects of a contract to be governed by the same legal system, which would be convenient for the parties and the courts. Application of the objective proper law would lead to more legal certainty (if the rules in this regard are reasonably predictable; and definitely if compared to the application of the *lex domicilii*). Uniform application of the objective proper law would promote international harmony of decision by overcoming the continued dichotomy between (primarily civil-law) states that traditionally apply nationality and (primarily common-law) legal systems that apply domicile as the prime connecting factor in respect of contractual capacity. Finally, application of the objective proper law would be in line with the justified expectations of the parties.[326] The South African courts should therefore consider adding the putative objective proper law as one of the legal systems that govern contractual capacity. The *Tesoriero* case is the forerunner in this process.[327]

Application of the proper law mainly provides a protection mechanism for the capable contracting party (although the result in a particular case will always depend on the content of the relevant legal systems). However, the interests of both the capable and incapable parties need to be taken into account.[328] The following limitation on the application of the putative objective proper law is therefore proposed to effect the envisaged balance: the proper law should not be applied if the capable contractant was aware of his or her counterpart's incapacity under relevant personal law(s)[329] at the time of conclusion of the contract, or was unaware thereof as a result of negligence.[330]

The proposed limitation is ultimately based on a decision of the French *Cour de cassation*, *Lizardi v Chaize*,[331] which was later accepted, in a modified form, in Article 11 of the Rome Convention on the Law Applicable to Contractual Obligations[332] and Article 13 of the Rome I Regulation on the Law Applicable to Contractual Obligations.[333] The so-called *Lizardi* rule originally featured in the context of limitation of the scope of application of the *lex loci contractus* (not the proper law) to contractual capacity.[334] No support for a *Lizardi*-like rule could be found in any common-law cases. Only one common-law author could be found (outside the context of Article 11 and Article 13 of the Rome Convention and the Rome I Regulation,

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325 Fredericks *Contractual Capacity* 5, 105, 226, 247 and 248.

326 Fredericks *Contractual Capacity* 226–234.

327 *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd supra* 172G–H. Also see *Guggenheim v Rosenbaum (2) supra* 29H–33A and *Powell v Powell supra.*

328 Fredericks *Contractual Capacity* 233–234 and 243–246.

329 See Fredericks 2019 *THRHR* 69–82.

330 Fredericks *Contractual Capacity* 247–249.

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

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

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

334 See Fredericks *Contractual Capacity* 116–120 and 212–225.

respectively) advocating a similar rule. According to Clarence Smith, the *lex domicilii* in principle applies to contractual capacity; the *lex loci contractus* applies in the alternative only if the capable contractant could not reasonably be expected to know that the counterpart was incapable in terms of his or her *lex domicilii*.[335] The South African author Van Rooyen has been inspired by the *Lizardi* rule to formulate a similar exception in the context of the application of the proper law. He argues in favour of the alternative application of the *lex domicilii* and the proper law of the contract. However, the proper law should not be applied where the contract assertor knew, or should reasonably have known, of his counterpart's incapacity in terms of the *lex domicilii*.[336] The proposed exception to the application of the putative objective proper law at the end of the previous paragraph is directly inspired by this idea but moulded in the terminology of Articles 11 and 13 of the Rome Convention and the Rome I Regulation.

The current author supports, both for the purposes of the common-law systems and South African private international law, the development of the putative objective proper law of the contract as one of the legal systems to govern contractual capacity as part of an alternative reference rule.[337] However, the application must be limited as suggested by the *Lizardi*-inspired rule from civil-law origin as provided above.[338] From this contribution, it is clear that comparative studies should be as wide as possible and include common-law, civil-law and mixed jurisdictions, as well as regional, supranational and international instruments, where appropriate.[339]

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335 Clarence Smith 1952 *International and Comparative Law Quarterly* 470; Collins *et al* (eds) *Dicey, Morris and Collins* 15ed 1865, referring to the Rome instruments.

336 Van Rooyen *Die Kontrak* 126; *Kent v Salmon supra* 639–641, Forsyth *Private International Law* 340 fn 145 and Sonnekus 2002 *TRW* 146.

337 In Belgian private international law, the proper law is the primary (sole) applicable legal system governing capacity (Belgian Private International Law Code (2004) ch II, art 34 § 2), while in Oregon the proper law of the contract and the law of habitual residence apply in the alternative (Oregon's Conflict Law Applicable to Contracts (2001) s 5). In Louisiana (Civil Code of Louisiana (1991) art 3539) and Venezuela (Venezuelan Act on Private International Law (1998) art 16), capacity is governed through the alternative application of the proper law of the contract and the *lex domicilii*. Also see the Puerto Rican *Projet* (*Projet* for the Codification of Puerto Rican Private International Law (1991) ch 2, arts 36 and 39). The alternative application of the proper law and the *lex domicilii* is also supported by authors such as Carter 1987 *British Yearbook of International Law* 24; Clarkson and Hill *The Conflict of Laws* 250; and Crawford and Carruthers *International Private Law* 437. Also see The American Law Institute *Restatement of the Law Second* § 198(2), § 187 and § 188. There is also support for the application of the proper law and the law of habitual residence (Sychold in Verschraegen (ed) in Blanpain (gen ed) *International Encyclopaedia of Laws* par 185 and the Australian Law Reform Commission *Choice of Law* 101). On other possible legal systems to form part of the envisaged alternative reference rule, for instance personal legal systems, the *lex loci contractus* (in specific circumstances) and, for immovable property, the *lex situs*, see Fredericks 2019 *THRHR* 69–82, Fredericks 2018 *TSAR* 754–770 and Fredericks 2018 *THRHR* 281. See, in general, Fredericks *Contractual Capacity* ch 6.

338 Also compare the conflicts code of Oregon (Oregon's Conflicts Law Applicable to Contracts (2001) s 5(1) and (2)) and the Puerto Rican *Projet* (*Projet* for the Codification of Puerto Rican Private International Law (1991) ch 2, arts 36 and 39).

339 See, in general, Martinek "Comparative Jurisprudence – What Good Does It Do? History, Tasks, Methods, Achievements and Perspectives of an Indispensable Discipline of Legal Research and Education" 2013 *TSAR* 39.