Capacity

1. Conceptual diversity

In Europe one encounters a divergent terminology in respect of capacity: English writers usually refer to capacity or contractual capacity. The latter is the ability to enter into contracts. In Germany the term *Geschäftsfähigkeit* is used. It is the capacity to carry out → juridical acts. The term was introduced into German law in 1875 by Prussian legislation. The capacity to make a → will is a mere qualification of the *Geschäftsfähigkeit*. The same is not true in England for the capacity to make a will and contractual capacity. Prior to 1875 the term *Handlungsfähigkeit* was in use in Germany. It translates as capacity to act and includes *Geschäftsfähigkeit* and delictual capacity (→ law of torts/delict, general and *lex Aquilia*). The → *Bürgerliches Gesetzbuch* (BGB) does not make use of this term any longer. Its equivalent is still in use in Italy (*capacità di agire*). Also in France the term *capacité d'exercice* is still used, but it equals today rather the German *Geschäftsfähigkeit*.

In Germany *Geschäftsfähigkeit* is distinguished from *Rechtsfähigkeit*. The latter translates as legal capacity and is the capacity to hold rights and duties. In France one refers to *capacité de jouissance* and in Italy to *capacità giuridica*. In England the term of capacity also includes legal capacity. In Europe everyone, without exception, has such legal capacity. Different concepts of capacity also appear in the law of civil procedure. The capacity to sue and to be sued (*Parteifähigkeit*) corresponds in Germany to legal capacity and the capacity to act before a court (*Prozeßfähigkeit*) to *Geschäftsfähigkeit*. Furthermore, the broad term of capacity in England, or the term *capacité* in France, at times denotes the power of disposition. Finally, in law and economics transactional capacity is sometimes used to label the preconditions of making a rational economic decision. At the heart of these different concepts of capacity are different policy considerations and it is, thus, essential to keep them separate. This article will focus exclusively on contractual capacity.

2. Conflicting policy considerations

In principle everyone has contractual capacity.

However, there are exceptions. A contract is formed by consent. A prerequisite for entering into a contract is, thus, the ability to form a will. In most European legal systems contracts entered into by a person who lacks this ability are null and void. Examples of such persons may be infants or individuals who suffer from dementia or are under the influence of severe drugs.

Further exceptions are made to protect certain categories of persons: minors have the ability to form a will, but often lack the experience to realize the risks of a contract. Nevertheless, it would not be reconcilable with their party autonomy (→ freedom of contract) to exclude them from entering into contracts altogether and to hold that all contracts to which they are a party are null and void. This is why many legal systems speak with respect to them not of incapacity, but of limited capacity. The means to protect those persons has to be more flexible. Such a flexible approach may, however, impair market security, and it might result in a factual exclusion of minors from entering into contracts if this interest of the market were to be disregarded. Despite the numerous differences in how to effectuate the protection of minors, all European legal systems are in agreement that there needs to be a fixed age and that all persons obtain full contractual capacity once they have reached that age.

However, even after the attainment of this age it may be necessary to protect those who are mentally weak or vulnerable and are thus lacking the mental power that is a prerequisite for making a rational choice. Today, these cases become ever more important due to demographic changes in society. Again, those who need protection may not just be excluded from entering into contracts altogether as this would impair their autonomy. The means to protect them needs to be flexible.

3. Historical overview

Looking only at those persons who were *sui iuris*, in → Roman law four age groups were distinguished: the first age group were the *infantes*. The word *infantes* derives from *fari* (to speak). Thus, *infantes* were those who could not speak. Originally, the individual ability to speak was decisive. Later the age of seven was accepted as a fixed age. *Infantes* were incapable of entering into a contract. Any contract to which they were party was absolutely void (→ invalidity).

The second age group lasted until the attainment of puberty. Again, originally the individual sexual maturity was decisive. Later the age of 14 for boys and 12 for girls was accepted. An *impubes* had a *tutor* and he could obligate himself only with the authority of this *tutor*. If the *auctoritas tutoris* was missing, the *impubes* acquired rights under the contract but he was not obliged (limping contract, *negotium claudicans*). If the other party to the contract had already performed his side of the bargain, he was granted an action in → unjustified enrichment. This was not a *condictio* because the *condictio* was part of the *ius civile* and an *impubes* could not be obliged in *ius civile*. The other party was granted an action based on the *ius honorarium*, the *actio in quantum locupletior factus est*, which was, unlike the *condictio* in its original form, limited to the surviving enrichment. If the *impubes* had performed his side of the bargain and if he decided not to enforce his rights under the contract, he was able to claim back his performance with a *condictio*. Finally, if the *impubes* had acted with the authority of his *tutor*, the contract could be rescinded with an *in integrum restitutio*. This praetorian remedy applied, however, only if the contract was to the minor's detriment.

Boys over the age of 14 and girls over the age of 12 were able validly to enter into contracts. However, soon it was discovered that even they might need protection from being overreached. A *lex Laetoria* thus introduced a third age group: those under the age of 25 (*minores*). A *minor* could apply to the magistrate for a *curator*. If a minor had been overreached and an action on that contract was initiated against him, the *praetor* could grant him an *exceptio*. If the minor wanted to rescind such contract, he could apply for an *in integrum restitutio*. Already under Roman law, the position of *impubres* and of *minores* was assimilated. As a result, only the attainment of the 7th and of the 25th year of age was crucial. A man of 20 years and a woman of 18 years could on application be released by decree of the protecting means of the *lex Laetoria* and thereby attain majority even before the age of 25 (*venia aetatis*). Finally, special rules applied to the mentally ill (*furiosi*), to prodigals (*prodigi*) and to women.

4. Contractual capacity today

We are able to trace back many aspects of today's laws concerning contractual capacity to → Roman law: the distinction of different age groups and the subsequent assimilation of some of these distinctions; the grouping of persons according to individual factors versus grouping them on the basis of a fixed age; different legal consequences for the different types of incapacity (voidness, limping contract and judicial rescission); the legal consequences sometimes being triggered, as in the case of *infantes*, without any additional re-

quirement; the contract sometimes having to be to the detriment of the minor or his having been overreached; and finally we find a special treatment in the law of→ unjustified enrichment. In their further legal development, these different aspects have been modified and re-interpreted. As a consequence we find that today's laws in Europe are confusingly different in detail, but at the same time show a startling resemblance on a more abstract level.

a) Contractual incapacity of minors

Contracts of minors who have no contractual capacity are void (→ invalidity). But which minors have no contractual capacity? Is it advisable to have a fixed age with the attainment of which the person gains limited contractual capacity? This is the German approach: a person who is not yet seven years of age has no contractual capacity. Contracts into which he enters are, without exception, absolutely void. Greek and Bulgarian law adopt an identical approach but choose different age limits to draw the borderline.

Swiss law does not have a fixed age for drawing the line between incapacity and limited capacity. An individual under the age of 18 has no capacity to act if he is not capable of making a rational judgment. The ability to make a rational judgment may be missing due to infancy. Whether the ability to make a rational judgment is missing due to infancy is ascertained for each person and for each contract anew. Accordingly, individuals not yet capable of any rational judgment due to infancy have no capacity to enter into contracts. Turkish and French law adopt a similar approach.

In Austria a person under the age of seven is said to have no contractual capacity. However, a contract to which he is party is not null without exception. A contract which is commonly entered into by persons of his age and which relates to a minor matter of everyday life will become valid once he has performed his side of the bargain. From a comparative perspective such a person should not be called an *incapax*. He has limited contractual capacity. A person only has no contractual capacity if he is of an age in which persons commonly do not enter into any contracts at all. Thus, a fixed age limit as in German law is unknown to Austrian law. It differs from Swiss law in that it does not follow a subjective approach and does not ascertain whether the individual minor was able to make a rational judgment in that specific case with respect to that particular contract. It applies an objective test of whether a contract is common for persons of his age. A similar approach is taken in Poland and in Scotland.

b) Limited contractual capacity of minors

The attainment of full contractual capacity is marked by a fixed age. In the last decades this fixed age has been reduced to 18 in the whole of Europe. At the same time the possibility of emancipation before reaching this age (*venia aetatis*) has been abolished (Germany, Austria and Switzerland), yet some European legal systems still allow such a possibility, eg as a consequence of a marriage, but in most of these legal systems full contractual capacity is not obtained through marriage; the limits are only relaxed (Spain, Poland, Turkey, France, Italy, Greece, and the Netherlands).

Many legal systems in Europe have different grades of a limited contractual capacity. In Austria, for instance, the requirements under which a contract of an underage person will be valid differ for those who are under 7, 14 and 18, and the limits of the contractual capacity are respectively relaxed. A similar approach is adopted in Poland, Scotland and Greece.

A person who is lacking contractual capacity is not able to enter himself into any valid contract. In contrast, a person with limited contractual capacity has the ability to enter into certain contracts himself. In Europe a number of different factors apply for holding whether a contract is valid. According to Swiss law the individual ability to make a rational judgment with respect to the specific contract is crucial. Other legal systems assume that a person of a certain age has some ability to make a rational judgment and then apply an objective test to decide which contracts are valid. Still other legal systems demand an individual ability to make a rational judgment and combine this minimum requirement with a typifying approach. Such factors are, eg, whether the contract relates to necessaries, whether the contract is common to persons of his age, whether an adult exercising reasonable prudence would have entered into such contract, whether the contract terms are reasonable, whether it is legally or economically beneficial, neutral or detrimental to the minor, whether he is circumvented or overreached, whether the contract serves to protect his estate, whether the contract relates to matters of daily life, whether the contract was entered into with the authority of a legal representative, or whether the minor will perform his side of the bargain with means that were given to him for his free disposal. Special rules also apply to certain types of contracts, such as contracts of employment.

All of these factors aim at protecting the minor. However, only those which are transparent to others will produce market security. In some legal systems it is thought that another purpose of the rules on limited contractual capacity of minors is to introduce them to a responsible use of their autonomy. Yet, such educational impetus is alien to private law. This is, therefore, not an underlying rationale of these rules but simply a side-effect. Furthermore, most of the identified factors do not even meet such an educational purpose. It would certainly not serve an educational purpose to intervene whenever a contract turns out not to be to the benefit of the minor. Some legal systems also point to the parents' right to educate their children that has to be taken into consideration. However, it can hardly be reconciled with the autonomy of the minor if his right to enter into contracts were to be limited even with respect to common, reasonable and beneficial contracts only because his parents wish him to be released from the contract. The parental rights are an internal matter alone, and they should not affect the validity of the contract. Finally, the choice of the right factors depends on whether or not a legal system employs the institution of legal → representation.

But what happens if the contract does not belong to the class of contracts which a person with a limited contractual capacity may validly enter into? In the different European legal systems we find very different answers, but they all are merely different grades of → invalidity: in some legal systems the contract is void, either absolutely or relatively, while in other legal systems the contract is only voidable; in some of these latter systems the rescission is a self-help remedy and the contract is, thus, rescinded by notice, while in other systems it is a judicial remedy; some legal systems opt for a rescission with retrospective effect while in others rescission only works prospectively; some legal systems still employ the concept of a *negotium claudicans*; in yet other legal system the contract is void, but this voidness is only provisional and the legal representative of the minor may ratify the contract. Those legal systems which adopt different grades of limited contractual capacity opt for different grades of invalidity for each grade of limited contractual capacity and thereby try to reflect the different needs for protection. Furthermore, many legal systems also have special rules for special contracts, eg contracts of employment. Finally, if the contract is invalid or if it has been invalidated but the performances have already been exchanged, the contract will be unwound (→ unwinding of contracts). Each party will have a claim in → unjustified enrichment. The policy considerations which demand that the contract is invalidated, ie, the protection of minors, are also taken into account in this branch of law.

c) Contractual incapacity and limited capacity of adults

In the last decades the rules concerning contractual incapacity and limited contractual capacity of adults have been reformed throughout Europe. The general trend is to limit the autonomy of the persons concerned as little as possible and to react as flexibly as possible to their individual needs.

Many European legal systems still employ an incapacitation by judicial decree. Depending on the degree of the mental illness of the person concerned, there may be a complete or only partial incapacitation. At the same time a guardian will be appointed. With respect to the range of contracts the incapacitated person can enter into himself, and with respect to the legal consequences of all other contracts, a complete incapacitation is treated like incapacity and a partial incapacitation is treated like a limited capacity (Italy, Poland and Bulgaria). Furthermore, in some legal systems a mental illness may lead to incapacity even without a formal incapacitation (Italy and Germany). We find different answers to the question of whether a contract entered into by the person while in a lucid interval is valid.

Many legal systems have now created new forms of administering the affairs of those who are not capable of looking after their own interests and who are not able to form the rational judgment that is a prerequisite to consent, thereby seeking to protect and to assist them, eg *Betreuung* or *amministrazione di sostegno*. These new forms of assistance and of protection aim at limiting the autonomy of the person concerned as little as possible and at reacting as flexibly as possible to his individual needs. In some legal systems these new forms of assistance and protection replace the possibility of incapacitation (Germany and Greece). In other legal systems they were only added supplementally, and an incapacitation remains possible (Italy). In detail, we find numerous differences in Europe, as for example with respect to the question whether and to what extent the person concerned is able to contract without the authority of his guardian.

d) Legal representation

In nearly all European legal systems the person who lacks full contractual capacity has a legal

representative who acts for him. The exception is the common law. With respect to guardianship of adults the general trend of legal development is that the guardian may not act for the person concerned, but should only assist and give advice or give his consent to any or at least some contracts the person concerned enters into.

e) Misrepresenting one's own capacity

The protection of minors or of mentally ill adults assumes priority over the interests of the market not to set aside contracts. It follows that it will not help the other party if he was in → good faith as to the capacity of his contractual partner. The picture may change if the minor acted fraudulently with regard to his age (→ fraud). European legal systems differ with respect to the exact requirements of such misrepresentation (a mere misstatement as to age will normally not do) and with respect to its legal consequence (in some legal systems the minor is estopped from relying on the → invalidity; in other legal systems the minor is liable in damages to the extent of the other party's reliance interest).

f) Further means of protection during adulthood

In view of the reduction of the age of full contractual capacity to 18 and of the ongoing demographic changes the general legal tools of contract law have gained importance as a means of protection, eg when the elderly or persons who are of full age but who are still inexperienced due to their youth stand surety for close relatives. Such contracts may be void because they are immoral (Germany), they may be set aside on the basis of → undue influence (England), or they may be rescinded for breach of good faith (Scotland).

g) Private international law

The predominant approach in Europe is that a person's contractual capacity is governed by his national law. Only in a few legal systems the domicile is decisive. In England and Scotland no uniform approach prevails.

5. Legal unification

Uniform laws, community law and the numerous legal harmonization projects are, with the exception of the → *Code Européen des Contrats (Avant-projet)*, silent on substantive questions of contractual capacity. The same is largely true for those instruments that harmonize private international law. The Convention on the law applicable to Contractual Obligations of 1980 and the Rome I Reg only contain a special rule concerning the case where one party acted in good faith with respect to the other party's capacity.

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Phillip Hellwege