

THE COMMON-LAW AUTHORS ON CONTRACTUAL CAPACITY IN PRIVATE INTERNATIONAL LAW

1 Introduction

Contractual capacity in private international law concerns the law applicable to the competence of a natural person to create rights and duties by concluding a contract with another (natural or juristic) person or persons (see for the substantive law on contractual capacity in South Africa, Hutchison and Pretorius *The Law of Contract in South Africa* 2ed (2012) 149; and Nagel *Commercial Law* 4ed (2011) 73). Sometimes it is implied that contractual capacity is no longer such an important issue in private international law due to, for instance, the emancipation of married women (*cf* Tilbury, Davis and Opeskin *Conflict of Laws in Australia* (2002) 770; and on the other hand, Schwenzler, Hachem and Kee *Global Sales and Contract Law* (2012) 203 state, in general: “The legal capacity to enter into contracts is sometimes a neglected topic in the context of the sale of goods”). However, it is suggested that this development indeed increases the relevance of the topic, as today a husband’s contractual capacity could be dependent on the consent of his spouse, while a century ago this was invariably the position only in respect of the wife’s contractual capacity (see Sonnekus “Handelingsbevoegdheid van Getroudes en die Norme van die Internasionale Privaatreg” 2002 27 *Journal for Juridical Science* 145). In any event, there may be many non-Western legal systems where a married women’s contractual capacity remains limited. In respect of the age of majority, it is true that many legal systems now accept 18 years as the legal age. Nevertheless, a substantial minority of legal systems adhere to ages above or below (see Mankowski *J von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Internationales Recht der natürlichen Personen und der Rechtsgeschäfte* (2013) 74–104; Reithmann and Martiny *Internationales Vertragsrecht. Das internationale Privatrecht der Schuldverträge* 7ed (2010) 1878–1880; and Schwenzler *et al Global Sales and Contract Law* 204–205 and 2011). Contractual capacity may also be affected by mental illness, curatorship (for instance, in the case of prodigality and insolvency) or emancipation (Hutchison and Pretorius *The Law of Contract in South Africa* 149; and Nagel *Commercial Law* 73). It is therefore clear that contractual capacity continues to play an important role in private international law.

Nonetheless, the law in this regard is far from clear in South Africa. There is authority in case law for the *lex rei sitae* or the *lex situs* (the law of the country where the property is situated) to govern capacity in contracts involving immovable property (*Ferraz v d’Inhaca* 1904 TH 137). In respect of other contracts, the courts have applied the *lex domicilii* (the law of the

country of domicile) (*Powell v Powell* 1953 (4) SA 380 (W), discussed by Fredericks “Contractual Capacity in Private International Law: Interpreting the *Powell* case” 2006 69 *THRHR* 279–286), the *lex loci contractus* (the law of the country where the contract is concluded) (*Kent v Salmon* 1910 TPD 637) and the (putative) (objective) proper law of the relevant contract (*Tesoriero v Bhyjo Investments Share Block (Pty) Ltd* 2000 (1) SA 167 (W); *cf Powell v Powell*; and *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W)). A clear choice between these legal systems has not yet crystallised. There is also no Supreme Court of Appeal (nor Constitutional Court) decision in this regard and therefore no binding authority.

An investigation of the views held by the common-law authors on contractual capacity in private international law may therefore prove valuable in addressing the issue. An analysis is offered in the concluding remarks on whether the views held by the authors have been received in South African case law.

2 The common-law authors

South African private international law is based on Roman-Dutch law with strong influence from the English common law (Schoeman, Roodt and Wethmar-Lemmer *Private International Law in South Africa* (2014) par 1–4; see also Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* 5ed (2012) 41–47; and Forsyth “The Provenance and Future of Private International Law in South Africa” 2002 *TSAR* 60). The opinions of the Roman-Dutch jurists of the 17th and 18th centuries therefore remain relevant in the South African conflict of laws. Ulric Huber, although a Roman-Frisian jurist, has always been accepted as an important common-law authority (see, eg, Forsyth *Private International Law* 42–43). The discussion will focus on authors such as Rodenburg (*Tractatus de Jure Conjugum cum Tractatione Praeliminaris de Jure quod Oritur ex Statutorum vel Consuetudinum Descrepantium Conflict (De Jure Conjugum)*), Paulus Voet (*De Statutis Eorumque Concursu Liber Singularis* translated by Edwards and Kriel *The Selective Paulus Voet* (2007) (*De Statutis*)), Johannes Voet (*Commentarius ad Pandectas* translated by Gane *The Selective Voet being the Commentary on the Pandects* (1955) (*Commentarius*)), Huber (*Heedendaegse Rechtsgeleertheyt, soo Elders, als in Frieslandt Gebruikelyk* translated by Gane *The Jurisprudence of My Time (Heedendaegse Rechtsgeleertheyt)* (1939) (*HR*)), Van Bijkershoek (*Observationes Tumultuariae* (1926) (*Obs Tum*)) and Van der Keessel (*Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam* and *Theses Selectae Juris Hollandici et Zelandici ad Supplendam Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam, et Definiendas Celebriores Juris Hollandici Controversias, in Usum Auditorum Evulgatae* translated by Van Warmelo *Voorlesinge oor die Hedendaegse Reg na aanleiding van De Groot se “Inleiding tot de Hollandse Rechtsgeleerdheid”* (1961) (*Praelectiones* and (*Th*) respectively)).

Common-law authors as Rodenburg (*De Jure Conjugum* 1.3.1, as referred to by Van Rooyen *Die Kontrak in die Suid-Afrikaanse Internasionale Privaatreg* (1972) 15), Paulus Voet (*De Statutis* 4.3.3 and 4.3.4), Johannes

Voet (*Commentarius ad Pandectas* 4.1.29, 4.4.8 and 27.10.11), Huber (*HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41) and Van der Keessel (*Praelectiones* 73, 75, 98, 101 and 102 (*Th* 27 and 42)) were of the opinion that, in general, the *lex domicilii* should govern status and contractual capacity (at least as far as movable property is concerned – see the text below on immovable property). (Van der Keessel *Praelectiones* 98 (*Th* 42) submitted that applying the law of domicile is sensible – a traveller could not be a minor (lacking contractual capacity) in one instance and a moment later be a major (possessing such capacity), depending on his or her geographical presence.) Rules in this regard were namely seen to be personal in nature in terms of the then prevalent statute theory (Paulus Voet *De Statutis* 4.3.3 and 4.3.17; Johannes Voet *Commentarius* 1.4 App 2; and Van der Keessel *Praelectiones* 75 (*Th* 27)). (On the statute and comity theories and their influence in Roman-Dutch law, see Forsyth *Private International Law* 30–45.) The applicable rules would determine, for example, “whether a woman or minor is or is not to be allowed to make a contract without the consent of husband or guardian” (Johannes Voet *Commentarius* 1.4 App 2).

Van der Keessel provided the following examples. If a person from the Veluwe of 21 years old concluded a contract in Holland, he would be held to possess contractual capacity, although the majority age in Holland was 25 years. The reason is that the *lex domicilii*, the law of the Veluwe, provided that a male person became a major at age 20 and a female at 18. However, if a young man from Holland of 21 years old concluded a contract in the Veluwe, he would not have the required capacity to do so as his law of domicile regarded him as a minor (Van der Keessel *Praelectiones* 102 (*Th* 42)).

The author further employed the example of a 20-year-old domiciliary from Holland who obtained majority status by marriage according to the law of that province. In Friesland, majority could not be acquired by marriage. If the person from Holland concluded a contract in Friesland, he would be regarded as a major, as he had this status in Holland. The law of Holland *qua lex domicilii* applied (Van der Keessel *Praelectiones* 104 (*Th* 42)).

The *lex domicilii* was often said to apply on the basis of comity (Paulus Voet *De Statutis* 4.3.17; Johannes Voet *Commentarius* 4.1.29, 4.4.8 and 27.10.11; Van der Keessel *Praelectiones* 98, 102 and 104 (*Th* 42)). For instance, Johannes Voet stated that

“the question whether one is a major or a minor ... is to be decided by the law of the domicile, so that one who is a minor at the place of his domicile is to be deemed to be such anywhere in the world, and *vice versa* – whether you would have that to be the rule in strict law, or (more correctly) as a matter of comity” (Johannes Voet *Commentarius* 4.1.29 (translation Gane); also see 27.10.11; and Rodenburg *De Jure Conjugum* 2.1 as referred to by Van Rooyen *Die Kontrak* 15).

Huber was of the opinion that minors, married women and others with limited capacity, as determined under the relevant law of domicile, “enjoy the rights that persons of like capacities possess or are subject to in each place” (Huber *HR* 1.3.38; also see Huber *HR* 1.3.40 and 1.3.41). For instance, a

young man of 20 or 21 years old, domiciled in Utrecht, could sell (immovable) property in Friesland as he was recognised as a major in Friesland on the basis of the law of Utrecht (the *lex domicilii*), and a major, in terms of the law of Friesland (the *lex loci contractus*), of course, had the capacity to alienate property (Huber *HR* 1.3.40). (Naturally, a major would also have that capacity in terms of the law of Utrecht. See the example involving the *Senatusconsultum Macedonianum* below, which more clearly illustrates the difference between Huber's view and that of Van der Keessel. Huber here applied the *lex situs* in respect of immovables, but see below for a discussion in this regard.)

Various authors therefore suggest that Huber distinguished between status, governed by the law of domicile, and the consequences of that particular status, governed by the *lex loci contractus* (see Forsyth *Private International Law* 338; and Schoeman *et al Private International Law in South Africa* par 109). Nonetheless, Huber elsewhere unequivocally and repeatedly states that *capacity* is governed by the *lex domicilii*: Huber (*HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41). A distinction between status and its consequences was supported by Van der Keessel, referring to the work of Huber in this regard (*Praelectiones* 104 (*Th* 42)). However, Van der Keessel added that individuals could not obtain a wider capacity than they would have possessed in terms of the *lex domicilii* (Van der Keessel *Praelectiones* 104 (*Th* 42)). It seems that Van der Keessel proposed a cumulative reference rule in this regard: an individual would be held to have capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex loci contractus*. (See on the notion of a cumulative reference rule, Neels "Substantiewe Geregtheid, Herverdeling en Begunstiging in die Internasionale Familiereg" 2001 *TSAR* 692 707.)

An example involving the *Senatusconsultum Macedonianum* (found in *Digesta* 14.6), as provided by Van der Keessel (*Praelectiones* 104 (*Th* 42)), is useful in illustrating the different views of Huber and Van der Keessel in this regard. A young man of 25 from Friesland concluded a contract of loan in Holland. His father was still alive. In terms of Frisian law, where the *Senatusconsultum* was received and applied unabridged, the son, although a major, would have a perpetual exception at his disposal against a claim for repayment of the loan (unless, of course, his father was already deceased at the conclusion of the contract of *mutuum*). In terms of the law of Holland, the *Senatusconsultum* was a defence only available to minors (persons under 25) (see Lokin, Brandsma and Jansen *Roman Frisian Law of the 17th and 18th Century* (2003) 38–39; and Zimmermann *The Law of Obligations. Roman Foundations of the Civilian Tradition* (1992) 177–181). If one were to apply Huber's view here (as discussed above), one would recognise the son's status as a major on the basis of the law of domicile (the law of Friesland). However, the consequences of that status would be governed by the *lex loci contractus*, the law of Holland, where the defence was not available to majors. Van der Keessel, again, was of the opinion that the son would nevertheless be able to invoke the *Senatusconsultum Macedonianum* as he would be able to do so in terms of the law of Friesland. He required the son to have capacity in terms of both the law of Holland and that of Friesland before being liable (Van der Keessel *Praelectiones* 104 (*Th* 42)).

Another example may be provided to illustrate the difference between the views of Huber and Van der Keessel, although not based on a specific common-law text. In terms of the *lex domicilii* (the law of A) a minor does not possess contractual capacity whatsoever. In terms of the *lex loci contractus* (the law of B) a minor between 7 and 18 years of age, in general, does not have the capacity to conclude contracts, but he or she is able to conclude contracts in respect of essential goods (*cf* par 15[2] and [3] of the Hungarian Private International Law Code (1979)). Natural person X, aged 20 and domiciled in country A, is a minor in terms of the law of A but would be a major in terms of the law of B. Assume that X concludes a contract for essentials in country B. According to the distinction between status and the consequences of that status, as ascribed to Huber, X is, for the purposes of the law of B (including its private international law), recognised as a minor as the *lex domicilii* applies in respect of status. However, the law of B applies in respect of the consequences of the incapacity of minors. As such, X will be bound to the contract in respect of essential goods. However, according to Van der Keessel, X will not be bound as he or she does not have the capacity to conclude such contracts in terms of the *lex domicilii*.

Van Bijkershoek proposed the application of the *lex loci contractus* as the general rule. A certain case, which was presented before the *Hoge Raad*, involved a minor Dutch domiciliary who effected a donation in Austria, where he would have been a major. The court decided that Dutch law should govern, but Van Bijkershoek advocated the application of Austrian law *qua lex loci contractus* (Van Bijkershoek *Obs Tum* no 71). (There is, however, evidence to suggest that Van Bijkershoek did not regard the *lex loci contractus* to be applicable in all situations. This is deduced from Van Bijkershoek's commentary on another decision of the *Hoge Raad* (*Obs Tum* no 1523), as referred to by Van Rooyen (*Die Kontrak* 21).)

With regard to contracts relating to immovable property, Johannes Voet (*Commentarius* 4.4.8) and Van der Keessel (*Praelectiones* 103 (*Th* 42)) in principle supported the application of the *lex situs*. (One text of Huber (*HR* 1.3.45) may be cited in favour of the *lex situs* but another (*HR* 1.3.40) in favour of the *lex domicilii* as the governing law in respect of immovable property.) Voet referred to the Flemish author Burgundius in this regard:

“[A] man of [read: domiciled in] Ghent who has passed the twentieth year of his age can sell and solemnly transfer feudal properties in Hainault ... because in Hainault anyone is deemed a major who has completed his twentieth year, though at Ghent it is only the fulfilment of the twenty-fifth year which brings majority” (Burgundius *Ad Consuetudines Flandriae aliarumque Gentium, Tractatus Controversiarum* Treatise 1, nn 7 and 8, as referred to by Johannes Voet *Commentarius* 4.4.8; translation Gane).

Van der Keessel, however, submitted that the application of the *lex situs* could not confer a wider capacity than the *lex domicilii* would have done (Van der Keessel *Praelectiones* 103 (*Th* 42)). An individual therefore had capacity only if he or she had this capacity in terms of both the *lex domicilii* and the *lex situs*. Van der Keessel clearly advocated a cumulative reference rule also in the context of immovable property. (See Neels 2001 *TSAR* 707 on the notion of a cumulative reference rule.)

Johannes Voet, Huber and Van der Keessel all proposed exceptions to the primarily applicable rules in favour of the *lex loci contractus*. Examples of these are found only in cases where foreign court orders were involved. However, the same principle would probably have applied to determine the applicable legal system in cases where no such court order was relevant.

In this regard, Johannes Voet (*Commentarius* 27.10.11) and Van der Keessel (*Praelectiones* 103 (*Th* 42)) required fraud on the part of the incapable party (having brought the contract assessor under the impression that he or she did possess contractual capacity) for the *lex loci contractus* to be applicable. Voet (*Commentarius* 27.10.11), in addition, required the ignorance (or good faith) of the contract assessor but also that the ignorance was reasonable in the circumstances. (This was the position where the incapable individual fraudulently concealed his incapacity, while the other contractant was in good faith and indeed deceived by the incapable party. See Johannes Voet *Commentarius* 27.10.11.) He provided the following example:

“Of course if a person who is altogether ignorant of an order of court, and who lives in another country where the order has not been published, has made a contract with a prodigal who craftily conceals that he has been formally interdicted from his property, it would be just for the person who has been so cozened by the prodigal to be relieved on the ground of just mistake, so that he has just as effective an action as if he had contracted with another who had not been interdicted from his property. This assumes that the ignorance is quite reasonable, and that, if it is demanded, he shall himself confirm his good faith by the scruple of an oath” (Johannes Voet *Commentarius* 27.10.11; translation Gane).

Van der Keessel also required the *bona fides* of the contract assessor (*Praelectiones* 103 (*Th* 42)) but, in addition, that the fraud of the incapable contractant would have prejudiced the first-mentioned party (*Praelectiones* 104 (*Th* 42)).

Huber formulated a more general approach, namely that the primary applicable legal system may be excluded “for reasons of equity” (Huber *HR* 1.3.39). He provided an example in terms of which the contract assessor “had been kept in ignorance of the fact” of the incapacity, referring to his or her *bona fides*, as well as the fraud of the incapacitated party (Huber *HR* 1.3.39).

3 Conclusion

According to Van Rooyen, it is difficult to obtain a clear impression from the works of the common-law authors (Van Rooyen *Die Kontrak* 23). Forsyth agrees, stating that the old authorities “spoke with an uncertain voice on the question of capacity”, recognising “the need for flexibility” in this regard (Forsyth *Private International Law* 338). The common-law authors utilised the *lex domicilii* and the *lex loci contractus* with some flexibility, taking into account the need for an equitable outcome in the particular case. In respect of contracts relating to immovable property, support for the *lex situs* existed.

The legal systems governing capacity according to the common-law authors were all received in South African case law: the *lex domicilii* in

Powell v Powell, the *lex loci contractus* in *Kent v Salmon* and the *lex situs* in *Ferraz v d'Inhaca* (in respect of immovable property). The support for the application of the (putative) (objective) proper law of the relevant contract in *Tesoriero v Bhyjo Investments Share Block (Pty) Ltd*, is not based on Roman-Dutch law but rather on the opinion of Dicey and Morris (Collins *et al Dicey and Morris on the Conflict of Laws Vol 2* 12ed (1993) 1271–1275; for today, see Collins *et al Dicey, Morris and Collins on the Conflict of Laws Vol 2* 15ed (2012) 1865–1871), writing in the context of English private international law.

The differentiation between status and its consequences, ascribed to Huber (*HR* 1.3.36, 1.3.37, 1.3.38, 1.3.40 and 1.3.41), and advocated by Van der Keessel (*Praelectiones* 104 (*Th* 42)), has not been received in South African case law as it never formed part of the argumentation of any of the courts involved (although Forsyth *Private International Law* 339 is of the opinion that the distinction could provide an explanation for the decision in *Kent v Salmon*). The cumulative reference rules proposed by Van der Keessel (*Praelectiones* 104 (*Th* 42)) have never been considered. The exceptions to the general rules (as proposed by Johannes Voet (*Commentarius* 27.10.11), Huber (*HR* 1.3.39) and Van der Keessel (*Praelectiones* 103 (*Th* 42))) are also not referred to in the South African decisions. It nevertheless remains important, as formulated by Huber in a general statement, that the primary applicable legal system(s) may be excluded “for reasons of equity” (Huber *HR* 1.3.39), leaving the door wide open for possible future development in this field.

Eesa Allie Fredericks
University of Johannesburg