

Contractual Capacity in Private International Law: The *Lizardi* Rule in the Far East

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Abstract

This article concerns the contractual capacity of natural persons in the conflict-of-law rules in various Far Eastern jurisdictions. In particular, attention is devoted to the so-called *Lizardi* rule, which is based on a decision of the French *Cour de cassation* in 1861. The rule provides certain conditions for the application of the law of the place of contracting in addition to the relevant personal law(s). The *Lizardi* rule, in amended form, became part of European regional and supranational private international law. The influence of the rule is traced in the conflicts codes in force in China, Japan, Macau, Mongolia, the Philippines, South Korea, Taiwan, Thailand and Vietnam. The various arrangements in these codes are compared to the original formulation of the rule in the *Lizardi* case, and with its amended form in the Rome Convention and the Rome I Regulation on the Law Applicable to Contractual Obligations. The author submits that the arrangement in the South Korean Conflict of Laws Act is the most preferable in this regard, as it constitutes a commendable *via media* between the interests of the incapacitated party and the capable contractant.

INTRODUCTION

This article concerns the contractual capacity of natural persons in the private international law rules of various legal systems in the Far East. The investigation therefore deals with the applicable law in these jurisdictions in respect of the competence of a natural person to create rights and duties by concluding a contract with another (natural or juristic) person or other persons.¹

Sometimes it is implied that contractual capacity is no longer such an important issue in private international law due to, for instance, the

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¹ According to Fu-ting Cheng, *The Rules of Private International Law Determining Capacity to Contract* (Stevens and Sons 1916) 19 and 26, contractual capacity may be defined as 'the legal qualification, independent of contract, but absolutely by law on a person as the average member of the community, to enter into legal relations binding himself without the interference of others.'

emancipation of married women.² It is submitted, however, that this development indeed increases the relevance of the topic. 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.³ 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 eighteen years as the legal age. Nevertheless, a substantial minority of legal systems adhere to ages above or below this standard.⁴ Contractual capacity may also be affected by mental illness, curatorship (for instance, in the case of prodigality and insolvency), or emancipation.⁵ It is, therefore, clear that contractual capacity continues to play an important role in private international law and will do so increasingly in future.

Investigating the rules on contractual capacity in private international law in jurisdictions in the Far East, such as China, Japan, Macau (China), Mongolia, the Philippines, South Korea, Taiwan, Thailand and Vietnam, is crucial considering the importance of these countries globally. Indeed, China and Japan currently hold the second and third positions, respectively, on the Gross Domestic Product (GDP) (nominal) ranking list.⁶ Most of the other listed jurisdictions also hold prominent positions in terms of this ranking system—South Korea (12), Taiwan (22), Thailand (26), the Philippines (34) and Vietnam (47).⁷ In addition, in terms of the list of countries by real GDP growth,⁸ Macau is ranked the highest of the relevant jurisdictions, holding the second position, followed by China (13), the Philippines (16), Vietnam (20), and Thailand (85).⁹ Therefore, in terms of both ranking systems, the listed jurisdictions perform particularly well.

The governing legal systems traditionally associated with contractual capacity are the *lex domicilii*: the law of the country of domicile; the law of

² Cf Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (OUP 2002) 770. But, see Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) who state in general (at 203): 'The legal capacity to enter into contracts is sometimes a neglected topic in the context of the sale of goods.'

³ Cf Jean Sonnekus, 'Handelingsbevoegdheid van Getroudes en die Norme van die Internasionale Privaatreg' (2002) 27(2) TRW 145.

⁴ Christoph Reithmann and Dieter Martiny, *Internationales Vertragsrecht. Das Internationale Privatrecht der Schuldverträge* (7 edn, Verlag Dr Otto Schmidt 2010) 1785–1938; and Schwenzer (n 2) 204–205 and 211.

⁵ See, eg Schwenzer (n 2) 203.

⁶ Statistics Times, 'International Monetary Fund World Economic Outlook' (2017) <<http://statisticstimes.com/economy/countries-by-projected-gdp.php>> accessed 15 February 2018.

⁷ With Macau and Mongolia coming in at positions 85 and 135 respectively out of 191 jurisdictions.

⁸ CIA, 'The World Factbook' <<https://www.cia.gov/library/publications/the-world-factbook/rankorder/2003rank.html>> accessed 15 February 2018.

⁹ With South Korea, Mongolia, Taiwan and Japan coming in at positions 114, 153, 156 and 174 respectively, out of 223 jurisdictions.

the country of habitual residence; the *lex patriae*: the law of the country of nationality; the *lex loci contractus*: the law of the country where the contract in question was concluded; and, where the contract concerns immovable property, also the *lex rei sitae* or the *lex situs*: the law of the country where the immovable property is situated. In recent times, the proper law of the contract (the law of the country to which the contract is most closely connected) also came to play an important role in various legal systems.¹⁰ The law of domicile, habitual residence and nationality, either individually or in combination, are also referred to as an individual's personal law.

In many civil-law-oriented jurisdictions, the primarily applicable legal systems (such as the *lex patriae*, the *lex domicilii* and/or the law of habitual residence) are applied to capacity together with the *lex loci contractus* as an additional applicable legal system in certain types of scenarios. This appears to have emanated from an approach adopted by the French Court of Cassation in 1861, in the case of *Lizardi v Chaize*.¹¹ Lizardi, a Mexican national, twenty-two years of age, lacking capacity in terms of his personal law, concluded a contract for the sale of jewellery with a jeweller in Paris (France). According to French law, however, he would have been a major and possessed the necessary capacity. The *Cour de cassation* did not take his minority in terms of Mexican law into consideration. The court held:

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

¹⁰ See, in general, Eesa Fredericks, *Contractual Capacity in Private International Law* (Dr Jur thesis, EM Meijers Instituut, Leiden Law School 2016).

¹¹ Cass Req 16 janv 1861 Sirey 1861 (1) 305 DP 1861 (1) 193.

quoique âgé alors de plus 22 ans, était cependant encore mineur d'après les lois de son pays.¹²

It was, therefore, decided that, in the particular circumstances, French law in principle applied to the contractual capacity of a foreigner where the contract was concluded in France.¹³ The personal legal system of a foreigner reasonably speaking, need not be taken into consideration by the counterpart. The reasoning behind this rule is that, in respect of regular commercial contracts, it cannot be expected that an enquiry must be made into the content of the personal legal system (here, the *lex patriae*) of the foreigner.¹⁴

From the decision, it may be deduced that the *lex loci contractus* is applied in addition to the primarily applicable law (the law which applies in any event, without reference to conditions or requirements), the *lex patriae* in French law, where a contractant, incapable in terms of his or her personal law concluded a contract in the forum state where he or she would have had contractual capacity. However, the *lex loci contractus* shall not be applied where the capable contractant was or should have been aware of his or her counterpart's incapacity at the moment of contracting.

The arrangement extracted from the *dictum* is called 'the *Lizardi* rule'.¹⁵ Therefore, in its original formulation, the *Lizardi* rule entails the application of the *lex loci contractus* (which will also be the *lex fori*)¹⁶ on condition that (1) the contract was concluded in the forum state; and (2) there is no fault on the part of the capable contractant.¹⁷

¹² John Clarence Smith, 'Capacity in the Conflict of Laws: A Comparative Study' (1952) 1 Intl Comp LQ 457, translates this passage as follows: 'It cannot be a Frenchman's duty to know the laws of the various nations and in particular their provisions concerning minority, majority and the extent of the obligations which foreigners are civilly capable of assuming: it is enough for the validity of the contract that the Frenchman has dealt *without carelessness, without imprudence, and in good faith* [own italics]. Here it is not established that the defendants knew that the plaintiff was a foreigner when they dealt with him; in selling him the goods in which they traded they acted in complete good faith; the price of these sales, though considerable, was yet not disproportionate to Lizardi's wealth; these goods were supplied to him in the presence of his family and with no objection taken on their part; the sales were even to some extent on terms profitable to him; and there was nothing to suggest to the defendants that Lizardi, though over 22, was yet a minor by his own country's laws.'

¹³ Having regard to the reasoning underlying the decision (the national interest in the protection of businesses located in France), the author argues elsewhere that it is unlikely that the outcome would have differed had the jeweller not been a French citizen. See Fredericks (n 10) 117.

¹⁴ See also Volker Lipp, 'Verkehrsschutz und Geschäftsfähigkeit im IPR' (1999) 63 RabelsZ 107.

¹⁵ Georges Delaume, *American–French Private International Law* (2 edn, Oceana Publications 1961) 118, refers to the *Lizardi* rule as a manifestation of the 'intérêt national' (national interest) theory. See also Ole Lando, 'Contracts' in Kurt Lipstein (ed), *International Encyclopaedia of Comparative Law* (Mouton JCB Mohr 1976) 95; and Lipp (n 14) 107.

¹⁶ See the text at (n 24).

¹⁷ On the possibility of nationality as an additional requirement, see Fredericks (n 10) 118.

It is clear that condition (2), in this context, plays the role of an exception to the applicability of the *lex loci contractus*. The line of argumentation therefore involves three steps. Step 1: the application of the legal system applicable in principal (the default legal system or primarily applicable law), namely the *lex patriae*. Step 2: the additional application of the *lex loci contractus* where condition 1 is present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant. Fault exists where the latter contractant was aware of the counterpart's incapacity (in terms of the counterpart's *lex patriae*) at the conclusion of the contract, or was not aware thereof, as a result of negligence. The existence of fault, therefore, leads to the non-application of the *lex loci contractus*. This method of argumentation is referred to as the three-step model.¹⁸

The principle espoused in the *Lizardi* rule has been received in an amended form in Article 11 of the regional European Rome Convention¹⁹ which has, for contracts concluded as from 17 December 2009, been replaced with the supranational European Rome I Regulation.²⁰ Article 13 of the Regulation, the equivalent of Article 11 of the Convention, reads:

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

Articles 11 and 13, therefore, provide for the application of the *lex loci contractus* in addition to the law applicable to capacity in terms of the *lex fori*'s private international law, when certain requirements are fulfilled, namely, that the contractants were present in the same country at the moment of contracting, and that the incapable party had capacity in terms of the *lex loci contractus* (which capacity he or she lacked in terms of the primarily applicable legal system), unless the capable contractant was aware of the incapacity, or was unaware thereof due to negligence.

This means that Articles 11 and 13 have the same effect as *Lizardi*: the application of the *lex loci contractus* in addition to the primarily applicable legal system. However, in terms of the articles, the contractants are merely required to have been in the same country at the moment of contracting for the *lex loci contractus* to be applied as an additional legal system, while, in terms of the *Lizardi* rule, the contract must have been concluded in the

¹⁸ See the text at (n 61–62) on the so-called two-step model.

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

²⁰ Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I).

forum state. Articles 11 and 13 are, therefore, comprehensive versions of the rule articulated in *Lizardi*, because they also apply to contracts concluded abroad and, as such, have a broader scope of application.²¹ In conformity with the original *Lizardi* rule, the articles make provision for a fault-related exception to the application of the *lex loci contractus* by way of the three-step model as explained above.²²

The *Lizardi* rule has influenced the formulation of the rules pertaining to the additional application of the *lex loci contractus* in the vast majority of civil codes and other statutory arrangements.²³ The purpose of this article is to examine the extent of the influence of this rule on the private international law codes of the Far East. To this end, a comparative study is undertaken of the conflicts codes of China, Japan, Macau, Mongolia, the Philippines, South Korea, Taiwan, Thailand and Vietnam. The general private international law rules on contractual capacity in these jurisdictions will be canvassed first,²⁴ followed by an analysis of *Lizardi*'s influence on certain aspects of the rules.²⁵

The article does not include a discussion of the private international law rules in Far Eastern jurisdictions of the common-law tradition, such as Bangladesh, Hong Kong, India, Malaysia and Pakistan. The rules on capacity in these jurisdictions are unique to the common-law context and not readily comparable to the civil-law counterparts. The common-law rules on contractual capacity in private international law demonstrate no direct influence of the *Lizardi* decision.

In this article, a combined reference to particular legal systems, as in *lex loci contractus / lex fori*, denotes the phenomenon that the first-mentioned legal system is primarily applicable, but that it will always coincide with the second one due to the specific requirements for its application. In some legal

²¹ Paul Vonken, *Mr C Assers Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht. Internationaal Privaatrecht. Deel 1. Algemeen Deel IPR* (Kluwer 2013) 128; Pierre Mayer and Vincent Heuzé, *Droit International Privé* (10 edn, Montchrestien 2010) 395–396; Marie-Laure Niboyet and Géraud de Geouffre de la Pradelle, *Droit International Privé* (2 edn, Librairie Generale de Droit et de Jurisprudence 2009) 179–180.

²² See the text at (n 17–18).

²³ For conflicts codifications outside of the Far East, see, eg, the Civil Code of Algeria 1975, ch II, art 10; the Civil Code of Angola 1966, art 28(2); the Bulgarian Private International Law Code 2005, art 50(2); the Code on the Law of Persons and the Family 1989, ch II, art 1018 (Burkina Faso); the Civil Code of Egypt 1948, art 11; the Introductory Act to the Civil Code 1896, 1994, 2008, s12 (Germany); the Legal Capacity and Guardianship Law 1962, s77 (Israel); the Italian Statute on Private International Law 1995, ch II, art 23(2); the Civil Code of Mozambique 1966, art 28(2); Book 10 of the Dutch Civil Code 2012, art 11(2) (the Netherlands); the Civil Code of Portugal 1966, art 28(2); the Civil Code of Qatar 2004, art 11; the Civil Code of Quebec 1991, Book 10, ch 1, art 3086; the Swiss Federal Statute on Private International Law 1987, ch 2, art 36(1); the Civil Code of Syria 1949, art 12(1); and the Civil Code of the United Arab Emirates 1985, art 11.

²⁴ See 'The Relevant Provisions in the Private International Law Codifications of the Civil-Law Jurisdictions of the Far East' below.

²⁵ See 'Influence of the *Lizardi* Rule' below.

systems, for instance, the *lex loci contractus* only applies if the contract was concluded in the forum state.²⁶ The *lex loci contractus* will then always be the *lex fori*. If the *lex fori* applies on condition that the contract was concluded and the performance had to be effected in the forum state,²⁷ the reference '*lex fori / lex loci contractus / lex loci solutionis*' is used.

THE RELEVANT PROVISIONS IN THE PRIVATE INTERNATIONAL LAW CODIFICATIONS OF THE CIVIL-LAW JURISDICTIONS OF THE FAR EAST China

The current Chinese Private International Law Act was adopted on 28 October 2010 and entered into force on 1 April 2011.²⁸ The relevant provision is contained in Chapter II,²⁹ Article 12, which stipulates:

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

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

The law of the country of habitual residence thus generally governs the contractual capacity of a natural person.³⁰ However, if a natural person lacks capacity in terms of the law of habitual residence, but is capable under the *lex loci contractus*, then the latter legal system applies, except where the relevant contract concerns family or succession law. If the contract does not fall under the latter categories, the law of habitual residence and the *lex loci contractus* therefore govern on an equal basis. The contractual capacity of a

²⁶ See the discussion below of the law in Macau, Mongolia, Taiwan, Thailand and Vietnam.

²⁷ As in Vietnamese conflicts law. See 'Vietnam' below.

²⁸ Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2010. See, in general, Zheng Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Law in the People's Republic of China* (Edward Elgar 2016).

²⁹ Ch II is titled: 'Civil Entities'.

³⁰ The concept of habitual residence has been given content in s 15 of the Interpretation of the Supreme People's Court of 10 December 2012 (in force as of 7 January 2013). In terms of the paragraph, an individual would be accepted as habitually resident at a particular place if he or she has resided there for at least a year and this place of residence forms the centre of his or her life. For the German text of s 15, see 'Erläuterungen des Obersten Volksgerichts zu einigen Fragen des "Gesetzes der Volksrepublik China über das anwendbare Recht auf zivilrechtliche Beziehungen mit Außenberührung"' teil 1 (2013) ZChinR/J of Chinese L 110. See also Peter Leibkühler, 'Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China' (2013) ZChinR/J of Chinese L 89–98 and Xue Tong, 'Neue Regeln des Obersten Volksgerichts: Die erste Justizielle Interpretation des Chinesischen IPR-Gesetzes' (2014) 34 IPRax 206–211.

natural person in Chinese private international law is therefore determined generally by the law of the country of habitual residence and the *lex loci contractus* on an equal basis.

Japan

On 1 January 2007, the Act on the General Rules of Application of Laws³¹ entered into force. The provisions relating to contractual capacity are contained in (Chapter 3, section 1) Article 4³² of the Act.³³

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

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

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

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

³¹ Act on the General Rules of Application of Laws 2006.

³² Chapter 3 is titled 'General Rules on Applicable Law', s 1 relates specifically to 'Persons' and art 4 to 'A Person's Legal Capacity'.

³³ Act on the General Rules of Application of Laws 2006. English translation in (2006) 8 Y Priv Intl L 427–441.

Macau (China)

The relevant sections of the Civil Code of Macau³⁴ are found in (Book I, Title 1, Chapter III,³⁵ Division II, Subdivision I) Articles 24, 27 and 30 (subdivision IV) and Article 46.³⁶

Article 24 reads:

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

Article 27 of the code states as follows:

1. Transactions concluded in [Macau]³⁷ by a person who lacks legal capacity under the applicable personal law shall not be annulled on the ground of such incapacity, if the person would be considered capable under the internal law of [Macau], if it were applicable.
2. This exception no longer exists if the other party was aware of the incapacity or if the transaction is unilateral, pertains to family law or to the law of succession or deals with the transfer of immovables situated outside the territory of [Macau].
3. If the person without legal capacity concludes the transaction outside [Macau], the law of the place where the transaction is concluded shall apply, provided it contains rules identical to those laid down in the preceding paragraphs.

The relevant provisions of Article 30 read as follows:

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

³⁴ Civil Code of Macau 1999. English translation in (2000) 2 Y Priv Intl L 343. See, in general, António Marques dos Santos, 'The New Private International Law Rules of Macao' (2000) 2 Y Priv Intl L 133–151.

³⁵ Book I is the 'General Part', Title 1 refers to the rules of law, their interpretation and application, while ch III relates to the rights of foreigners and private international law.

³⁶ Division II is titled 'Choice of Law Rules', while Subdivision I concerns the scope and determination of the personal law. Arts 24, 27 and 30 focus on the scope of the personal law, the exceptions with respect to the effects of incapacity and determining the personal law respectively. Subdivision IV relates to the law applicable to property and art 46 deals with the capacity to acquire or transfer real rights in immovable property.

³⁷ The translated text of the code reads 'Macao', from the original Portuguese, but the correct English translation is 'Macau'.

Article 46, which relates to immovable property, provides that '[t]he capacity to acquire or transfer real rights in immovable property shall also be governed by the law of the place where the property is situated if that law thus provides; otherwise the personal law shall apply.'

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

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

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

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

Mongolia

Article 543(2) and (5) in Chapter 62 of the Mongolian Civil Code deals with the law applicable to contractual capacity in private international law.³⁸ According to sub-article 2, the contractual capacity of foreign citizens shall be governed by the *lex patriae*. Sub-article (5) states that the capacity of foreign citizens relating to contracts which are concluded in Mongolia shall be governed by the *lex fori*.

³⁸ Civil Code of Mongolia 2002. See, for a translation (2003) 23 IPRax 381.

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

Philippines

There is only one provision relating to contractual capacity in the private international law section of the Philippine Civil Code.³⁹ Article 15 reads: ‘Laws relating to family rights and duties, or to the status, condition and legal capacity of persons are binding upon citizens of the Philippines, even though living abroad.’ This conflicts rule entails that the contractual capacity of citizens of the Philippines is governed by the *lex patriae*, which will also be the *lex fori*.

South Korea

Contractual capacity is covered in (Chapter 2) Articles 13 and 15 of the South Korean Conflict of Laws Act.⁴⁰ Article 13 provides the following:

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

Article 15 reads:

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

³⁹ Civil Code of the Philippines 1949. English translation in Jan Kropholler and others, *Außereuropäische IPR-Gesetze* (Max-Planck-Institut für ausländisches und internationales Privatrecht 1999) 712.

⁴⁰ Conflict of Laws Act of the Republic of Korea 2001. See, Petar Šarčević and Paul Volken, ‘Law Amending the Conflict of Laws Act of the Republic of Korea’ (2002) 5 Y Priv Intl L 315. Ch 2 is titled ‘Persons’ and art 13 focuses specifically on the capacity to act. Art 14 concerns ‘Declaration of Quasi-Incompetence and Incompetence’ and art 15 is titled ‘Protection of Transactions’. See, in general, Kwang Hyun Suk, ‘The New Conflict of Laws Act of the Republic of Korea’ (2003) 5 Y Priv Intl L 99–141.

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

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

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

Taiwan

Paragraph 10 in Chapter 2 of the Taiwanese Private International Law Act⁴¹ contains the relevant provisions regarding contractual capacity. This paragraph provides that the contractual capacity of a person shall be governed by the *lex patriae*. Further, a change in nationality by a capable person shall not result in the loss or limitation of contractual capacity. Where a foreign contractant concludes a contract in Taiwan ('the Republic of China'), while lacking contractual capacity according to his or her *lex patriae* but possessing such in terms of the *lex loci contractus* / *lex fori*, then the latter legal system shall apply. This exception, however, shall apply neither where the contract in issue relates to family and succession law, nor to immovable property located outside Taiwan.

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

Thailand

The Thai Act on Conflict of Laws⁴² also contains provisions relating specifically to contractual capacity. These are found in section 10, Chapter II⁴³ of the Act. This section reads as follows in the English translation:

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

⁴¹ Private International Law Act 2010. German translation available at <<http://www.mpipriv.de/files/pdf3/ipr-gesetztaiwan2010.pdf>> accessed 15 February 2018.

⁴² Act on Conflict of Laws 1938, in Kropholler (n 39) 810.

⁴³ Ch II is titled 'Status and Capacity of Persons'.

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

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

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

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

Vietnam

The relevant provisions of the Vietnamese Civil Code⁴⁴ are contained in Article 831, sections (1) and (2). The English translation reads:⁴⁵

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

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

⁴⁴ Civil Code of the Socialist Republic of Vietnam 1996 in Kropholler (n 39) 1040.

⁴⁵ Part 7 of the code relates to the 'Civil Relations with a Foreign Element' and art 831 is titled 'Legal Capacity of Foreigners'.

performance, in terms of the contract, is to take place in Vietnam but is then effected elsewhere. It also does not specify what the position is in respect of Vietnamese citizens.

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

INFLUENCE OF THE *LIZARDI* RULE

As illustrated, the majority of the conflicts codes in the Far East, which are discussed above, utilise reference rules in respect of capacity that amount to the application, if certain requirements are met, of the *lex loci contractus* in addition to the primarily applicable (personal) legal system(s)—as it is found in the *Lizardi* decision. In jurisdictions such as Japan,⁴⁶ Mongolia,⁴⁷ South Korea,⁴⁸ Taiwan,⁴⁹ Thailand⁵⁰ and Vietnam,⁵¹ the *lex loci contractus* applies in addition to the *lex patriae*,⁵² but in Macau, it applies in addition to the law of habitual residence.⁵³ The law of habitual residence is also of primary applicability in China, but the formulation of the rule suggests that it applies together with the *lex loci contractus* on an equal level.⁵⁴

It will be argued that the conditions or requirements for the additional application of the *lex loci contractus* in the cited jurisdictions have indeed been influenced by the *Lizardi* rule—extensively in some instances, and to a limited degree in others. Further, as in *Lizardi*, condition 2 plays the role of an exception within the context of the three-step model in these jurisdictions where the additional application of the *lex loci contractus* is excluded in the presence of fault on the part of the capable contractant.⁵⁵

In some jurisdictions outside of the Far East, such as Algeria,⁵⁶ Egypt,⁵⁷ Qatar,⁵⁸ Romania,⁵⁹ Syria⁶⁰ and the United Arab Emirates,⁶¹ condition 2 is

⁴⁶ Act on the General Rules of Application of Laws 2006, art 4(1).

⁴⁷ Civil Code of Mongolia 2002, art 428(2).

⁴⁸ Conflict of Laws Act of the Republic of Korea 2001, art 13(1).

⁴⁹ Private International Law Act 2010, s 10.

⁵⁰ Act on Conflict of Laws 1938, s 10.

⁵¹ Civil Code of the Socialist Republic of Vietnam 1996, art 831 s (1).

⁵² The *lex patriae* is also the primarily applicable legal system in the Philippines but the *lex loci contractus* does not play a role (Civil Code of the Philippines 1949, art 15).

⁵³ Civil Code of Macau 1999, arts 24 and 30.

⁵⁴ Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2010, art 12.

⁵⁵ See the text at (n 17–18) on the so-called three-step model.

⁵⁶ Civil Code of Algeria 1975, ch II, art 10.

⁵⁷ Civil Code of Egypt 1948, art 11.

⁵⁸ Civil Code Qatar 2004, art 11.

⁵⁹ Romanian Private International Law Code 1992, ch II, art 17.

⁶⁰ Civil Code of Syria 1949, art 12(1).

⁶¹ Civil Code of the United Arab Emirates 1985, art 11.

formulated as a requirement (the absence of fault) which must be fulfilled for the *lex loci contractus* to be applied. The line of argumentation here entails only two steps. Step 1: the application of the legal system that is applicable in principle (the default legal system or primarily applicable law). Step 2: the additional application of the *lex loci contractus* where condition 1 is present and/or the contractants were in the same country at conclusion of the contract, and/or the forum state is the country where performance is to be effected *and* fault is absent on the part of the capable contractant. Fault is absent where the contract assessor, at the time of the conclusion of the contract, was not aware of the incapacity of the other party, and the non-existence of the knowledge of the incapacity was not due to negligence. This method of argumentation is referred to as the two-step model.

I submit, however, that the three-step model (as it is found in *Lizardi*) is preferable. The three-step model conforms to that employed in the Rome instruments⁶² and numerous jurisdictions of the civil-law tradition⁶³ and is more in line with the generally accepted arrangement in respect of the onus of proof, namely, that the incapable contractant bears the burden to prove that, at the time of the conclusion of the contract, the capable party was aware of the incapacity, or was unaware thereof as a result of negligence.⁶⁴

Macanese private international law appears to have been most extensively influenced by the *Lizardi* rule. In this jurisdiction, the *lex loci contractus* / *lex fori* will only apply in addition to the primarily applicable law (the law of habitual residence) where a contractant, incapable in terms of his personal law, concluded a contract in the forum state, where he or she would have had contractual capacity. This legal system shall, however, not apply where the capable contractant was or should have been aware of the counterpart's incapacity at the moment of contracting.⁶⁵ Fault thus plays the role of an exception within the three-step model. Step 1: the application of the default legal system, namely the law of habitual residence. Step 2: the additional application of the *lex loci contractus* where condition 1 (the contract was concluded in the forum state) is present. Step 3: the exclusion of the applicability of the *lex loci contractus* where fault exists on the part of the capable contractant (condition 2). The rule therefore reflects the original

⁶² Article 11 of the Rome Convention (n 19) and art 13 of the Rome I Regulation (n 20).

⁶³ For conflicts codes outside of the Far East, see the Civil Code of Angola 1966, art 28(2); the Bulgarian Private International Law Code 2005, art 50(2); the Code on the Law of Persons and the Family 1989, ch II, art 1018 (Burkina Faso); the French Civil Code 1804, 2004, art 3; the Introductory Act to the Civil Code 1994, s 12 (Germany); the Legal Capacity and Guardianship Law 1962, s 77 (Israel); the Italian Statute on Private International Law 1995, ch II, art 23(2); the Civil Code of Mozambique 1966, art 28(2); Book 10 of the Dutch Civil Code 2012, art 11(2); the Civil Code of Portugal 1996, art 28(2); the Civil Code of Quebec 1991, Book 10, ch 1, art 3086; and the Swiss Federal Statute on Private International Law 1987, ch 2, art 36(1).

⁶⁴ See, eg Fredericks (n 10) 216, 247 and 249.

⁶⁵ Civil Code of Macau 1999, art 27(1).

formulation of the *Lizardi* rule, in that both conditions 1 and 2 as listed above are required for the additional application of the *lex loci contractus*.

Substantial influence of *Lizardi* is also encountered in South Korean private international law. The *lex loci contractus* is applied when a contractant, incapable in terms of the *lex patriae*, concluded a contract with the counterpart while present in the same country, where the incapable party would have had contractual capacity.⁶⁶ Compared to condition 1 in the original formulation of the rule (the contract must have been concluded in the forum state), the arrangement in the South Korean Act extends the protection afforded the creditor to a wider scenario. The Act further provides that the *lex loci contractus* shall not apply where the capable contractant was or should have been aware of the counterpart's incapacity at the moment of contracting.⁶⁷ The presence of fault, therefore, plays the role of an exception; the line of argumentation here entails three steps, precisely in line with the original *Lizardi* rule, in that the default legal system is indeed the *lex patriae*. The extensive influence of *Lizardi* on South Korean conflicts law is clear: both compliance with condition 1, albeit in an extended formulation, and compliance with condition 2 are required. The rule in its extended formulation conforms to that articulated in Article 11 of the Rome Convention⁶⁸ and Article 13 of the Rome I Regulation,⁶⁹ as discussed above.

In a number of jurisdictions, the rules regarding the additional application of the *lex loci contractus* partially resemble that of *Lizardi*. In Taiwanese⁷⁰ and Thai⁷¹ private international law, the *lex loci contractus* will apply in addition to the *lex patriae* where the contract in question was concluded in the forum state, where the incapable contractant (in terms of his or her *lex patriae*) indeed had capacity. In jurisdictions such as Mongolia⁷² and Vietnam,⁷³ on the other hand, the relevant rules refer to contracts concluded in the forum state in general, irrespective of a contractant's incapacity in terms of his or her *lex patriae*. However, the *Lizardi*-inspired rule in any event only becomes relevant where the incapable party lacks the required capacity in terms of the primary applicable legal system. In all these legal systems, condition 1 in the original *Lizardi* rule—the conclusion of the contract in the forum state—is required for the additional application of the *lex loci contractus*, but not condition 2—the absence of fault on the part of the capable contractant. One therefore finds only a partial resemblance to

⁶⁶ Conflict of Laws Act of the Republic of Korea 2001, art 15(1).

⁶⁷ *ibid.*

⁶⁸ (n 19).

⁶⁹ (n 20).

⁷⁰ Private International Law Act 2010, s 10.

⁷¹ Act on Conflict of Laws 1938, s 10.

⁷² Civil Code of Mongolia 2002, art 428(4).

⁷³ Civil Code of the Socialist Republic of Vietnam 1996, art 831 s 2.

Lizardi. Nevertheless, the *Lizardi* case obviously influenced the formulation of the rules.

The rule on capacity in Japanese conflicts law is comparable to that of South Korea. As in South Korea,⁷⁴ the parties must have been in the same country (where the contractant incapable in terms of the *lex patriae* would have had capacity) at the time of contracting for the *lex loci contractus* to apply.⁷⁵ The Japanese rule thus requires compliance with the extended formulation of condition 1, but it differs from South Korean law⁷⁶ as compliance with condition 2—the absence of fault on the part of the capable contractant—is not required. It is submitted that, despite these inconsistencies with the conditions required in the original *Lizardi* rule, the Japanese Civil Code clearly reflects the influence of *Lizardi* where it provides for the additional application of the *lex loci contractus* in particular circumstances.

Chinese private international law displays only some influence of the *Lizardi* rule. The *lex loci contractus* applies where a contracting party lacks capacity in terms of the law of habitual residence, but is capable according to the former legal system.⁷⁷ The conflicts rule in this instance does not require compliance with either condition 1 or 2 of the *Lizardi* case. The *lex loci contractus* applies in general and therefore on an equal level with the law of habitual residence. The particular formulation indicating the additional application of the *lex loci contractus* in Chinese private international law nevertheless reflects some influence of the *Lizardi* rule.

The law of the Philippines is the only legal system canvassed for the purposes of this article, which displays no influence of the *Lizardi* rule. In the case of Philippine citizens, contractual capacity is governed by the *lex patriae*, which will also be the *lex fori*.⁷⁸ The conflicts rule for capacity in this jurisdiction makes no provision for the additional application of the *lex loci contractus*.

In certain jurisdictions, the *lex loci contractus* (as an additional legal system) is not applicable to particular types of contracts. This must be seen as a development of the rules on capacity post *Lizardi*, since the latter does not provide for such an exclusion. In these jurisdictions, the *lex loci contractus* does not apply in addition to the personal law when the contract in question concerns family or succession law. In Chinese⁷⁹ and Thai⁸⁰ private international law, this is the only limitation in this regard.

⁷⁴ Conflict of Laws Act of the Republic of Korea 2001, art 15(1).

⁷⁵ Act on the General Rules of Application of Laws 2006, art 4(2).

⁷⁶ Conflict of Laws Act of the Republic of Korea 2001, art 15(1).

⁷⁷ Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2010, art 12.

⁷⁸ Civil Code of the Philippines 1949, art 15.

⁷⁹ Law of the People's Republic of China on the Law Applicable to Foreign-related Civil Relations of the People's Republic of China 2010, art 12.

⁸⁰ Act on Conflict of Laws 1938, s 10.

In Macau,⁸¹ South Korea⁸² and Taiwan,⁸³ the *lex loci contractus* shall also not apply if the contract in question concerns immovable property situated abroad. A further limitation in Japanese conflicts law concerns contracts relating to immovable property situated in a country where the law regarding immovables differs from the *lex loci contractus*.⁸⁴

It may be mentioned, further, that, in Thai private international law, capacity to contract in respect of immovable property is governed by the *lex rei sitae*.⁸⁵ In Macau, the *lex situs* shall govern capacity if that law indeed stipulates that the *lex situs* applies; if not, the law of habitual residence is applicable.⁸⁶

CONCLUSION

It is clear that the *Lizardi* rule has influenced the conflicts rules pertaining to the additional application of the *lex loci contractus* in the majority of the private international law codifications of Far Eastern jurisdictions. The degree of influence was measured by comparing the respective conflicts provisions in a particular jurisdiction with the original formulation of the rule as extracted from the *Lizardi* decision. The rule relates to the additional application of the *lex loci contractus* where the contract was concluded in the forum state—condition 1—and there was no fault on the part of the capable contractant—condition 2.

The most extensive influence is found in Macau, where the relevant rule reflects the original formulation of *Lizardi*, requiring compliance with both the original conditions for the additional application of the *lex loci contractus*.⁸⁷ South Korean private international law is substantially influenced by *Lizardi*, despite the rule not reflecting the original formulation. The relevant rule, which requires (i) the contractants having been present in the same country at the moment of contracting (an extension of condition 1) and (ii) the absence of fault (condition 2 in its original formulation),⁸⁸ resembles Article 13 of the Rome I Regulation⁸⁹ in European private international law. In Japan, compliance with an amended condition 1 (similar to that in South Korean private international law) is sufficient for the additional application of the *lex loci contractus*.⁹⁰ Compliance with condition 2 is not required. The respective rules in jurisdictions such as

⁸¹ Civil Code of Macau 1999, art 27(2).

⁸² Conflict of Laws Act of the Republic of Korea 2001, art 15(2).

⁸³ Private International Law Act 2010, s 10.

⁸⁴ Act on the General Rules of Application of Laws 2006, art 4(3).

⁸⁵ Act on Conflict of Laws 1938, s 10.

⁸⁶ Civil Code of Macau 1999, art 46.

⁸⁷ Civil Code of Macau 1999, art 27(1).

⁸⁸ Conflict of Laws Act of the Republic of Korea 2001, art 15(1).

⁸⁹ (n 20).

⁹⁰ Act on the General Rules of Application of Laws 2006, art 4(2).

Mongolia,⁹¹ Taiwan,⁹² Thailand⁹³ and Vietnam⁹⁴ partially resemble that of *Lizardi*, in that only compliance with the original condition 1 is required. Chinese private international law reflects less influence of the *Lizardi* rule, since compliance with none of the traditional conditions are required: the personal law and the *lex loci contractus* apply on an equal level. However, the mere fact that the *lex loci contractus* applies in addition to the personal law, as well as the particular formulation utilised in this regard, nevertheless reflect the influence of the *Lizardi* case. The *Lizardi* rule had no effect on Filipino private international law, as no provision for the additional application of the *lex loci contractus* exists.⁹⁵

It is suggested that the adaptation of the *Lizardi* rule as applied in South Korean private international law is the most preferable. As the *lex loci contractus* will be applicable to instances where the contract was concluded between parties in the same country, the rule's scope is broadened in that it is not limited to contracts entered into in the forum state (original condition 1). The creditor's protection is, therefore, extended to a wider scenario. This would often also avoid disputes over where exactly the contract was concluded.⁹⁶ On the other hand, the South Korean conflicts rules also provide for the non-application of the *lex loci contractus* where fault is present on the part of the capable contractant (condition 2). This is a necessary exception as it protects the interests of the incapable party. Where fault is present on the part of the capable contractant, the incapable party may rely on his or her incapacity in terms of the primarily applicable legal system(s) and avoid liability, since no valid contract came into existence. Where fault is absent, however, the capable party will be protected, in that he or she may duly insist upon the enforcement of the contract. As such, the provision carefully balances the interests of both parties to the contract. Therefore, the approach of South Korean private international law, namely the extended formulation of condition 1, together with the exception (condition 2), constitutes a commendable *via media* between the interest of the incapacitated party and the capable contractant.

⁹¹ Civil Code of Mongolia 2002, art 428(4).

⁹² Private International Law Act 2010, s 10.

⁹³ Act on Conflict of Laws 1938, s 10.

⁹⁴ Civil Code of the Socialist Republic of Vietnam 1996, art 831 s 2.

⁹⁵ Civil Code of the Philippines 1949, art 15.

⁹⁶ Especially when concluded by post, telephone or electronically.