READER

Law 253.2, Sec. 1
Agency, Partnerships and Limited Liability Companies

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Message from Professor Buxbaum regarding the Reader:

For your convenience, I have put all of the relevant provisions of the Restatement Third, Agency into the "Reader". Obviously, you are not assigned all of them; rather, you should have them in front of you as we march through what is the U.S. equivalent of an "Agency Code" in our first session on January 10.

The excerpts from texts by DeMott (incidentally, the Chief Reporter for this Restatement) and Francis are background material; the latter particularly helpful in the comparative-law context. In that connection please recall that students from non-U.S. legal systems should have their legislation concerning "Agency" for ready reference. Occasional looks at that material will help you contextualize the U.S. material; correspondingly, reflecting on other roads to the same universal concept will do the same for the JD students.

Session One: January 10
Basic (and Universal) Agency Concepts – Actual, Implied and Apparent Authority

Restatement of the Law, Third, Agency
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Restatement of the Law, Agency 3d - Official Text

Selected sections from Chapters 1, 2, 3, 5, 6 and 7:

§ 1.01 Agency Defined

Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

§ 1.02 Parties' Labeling and Popular Usage Not Controlling

An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.

§ 1.03 Manifestation

A person manifests assent or intention through written or spoken words or other conduct.

§ 1.04 Terminology

(1) Coagents. Coagents have agency relationships with the same principal. A coagent may be appointed by the principal or by another agent actually or apparently authorized by the principal to do so.

(2) Disclosed, undisclosed, and unidentified principals.

(a) Disclosed principal. A principal is disclosed if, when an agent and a third party interact, the third party has notice that the agent is acting for a principal and has notice of the principal's identity.

(b) Undisclosed principal. A principal is undisclosed if, when an agent and a third party interact, the third party has no notice that the agent is acting for a principal.

(c) Unidentified principal. A principal is unidentified if, when an agent and a third party interact, the third party has notice that the agent is acting for a principal but does not have notice of the principal's identity.

(3) Gratuitous agent. A gratuitous agent acts without a right to compensation.

(4) Notice. A person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should know the fact to fulfill a duty owed to another person. Notice of a fact that an agent knows or has reason to know is imputed to the principal as stated in §§ 5.03 and 5.04. A notification given to or by an agent is effective as notice to or by the principal as stated in § 5.02.

(5) Person. A person is (a) an individual; (b) an organization or association that has legal capacity to possess rights and incur obligations; (c) a government, political subdivision, or instrumentality or entity created by government; or (d) any other entity that has legal capacity to possess rights and incur obligations.

(6) Power given as security. A power given as security is a power to affect the legal relations of its creator that is created in the form of a manifestation of actual authority and held for the

benefit of the holder or a third person. It is given to protect a legal or equitable title or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency under § 1.01.

(7) Power of attorney. A power of attorney is an instrument that states an agent's authority.

(8) Subagent. A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationship between an appointing agent and a subagent is one of agency, created as stated in § 1.01.

(9) Superior and subordinate coagents. A superior coagent has the right, conferred by the principal, to direct a subordinate coagent.

(10) Trustee and agent-trustee. A trustee is a holder of property who is subject to fiduciary duties to deal with the property for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee. An agent-trustee is a trustee subject to the control of the settlor or of one or more beneficiaries.

§ 2.01 Actual Authority

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

§ 2.02 Scope of Actual Authority

(1) An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act.

(2) An agent's interpretation of the principal's manifestations is reasonable if it reflects any meaning known by the agent to be ascribed by the principal and, in the absence of any meaning known to the agent, as a reasonable person in the agent's position would interpret the manifestations in light of the context, including circumstances of which the agent has notice and the agent's fiduciary duty to the principal.

(3) An agent's understanding of the principal's objectives is reasonable if it accords with the principal's manifestations and the inferences that a reasonable person in the agent's position would draw from the circumstances creating the agency.

§ 2.03 Apparent Authority

Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

§ 2.04 Respondeat Superior

An employer is subject to liability for torts committed by employees while acting within the scope of their employment.

§ 2.05 Estoppel to Deny Existence of Agency Relationship

A person who has not made a manifestation that an actor has authority as an agent and who is not otherwise liable as a party to a transaction purportedly done by the actor on that person's account is subject to liability to a third party who justifiably is induced to make a detrimental change in position because the transaction is believed to be on the person's account, if

(1) the person intentionally or carelessly caused such belief, or

(2) having notice of such belief and that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts.

§ 2.06 Liability of Undisclosed Principal

(1) An undisclosed principal is subject to liability to a third party who is justifiably induced to make a detrimental change in position by an agent acting on the principal's behalf and without actual authority if the principal, having notice of the agent's conduct and that it might induce others to change their positions, did not take reasonable steps to notify them of the facts.

(2) An undisclosed principal may not rely on instructions given an agent that qualify or reduce the agent's authority to less than the authority a third party would reasonably believe the agent to have under the same circumstances if the principal had been disclosed.

§ 2.07 Restitution of Benefit

If a principal is unjustly enriched at the expense of another person by the action of an agent or a person who appears to be an agent, the principal is subject to a claim for restitution by that person.

§ 3.01 Creation of Actual Authority

Actual authority, as defined in § 2.01, is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf

§ 3.02 Formal Requirements

If the law requires a writing or record signed by the principal to evidence an agent's authority to bind a principal to a contract or other transaction, the principal is not bound in the absence of such a writing or record. A principal may be estopped to assert the lack of such a writing or record when a third party has been induced to make a detrimental change in position by the reasonable belief that an agent has authority to bind the principal that is traceable to a manifestation made by the principal.

§ 3.03 Creation of Apparent Authority

Apparent authority, as defined in § 2.03, is created by a person's manifestation that another has authority to act with legal consequences for the person who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation

§ 3.04 Capacity to Act as Principal

(1) An individual has capacity to act as principal in a relationship of agency as defined in § 1.01 if, at the time the agent takes action, the individual would have capacity if acting in person.

(2) The law applicable to a person that is not an individual governs whether the person has capacity to be a principal in a relationship of agency as defined in § 1.01, as well as the effect of the person's lack or loss of capacity on those who interact with it.

(3) If performance of an act is not delegable, its performance by an agent does not constitute performance by the principal.

§ 3.05 Capacity to Act as Agent

Any person may ordinarily be empowered to act so as to affect the legal relations of another. The actor's capacity governs the extent to which, by so acting, the actor becomes subject to duties and liabilities to the person whose legal relations are affected or to third parties.

§ 3.06 Termination of Actual Authority--In General

An agent's actual authority may be terminated by:

(1) the agent's death, cessation of existence, or suspension of powers as stated in § 3.07(1) and (3); or

(2) the principal's death, cessation of existence, or suspension of powers as stated in § 3.07(2) and (4); or

(3) the principal's loss of capacity, as stated in § 3.08(1) and (3); or

(4) an agreement between the agent and the principal or the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf, as stated in § 3.09; or

(5) a manifestation of revocation by the principal to the agent, or of renunciation by the agent to the principal, as stated in § 3.10(1); or

(6) the occurrence of circumstances specified by statute.

§ 3.07 Death, Cessation of Existence, and Suspension of Powers

(1) The death of an individual agent terminates the agent's actual authority.

(2) The death of an individual principal terminates the agent's actual authority. The termination is effective only when the agent has notice of the principal's death. The termination is also effective as against a third party with whom the agent deals when the third party has notice of the principal's death.

(3) When an agent that is not an individual ceases to exist or commences a process that will lead to cessation of existence or when its powers are suspended, the agent's actual authority terminates except as provided by law.

(4) When a principal that is not an individual ceases to exist or commences a process that will lead to cessation of its existence or when its powers are suspended, the agent's actual authority terminates except as provided by law.

§ 3.08 Loss of Capacity

(1) An individual principal's loss of capacity to do an act terminates the agent's actual authority to do the act. The termination is effective only when the agent has notice that the principal's loss of capacity is permanent or that the principal has been adjudicated to lack capacity. The termination is also effective as against a third party with whom the agent deals when the third party has notice that the principal's loss of capacity is permanent or that the principal has been adjudicated to lack capacity.

(2) A written instrument may make an agent's actual authority effective upon a principal's loss of capacity, or confer it irrevocably regardless of such loss.

(3) If a principal that is not an individual loses capacity to do an act, its agent's actual authority to do the act is terminated.

§ 3.09 Termination by Agreement or by Occurrence of Changed Circumstances

An agent's actual authority terminates (1) as agreed by the agent and the principal, subject to the provisions of § 3.10; or (2) upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf.

§ 3.10 Manifestation Terminating Actual Authority

(1) Notwithstanding any agreement between principal and agent, an agent's actual authority terminates if the agent renounces it by a manifestation to the principal or if the principal revokes the agent's actual authority by a manifestation to the agent. A revocation or a renunciation is effective when the other party has notice of it.

(2) A principal's manifestation of revocation is, unless otherwise agreed, ineffective to terminate a power given as security or to terminate a proxy to vote securities or other membership or ownership interests that is made irrevocable in compliance with applicable legislation. See §§ 3.12-3.13.

§ 3.11 Termination of Apparent Authority

(1) The termination of actual authority does not by itself end any apparent authority held by an agent.

(2) Apparent authority ends when it is no longer reasonable for the third party with whom an agent deals to believe that the agent continues to act with actual authority.

§ 3.12 Power Given as Security; Irrevocable Proxy

(1) A power given as security is a power to affect the legal relations of its creator that is created in the form of a manifestation of actual authority and held for the benefit of the holder or a third person. This power is given to protect a legal or equitable title or to secure the performance of a duty apart from any duties owed the holder of the power by its creator that are incident to a relationship of agency under § 1.01. It is given upon the creation of the duty or title or for consideration. It is distinct from actual authority that the holder may exercise if the holder is an agent of the creator of the power.

(2) A power to exercise voting rights associated with securities or a membership interest may be conferred on a proxy through a manifestation of actual authority. The power may be given as security under (1) and may be made irrevocable in compliance with applicable legislation.

§ 3.13 Termination of Power Given as Security or Irrevocable Proxy

(1) A power given as security or an irrevocable proxy is terminated by an event that

(a) discharges the obligation secured by the power or terminates the interest secured or supported by the proxy, or

(b) makes its execution illegal or impossible, or

(c) constitutes an effective surrender of the power or proxy by the person for whose benefit it was created or conferred.

(2) Unless otherwise agreed, neither a power given as security nor a proxy made irrevocable as provided in § 3.12(2) is terminated by:

(a) a manifestation revoking the power or proxy made by the person who created it; or

(b) surrender of the power or proxy by its holder if it is held for the benefit of another person, unless that person consents; or

(c) loss of capacity by the creator or the holder of the power or proxy; or

(d) death of the holder of the power or proxy, unless the holder's death terminates the interest secured or supported by the power or proxy; or

(e) death of the creator of the power or proxy, if the power or proxy is given as security for the performance of a duty that does not terminate with the death of its creator.

§ 3.14 Agents with Multiple Principals

An agent acting in the same transaction or matter on behalf of more than one principal may be one or both of the following:

(a) a subagent, as stated in § 3.15; or

(b) an agent for coprincipals, as stated in § 3.16.

§ 3.15 Subagency

(1) A subagent is a person appointed by an agent to perform functions that the agent has consented to perform on behalf of the agent's principal and for whose conduct the appointing agent is responsible to the principal. The relationships between a subagent and the appointing agent and between the subagent and the appointing agent's principal are relationships of agency as stated in § 1.01.

(2) An agent may appoint a subagent only if the agent has actual or apparent authority to do so.

§ 3.16 Agent for Coprincipals

Two or more persons may as coprincipals appoint an agent to act for them in the same transaction or matter.

§ 5.03 Imputation of Notice of Fact to Principal

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of the fact is material to the agent's duties to the principal, unless the agent

(a) acts adversely to the principal as stated in § 5.04, or

(b) is subject to a duty to another not to disclose the fact to the principal.

§ 5.04 An Agent Who Acts Adversely to a Principal

For purposes of determining a principal's legal relations with a third party, notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter, intending to act solely for the agent's own purposes or those of another person. Nevertheless, notice is imputed

(a) when necessary to protect the rights of a third party who dealt with the principal in good faith; or

(b) when the principal has ratified or knowingly retained a benefit from the agent's action.

A third party who deals with a principal through an agent, knowing or having reason to know that the agent acts adversely to the principal, does not deal in good faith for this purpose.

§ 6.01 Agent for Disclosed Principal

When an agent acting with actual or apparent authority makes a contract on behalf of a disclosed principal,

(1) the principal and the third party are parties to the contract; and

(2) the agent is not a party to the contract unless the agent and third party agree otherwise.

§ 6.02 Agent for Unidentified Principal

When an agent acting with actual or apparent authority makes a contract on behalf of an unidentified principal,

(1) the principal and the third party are parties to the contract; and

(2) the agent is a party to the contract unless the agent and the third party agree otherwise.

§ 6.03 Agent for Undisclosed Principal

When an agent acting with actual authority makes a contract on behalf of an undisclosed principal,

(1) unless excluded by the contract, the principal is a party to the contract;

(2) the agent and the third party are parties to the contract; and

(3) the principal, if a party to the contract, and the third party have the same rights, liabilities, and defenses against each other as if the principal made the contract personally, subject to §§ 6.05-6.09.

§ 6.04 Principal Does Not Exist or Lacks Capacity

Unless the third party agrees otherwise, a person who makes a contract with a third party purportedly as an agent on behalf of a principal becomes a party to the contract if the purported agent knows or has reason to know that the purported principal does not exist or lacks capacity to be a party to a contract.

§ 6.05 Contract That Is Unauthorized in Part or That Combines Orders of Several Principals

(1) If an agent makes a contract with a third party that differs from the contract that the agent had actual or apparent authority to make only in an amount or by the inclusion or exclusion of a separable part, the principal is subject to liability to the third party to the extent of the contract that the agent had actual or apparent authority to make if

(a) the third party seasonably makes a manifestation to the principal of willingness to be bound; and

(b) the principal has not changed position in reasonable reliance on the belief that no contract bound the principal and the third party.

(2) Two or more principals may authorize the same agent to make separate contracts for them. If the agent makes a single contract with a third party on the principals' behalves that combines the principals' separate orders or interests and calls for a single performance by the third party,

(a) if the agent purports to make the combined contract on behalf of disclosed principals, the agent is subject to liability to the third party for breach of the agent's warranty of authority as stated in § 6.10, unless the separate principals are bound by the combined contract;

(b) if the principals are unidentified or undisclosed, the third party and the agent are the only parties to the combined contract; and

(c) unless the agent acted with actual or apparent authority to bind each of the principals to the combined contract,

(i) subject to (1), none of the separate principals is subject to liability on the combined contract; and

(ii) the third party is not subject to liability on the combined contract to any of the separate principals.

§ 6.06 Setoff

(1) When an agent makes a contract on behalf of a disclosed or unidentified principal, unless the principal and the third party agree otherwise,

(a) the third party may not set off any amount that the agent independently owes the third party against an amount the third party owes the principal under the contract; and

(b) the principal may not set off any amount that the third party independently owes the agent against an amount the principal owes the third party under the contract.

(2) When an agent makes a contract on behalf of an undisclosed principal,

(a) the third party may set off

(i) any amount that the agent independently owed the third party at the time the agent made the contract and

(ii) any amount that the agent thereafter independently comes to owe the third party until the third party has notice that the agent acts on behalf of a principal against an amount the third party owes the principal under the contract;

(b) after the third party has notice that the agent acts on behalf of a principal, the third party may not set off any amount that the agent thereafter independently comes to owe the third party against an amount the third party owes the principal under the contract unless the principal consents; and

(c) the principal may not set off any amount that the third party independently owes the agent against an amount that the principal owes the third party under the contract, unless the principal and the third party agree otherwise.

(3) Unless otherwise agreed, an agent who is a party to a contract may not set off any amount that the principal independently owes the agent against an amount that the agent owes the third party under the contract. However, with the principal's consent, the agent may set off any amount that the principal could set off against an amount that the principal owes the third party under the contract.

§ 6.07 Settlement with Agent by Principal or Third Party

(1) A principal's payment to or settlement of accounts with an agent discharges the principal's liability to a third party with whom the agent has made a contract on the principal's behalf only when the principal acts in reasonable reliance on a manifestation by the third party, not induced by misrepresentation by the agent, that the agent has settled the account with the third party.

(2) A third party's payment to or settlement of accounts with an agent discharges the third party's liability to the principal if the agent acts with actual or apparent authority in accepting the payment or settlement.

(3) When an agent has made a contract on behalf of an undisclosed principal,

(a) until the third party has notice of the principal's existence, the third party's payment to or settlement of accounts with the agent discharges the third party's liability to the principal;

(b) after the third party has notice of the principal's existence, the third party's payment to or settlement of accounts with the agent discharges the third party's liability to the principal if the agent acts with actual or apparent authority in accepting the payment or settlement; and

(c) after receiving notice of the principal's existence, the third party may demand reasonable proof of the principal's identity and relationship to the agent. Until such proof is received, the third party's payment to or settlement of accounts in good faith with the agent discharges the third party's liability to the principal.

§ 6.08 Other Subsequent Dealings Between Third Party and Agent

(1) When an agent has made a contract with a third party on behalf of a disclosed or unidentified principal, subsequent dealings between the agent and the third party may increase or diminish the principal's rights or liabilities to the third party if the agent acts with actual or apparent authority or the principal ratifies the agent's action.

(2) When an agent has made a contract with a third party on behalf of an undisclosed principal,

(a) until the third party has notice of the principal's existence, subsequent dealings between the third party and the agent may increase or diminish the rights or liabilities of the principal to the third party if the agent acts with actual authority, or the principal ratifies the agent's action; and

(b) after the third party has notice of the principal's existence, subsequent dealings between the third party and the agent may increase or diminish the principal's rights or liabilities to the third party if the agent acts with actual or apparent authority or the principal ratifies the agent's action.

§ 6.09 Effect of Judgment Against Agent or Principal

When an agent has made a contract with a third party on behalf of a principal, unless the contract provides otherwise,

(1) the liability, if any, of the principal or the agent to the third party is not discharged if the third party obtains a judgment against the other; and

(2) the liability, if any, of the principal or the agent to the third party is discharged to the extent a judgment against the other is satisfied.

§ 6.10 Agent's Implied Warranty of Authority

A person who purports to make a contract, representation, or conveyance to or with a third party on behalf of another person, lacking power to bind that person, gives an implied warranty of authority to the third party and is subject to liability to the third party for damages for loss caused by breach of that warranty, including loss of the benefit expected from performance by the principal, unless

(1) the principal or purported principal ratifies the act as stated in § 4.01; or

(2) the person who purports to make the contract, representation, or conveyance gives notice to the third party that no warranty of authority is given; or

(3) the third party knows that the person who purports to make the contract, representation, or conveyance acts without actual authority.

§ 6.11 Agent's Representations

(1) When an agent for a disclosed or unidentified principal makes a false representation about the agent's authority to a third party, the principal is not subject to liability unless the agent acted with actual or apparent authority in making the representation and the third party does not have notice that the agent's representation is false.

(2) A representation by an agent made incident to a contract or conveyance is attributed to a disclosed or unidentified principal as if the principal made the representation directly when the

agent had actual or apparent authority to make the contract or conveyance unless the third party knew or had reason to know that the representation was untrue or that the agent acted without actual authority in making it.

(3) A representation by an agent made incident to a contract or conveyance is attributed to an undisclosed principal as if the principal made the representation directly when

(a) the agent acted with actual authority in making the representation, or

(b) the agent acted without actual authority in making the representation but had actual authority to make true representations about the same matter.

The agent's representation is not attributed to the principal when the third party knew or had reason to know it was untrue.

(4) When an agent who makes a contract or conveyance on behalf of an undisclosed principal falsely represents to the third party that the agent does not act on behalf of a principal, the third party may avoid the contract or conveyance if the principal or agent had notice that the third party would not have dealt with the principal.

§ 7.01 Agent's Liability to Third Party

An agent is subject to liability to a third party harmed by the agent's tortious conduct. Unless an applicable statute provides otherwise, an actor remains subject to liability although the actor acts as an agent or an employee, with actual or apparent authority, or within the scope of employment.

§ 7.02 Duty to Principal; Duty to Third Party

An agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct only when the agent's conduct breaches a duty that the agent owes to the third party.

§ 7.03 Principal's Liability--In General

(1) A principal is subject to direct liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.04, the agent acts with actual authority or the principal ratifies the agent's conduct and

(i) the agent's conduct is tortious, or

(ii) the agent's conduct, if that of the principal, would subject the principal to tort liability; or

(b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent; or

(c) as stated in § 7.06, the principal delegates performance of a duty to use care to protect other persons or their property to an agent who fails to perform the duty.

(2) A principal is subject to vicarious liability to a third party harmed by an agent's conduct when

(a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment; or

(b) as stated in § 7.08, the agent commits a tort when acting with apparent authority in dealing with a third party on or purportedly on behalf of the principal.

§ 7.04 Agent Acts with Actual Authority

A principal is subject to liability to a third party harmed by an agent's conduct when the agent's conduct is within the scope of the agent's actual authority or ratified by the principal; and

(1) the agent's conduct is tortious, or

(2) the agent's conduct, if that of the principal, would subject the principal to tort liability.

§ 7.05 Principal's Negligence in Conducting Activity Through Agent; Principal's Special Relationship with Another Person

(1) A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

(2) When a principal has a special relationship with another person, the principal owes that person a duty of reasonable care with regard to risks arising out of the relation

§ 7.06 Failure in Performance of Principal's Duty of Protection

A principal required by contract or otherwise by law to protect another cannot avoid liability by delegating performance of the duty, whether or not the delegate is an agent.

§ 7.07 Employee Acting Within Scope of Employment

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

(3) For purposes of this section,

(a) an employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work, and

(b) the fact that work is performed gratuitously does not relieve a principal of liability.

§ 7.08 Agent Acts with Apparent Authority

A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.

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Chapter 7

The Restatement (Third) of Agency and the Unauthorised Agent in US Law

DEBORAH A. DEMOTT

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6 *Inherent agency power*

Restatement (Second), in an innovation from the first *Restatement,* identified an additional basis on which the legal consequences of an agent's action might be attributed to the principal. *Restatement (Second)* characterised this basis as "inherent agency power," defining it as "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent."[1] The situations in which inherent agency power applied distinctively fell into two very different categories. First, and most frequently, inherent agency power was "the power of a servant to subject his employer to liability for faulty conduct in performing his master's business."[2] Second, inherent agency power was the basis on which an agent might bind a principal in a transaction for which the agent lacked actual authority when the agent's

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departure from authorised action was only a matter of slippage from the scope of authorised action on the part of a general agent;[3] when the agent, acting solely in the agent's own interests, entered into a transaction that would bind the principal were the agent's motives proper; and when the agent, authorised to dispose of goods owned by the principal, departed from the authorised disposal method.

An initial difficulty with inherent agency power is that it appears motivated by an attempt to bridge legal consequences stemming from very different bodies of primary law. That is, the rationales and policy justifications for imposing tort liability differ from rationales and policy justifications applicable in transactional settings. As a category-spanning bridge, inherent agency power seemed more like an artefact of an abstract scheme of classification than a normative doctrine articulating elements requisite to the imposition of liability.[4] A further difficulty stemmed from the possibility that an agent's unauthorised action might, if seen as an instance of inherent agency power, subject a principal to liability on a transaction when the third party with whom the agent dealt had notice that the agent lacked authority. To be sure, more specific formulations in *Restatement (Second)* appear alert to the need to fore close this risk[5] but inherent

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[1] *Restatement (Second),* § SA.

[2] *Ibid.,* comment *b.*

[3] Specifically, when "a general agent does something similar to what he is authorized to do, but in violation of orders": *Ibid.*

[4] See G. McMeel, "Philosophical Foundations of the Law of Agency" (2000) 116 *LQR* 387 (characterising inherent agency power as an example of an "ontological" as opposed to a "normative" theory of agency law).

[5] See *Restatement (Second),* § 161 (liability of disclosed or partially disclosed principal for acts done on principal's account by a general agent "which usually accompany or are incidental to transactions which the agent is authorize to conduct ... although forbidden by the principal" only when "the other party reasonably believes that the agent is authorized to do them and

agency power as a freestanding doctrine always had the potential to range more widely and to provoke the imposition of liability when unwarranted by the circumstances.

Restatement (Third) jettisons inherent agency power as a basis on which to subject a principal to liability. Its ability to do so stems in part from a recognition that the bridging function assigned to inherent agency power was too heroic to be useful. Thus, the circumstances under which a principal is subject to vicarious liability for torts committed by an employee

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or other agent are articulated and justified on their own terms. The circumstances under which unauthorised transactions entered into by an agent should generate legal consequences for the principal are articulated using the previously described normative vocabulary of apparent authority, estoppel and ratification. No gap in liability should result that would require or justify resort to inherent agency power.

In one rare recent instance in which the outcome reached by the court turns explicitly on inherent agency power, the result is problematic because it operates in favour of a third party that proceeded with a transaction on notice that the agent lacked actual authority to bind the principal. In *Menard Inc.* v. *Dage/MTI,* the third party dealt with a corporation through its president.[6] Although the third party knew that the president had required specific authorisation from the board of directors to commit the corporation to prior comparable transactions, it entered into a real estate transaction although the president lacked such authorisation and although the third party had no notice of any circumstance suggesting that the corporation had augmented the scope of its president's authority. A majority of the court acknowledged that the president lacked either actual or apparent authority to bind the corporation to the transaction but nonetheless subjected the corporation to liability on the basis of the president's inherent agency power.[7]

Effectively, the court's analysis in *Menard* allocates to a principal an ongoing burden of informing third parties with whom an agent deals that the principal has not removed restrictions on the agent's authority already known to the third party. But so to charge the principal is in sharp tension with a well-settled agency doctrine and the widely shared intuitions that underlie it. It is well established that an agent's apparent authority may survive or linger after the termination of actual authority because a third party may reasonably believe that the agent is authorised to take action and the belief is traceable to a

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has no notice that he is not so authorized') and § 165 (liability of a disclosed or partially disclosed principal “upon a contract purported to be made on his behalf by an agent authorized to make it for the principal's benefit, although the agent acts for his own or other improper purposes” subject to qualifier “unless the other party has notice that the agent is not acting for the principal's benefit”).

[6] 726 N2d 1206 (Ind. 2000).

[7] For a trenchant critique of *Menard* and inherent agency power more generally, see J.D. Ingram, “Inherent Agency Powers: A Mistaken Concept Which Should Be Discarded” (2004) 29 *Okla City U L Rev* 583. Inherent agency power is not without defenders: see M.P. Ward, “A Restatement or a Redefinition: Elimination of inherent Agency Power in the Tentative Draft of the Restatement (Third) of Agency” (2002) 59 *Wash & Lee LR* 1585.

manifestation made by the principal.[8] The underlying intuition is that one may reasonably assume

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an agent's actual authority to be an ongoing or continuing circumstance until placed on notice of circumstances to the contrary. It is difficult to see why comparable reasoning should not apply to restrictions on an agent's authority known to a third party.

[8] See *Restatement (Third),* § 3.11(2) (apparent authority "ends when it is no longer reasonable for the third party with whom the agent deals to believe that the agent continues to act with actual authority").

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Apparent Authority

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Abstract: This essay discusses the topic of what common lawyers call 'apparent authority', whereby a principal may be bound by an unauthorized act because the agent appears to the third party to be authorized. Other legal systems reach similar (but not always identical) results, sometimes by different means. It contrasts the view taken by most legal systems that the principal's liability depends on his own conduct (or 'manifestation'), with the diametrically opposed view that the liability depends on the reasonableness of the impression received by the third party, and whether there is any intermediate position. It considers the technical means for giving effect to such approaches, especially the first, and whether the 'estoppel' approach of Anglo-Australasian common law is prefer- able to the approach of *Restatement, Third,* which treats apparent authority as simply another form of authority not requiring additional means to be made effective.

1. Introduction

The topic of (what common lawyers call) apparent authority (also called 'ostensible authority') is a central one to all accounts of a law of agency. It is not difficult to say that if one person authorizes another to act on his behalf, that person has authority to do so and may in so doing change the legal position of his principal in some way. But in real life, people deal also with persons who say they represent, purport to represent, or look as if they represent, others. These persons may in fact not have been authorized by their supposed principal. Those who so deal may require protection against this, and common law 'apparent authority' is a general notion that the third party may be entitled to invoke for his protection in such a situation. Under orthodox doctrine, the principal may be liable on the contract, for the full performance interest, despite the fact that the agent has never been given authority, would normally have authority but the authority had in fact been limited or withdrawn, or has authority but, for some reason (whether death, mental incapability or simply direct withdrawal), the authority has been terminated. But we may note immediately that in parallel situations under some other legal systems, the reliance interest only may be available, at least in some situations.

In common law, and it seems in some other countries (of those discussed in this book, Scotland and South Africa), the notion of apparent authority is a general one and stands for almost all such protection. It has to do a great deal of work. But a first point brought out by this is that in many systems, there is another possible starting point or points, and this has the result that apparent authority (or equivalent reasoning) may only need to play a less prominent role. There may be rules

in some countries (Germany and the Netherlands for a start) whereby persons in a particular position (e.g., shop assistants, persons holding a document conferring general powers such as a common lawyer would call a power of attorney, and agents pursuing functions that require registration) are deemed to have certain authority, and the consequent powers of the agent may sometimes even exist although the third party knows that the principal has not authorized the act in question. There may also be special rules pro- longing authority after it would normally have ceased. An aggregation of such rules, together with special rules for corporate agents, may in some systems leave less need for a general doctrine of apparent authority, which may indeed in some legal systems still be controversial and not completely settled. (An example may be German law.)

2. General Doctrine of Apparent Authority: The Two Possibilities

Where there is a general doctrine of apparent authority, it has to be decided what its juristic basis is. It seems to me that this is a somewhat intractable problem in many countries, and reading the present book, I am not at all clear that the English language phrase 'apparent authority' really refers to entirely the same phenomenon in all the countries in connection with which the topic is discussed. But logically, there are two possibilities. The authority may in some way be regarded as emanating from the conduct of the principal or be attributed directly to protection of the agent.

There can be no question, but that in Western law, the first view predominates. The reason the principal is liable is that he has done something which enables the agent to appear authorized. That 'something' may be quite limited - for example, paying bills for items received or accepting or at any rate tolerating work done or, more significant commercially, appointing the agent to a position that would normally carry certain authority1 (which, to some extent, approaches rules that, in some systems, confer authority on specific types of representative, which I have mentioned above). But it is to the principal having acted in certain ways that that the agent's power, and the consequent protection of the third party, is traced.

One can see what the contrasting approach must be. It would require concentration on the good faith and reasonable belief of the third party. But there seems no hand rail for use in linking those factors. It does not seem practical to

[1] Sometimes called 'usual authority'.

advance a rule that any citizen who deals with another is entitled to assume that the other person, if dealing for a third party, has authority to bind the third party - even if one adds a requirement that the transaction should be a valid one. For a start, one would normally confine protection to citizens who had some reason to believe that the agent acted for another; otherwise, the reasoning would extend to undisclosed principals, and although the common law accepts this (although has never properly analyzed the relevant doctrine), it is not accepted everywhere. Second, one expects, even if the agency is disclosed, something basic linking the principal with what happened - even simply that the principal chose to act by means of an agent.

One is put in mind of similar questions arising in the transfer of property by non-owners. In this area of property, common law starts from the contrary principle of security of title but, by means of exceptions to it, gives some rather specific protection in such situations - most notably where a

'mercantile agent' is entrusted with possession of goods. But even in this context, common law looks on how the principal had behaved. There would be no protection for the third party unless the principal had allowed the possession in certain ways - if the agent was a dealer, by giving him possession in what appeared to be his line of business, but not if he sim- ply left the goods with the dealer for storage.

Many legal systems place emphasis on the reciprocal principle of security of title and contain general provisions protecting persons who acquire possession of goods in good faith in what reasonably appears to be a valid transaction. But where possession has been transferred, there is more to go on, more of a hand rail, than there is in the case of an unauthorized agent. The law can look on the transfer of possession itself and acquisition in a valid transaction, and there may be further restrictions, for example, non-operation where the goods had been stolen (or even lost). These do not translate across into an agency context.

3. The Doctrinal Approach Used by Common Law

The common law is an example of a system that undoubtedly bases apparent authority on an act of the principal. *Restatement, Third, Agency* [2] requires a manifestation by the principal to the third party, where the third party reasonably believes the agent to be authorized and that belief is traceable to the manifestation. Those last words are extremely important to indicate the basic theory adopted. They have some echoes in ideas mentioned in the present book that link the initial conduct with some form of 'risk principle'. For English law, a textbook on agency speaks of the principal by words or conduct *representing* to the third party that the agent was authorized.[3] The word 'represent' is also used in the leading common law case on the doctrine.[4] It gives a formulation that is perhaps too strong, that is, seems to require too much, and the most recent edition has been modified to accept the Restatement's word *'manifestation',* which has a more objective ring. In fact, in accordance with the ways of English judges, judicial support for the word 'represent' has recently been reiterated.[5] Nevertheless, it is difficult to see that the difference matters much.

How is the manifestation (or representation) made? As already stated, it is by words, by conduct, or by allowing the supposed agent to adopt a certain position that

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[2] Paragraph 2.03.

[3] F.M.B. Reynolds, *Bowstead and Reynolds on Agency,* 18th edn, (London: Sweet & Maxwell, 2006), Art. 72.

[4] *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Lrd [1964]* 2 QB 480, 503.

[5] *INC Re (UK) Ltd v. R&V Versicherung AC* (2006] EWHC 1544 (Comm.); (2006) 2 All ER(Comm.) 870, at para. (99].

normally carries with it a certain authority. A difficulty of the last category is that the third party may not know what sort of authority the post normally carries. A case in which such reasoning was

followed to an extreme length is one where a person was appointed an insurance 'branch manager'. The third party actually made inquiries about his authority and was given soft answers. But because the authority claimed was not that which such a manager would normally have (indeed there was no such title in the firm), the third party was held by the House of Lords unable to sue, even though he had no knowledge of the true situation and, though he had tried, no means of knowing either.6 I give this case simply as an example of how a tribunal can take logical reasoning too far and reach harsh results. I doubt whether, even with a system of binding precedent, English law is stuck with it.

4. Refinements

It is an essential consequence of the common law reasoning that the agent's power is traced back to the conduct of the principal and that the agent alone cannot give himself authority, and this is often stated. However, exceptions are going to be recognized. The agent may not be authorized to give himself authority, but he may have authority to state facts from which legal conclusions can be drawn. Thus, in one case, the manager of a bank had no authority to grant a particular loan and was known by the third party not to have it, but he did have authority to state whether the prospective borrower's application had been approved by the head office. Hence, the bank was liable for the loan when the manager wrongly stated that the loan had been approved.7

A much less straightforward example occurs where the statement by the agent is more casual. For example, a salesman agrees on a sale on certain terms, this is queried by the purchaser, and the salesman makes a telephone call, after which he claims that he has been authorized. Can the third party rely on this? Probably not, although one wonders what more he could have done. As a colleague said to me at a seminar discussing this sort of point, 'one doesn't ask further: it's rude'. But in a commercial setting, a chartering manager known not to have authority to execute an unusual charterparty stopped the taxi with his counterparty inside, went in to get permission from his superiors, and came out and said, 'As I thought, I got it'. The principal was not bound.[ll]

Furthermore, although related, reasoning is required when the third party knows that the agent would have authority in certain circumstances and the agent wrongly indicates that those circumstances are operative. Two English cases concern

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[6] *British Bank of the Middle East v. Sun Life Insurance Co of Canada Ltd* (1983] 2 Lloyd's Rep 9 (a case, though of the highest tribunal, never selected for reporting in the *Official Law Reports*).

[7] *First Energy (UK) Ltd v. Hungarian International Bank Ltd* (1993] 2 Lloyd's Rep 194.

[ll] *Armagas Ltd v.Mundogas SA* [1986J AC 717.

solicitors. In one case, the solicitor would normally have authority to promise to pay funds to a bank if his firm had already received such funds. The bank made a loan, but the firm had not received such funds. There was no express statement by the solicitor that it had, but the firm was held liable to the bank.[9] In another case, payment of funds by a firm would only be authorized if it was in the normal course of business. The agent, who was a partner in the solicitors' firm, specifically stated in the

relevant document that it was. The third party made no further inquiry, but when things went wrong, it was held that the solicitors' firm was not bound, and hence, the loss was to be suffered by the innocent third party. 10 The judgments contain much discussion of whether an assurance given by a solicitor has a superior standing from one given by, say, a person in the commercial world - a point that appears in examples from other countries given in the present book.

5. Duty of lnquiry

All this raises a general question, highly relevant in a comparative context, as to the extent to which a third party ought to make inquiries. If the UNIDROIT Principles of International Commercial Contracts (PICC) are anything to go by, [11] some countries simply use formulae (in the appropriate language) translatable as something like 'knows or ought to know'. [12] This presumably puts the matter within the discretion of the judge. The Principles of European Contract Law (PECL)[13] use the words 'or could not have been unaware', which seem to impose a lesser duty of inquiry. Common lawyers (especially because knowledge is a very significant feature in equity) are accustomed to having more guidance than such vague phrases. In one famous case, the judge isolated seven different degrees of knowledge, [14] and although a later court said that these were 'best forgotten', [15] there is no doubt that common lawyers (including myself) still find them useful. It looks to be the case that only French law gets near to addressing this question head-on.

6. Relevance of Negligence

Under reasoning such as this, the idea of negligence is irrelevant to the general principle (although it may be regarded, or may once have been regarded, as relevant in some countries). It is no defence to the principal that he used every reasonable effort to prevent his agents from misbehaving themselves. If the manifestation can

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[9] *United Bank of Kuwait Ltd v. Hammoud* (1988] 1WLR 1051.

[10] *Hirst v. Etheringtons* (1999] Lloyd's Rep PN 938.

[11] For example, Art. 2.2.3: the phrase appears seven times in this section of the Principles.

[12] The Draft Common Frame of Reference (DCFR) of 2009 uses 'or could reasonably be expected to have known', which seems bener; see Art. II. - 6:107 (3).

[13] Articles 3:204 and 3:205.

[14] *Baden Delvaux v. Societe Generate, etc.* (1993] 1WLR 509, 575-576.

[15] *Royal BruneiAirlines Sdn Bhd v. Tan* (1995] 2 AC 378.

be traced to the principal, and the third party acted reasonably, the principal is liable whatever steps he took.

Negligence can, however, at least in common law, come in as a separate line of reasoning where there is no agency manifestation, but it can be said that the principal has been negligent in allowing the person concerned to appear to have certain powers. An amusing example well known in American law schools, at least in former years, is the case mentioned by Professor DeMott of the bogus salesman of distinguished appearance (greying hair) carrying a clipboard, who takes an order in a shop and accepts payment for it from an imprudent customer. He is never seen again. The shop has (probably) not manifested that the grey-haired man has such agency powers, but it may be that the business of the shop is operated negligently in that insufficient precautions are taken to prevent the occurrence of such impostures. 16 Moving to a more commercial context, in Australia, a documentary credits manager signed a guarantee against delivery of goods without bill of lading, which she had no authority, actual or apparent, to do at all. She did, however, have the bank's rubber stamp, and it was held that the bank had (presumably by negligence) allowed her to give the impression that she had authority and hence was liable. [17]

7. A **contrasting Picture in French Law**

To all this, the response of French (and to some extent Belgian) law, as explained in this book, seems an immense contrast. Here the concentration appears to be on the third party, what he might reasonably know, specifically, what inquiries he might reasonably be expected to make and so forth - in fact, all the points with which a doctrine that bases apparent authority on a manifestation or representation by the principal has difficulties, as I have described above. A specific internal feature is the notion that a belief must be legitimate, which introduces a new idea into the equation. Pragmatic as this is, what I find difficult to determine is the juristic basis of the principal's liability - perhaps because one instinctively feels that no one should be held liable unless there is some justification in their conduct for imposing liability on them (which is true of course of contract generally). It is said in the book that the reasoning is based on the doctrine of *l'apparence,* which is described as doctrine 'whereby the French courts will attach legal consequences to a person's erroneous perception of reality'. I am told that much of the developed doctrine comes from decisions of lower courts on the facts. The extent that the *Gour de cassation* will exercise control in order to require precise reasoning and logical consistency, and perhaps even require the application of some sort of touchstone of reasonableness, is obviously important under this technique; [18] it requires an understanding of French legal method going considerably beyond substantive law solutions.

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16 *Hoddesdon v. Koos Bros* 135 A2d 702 (NJ, 1957).

17 *Pacific Carriers Ltd v. BNP Paribas* (2004) 218 CLR 451; see REYNOLDS (2005), 121 LQR55 and WATTS (2005), 26 Aust. Bar Rev. 185. Another court had in fact found no negligence.

18 See CANIVET, 'The Court of Cassation: Looking into the Future', (2007) 123 LQR 401.

8. **Compromise Views**[19]

For Dutch law, Dr Busch refers to apparent authority as resting 'upon the principle of the protection of reasonable beliefs'. [20] But he follows this by saying that 'a reason- able belief... must have been created by the principal of his own doing', which gets us back to the relevance of the conduct of the principal. It seems that due to the lack of a firm freestanding principle of justifiable reliance in the abstract, it is difficult to avoid the conduct of the principal as a starting point even if the doctrine arising is then severely modified, for example, by elements of a risk principle. As Dr Busch and Ms Macgregor say, 'No legal system appears to have rejected the connection with the principal's conduct entirely,'[21]

A view that I remember put forward by Professor Eisenberg at an early meeting in connection with *Restatement, Third, Agency* is that (if I understood him correctly) the act of the principal in acting by means of someone else was itself sufficient for imposing liability. Of course at that point, one seeks immediately to determine what a decision to act by means of another signifies.

In their 'Comparative Conclusions',[22] however, Dr Busch and Ms Macgregor seem to take the view that the balancing of views is best handled as a matter of giving discretion to the court. Common lawyers would find this difficult because they regard the word 'discretion' as indicating a free choice within set limits. It was one of the early criticisms of Hart's *Concept of Law* that its description of the legal process made it seem to turn in the end on discretion of this sort, hence the beginning of the first attack by Dworkin. Common lawyers at any rate seek more guidance from the law.

9. Justifications of the Principal-based Rule: The Estoppel Variant

If one sticks to the approach that traces back a manifestation to the principal, the next thing is to consider what basic theory governs the principal's subsequent liability. Here, in common law countries, the reasoning is normally attributed to estoppel,

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[19] At the meeting at which this paper was presented, it was suggested that the German approach, involving use of the doctrine of *culpa in contrahendo,* might represent a position between the two extremes. It is certainly a different approach but is presumably based on its own rather special starting points, and it seems to me that using a residual principle to give negative interest damages only is so different from the two extremes discussed above, which of course treat the act as authorized or as unauthorized, that one can only say that it is a separate way of viewing agency phenomena.

[20] Page 142.

[21] Page 398.

[22] Chapter 14.

that is, a loose principle that someone who makes a statement (here as to an agent's authority, although often very indirectly made) may in certain circumstances not go back on it. The force of this reasoning is well picked up by the Scottish phrase 'personal bar', which stresses that the bar is only

against a particular person who is barred from disavowing his actions, but the idea of estoppel brings in jurisprudence and doctrine of an extensive nature. The consequence of adopting such reasoning is that the doctrine may only be used to fix the principal with liability; Dr Busch refers more than once[23] to the idea that the third party is entitled but not bound to take advantage of this reasoning. He cannot actually sue unless he ratifies. This is a comparatively minor matter, but not without consequences, as I shall explain.

For, at any rate, some forms of common law, it can be said to be an estoppel not entirely in accord with the general principles of the notion as they are tradition- ally formulated in some contexts, for these require specific reliance on a representation, and apparent authority is plainly a looser notion. I admit to various vacillations on this point, but I personally now think the correct approach is stated in a recent book on estoppel in which the writer, Mr Justice Handley of the Court of Appeal of New South Wales, says, 'Each form of estoppel has its own elements, although some are common to others. The similarities warrant their recognition as a form of estoppel, but the differences make each a distinct form with its own history and requirements'. [24] I think this must be correct.

1Ω Second Basis: Objective Interpretation of Contract

If, however, apparent authority is not to be based on estoppel, we must find another basis for it. The obvious alternative is the reasoning provided by the rules relating to formation of contract, which in common law countries at any rate is very clearly objective. You are bound because you gave the impression to the other party, in a way that was reasonable to be relied on, that you intended to be bound. Agency merely complicates the situation; you are bound because you gave that impression by means of an agent. But equally, the third party who deals with an agent on this basis intends to be bound to the principal. So apparent authority is just another form of authority and justifies the principal's suing as well as his liability to be sued. Ratification is not necessary. [25]

This seems to be the approach of the PECL26 (although I have never been convinced that it is what was originally meant). Itis in fact much clearer in the Draft

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[23] For example, 142-143.

[24] *Estoppel by Conduct and Election* (2006), para. 1-028.

[25] My colleague, Dr Krebs, who takes this view, has recently shown {inter alia) that a failure to see differences between these types of reasoning creates some unsatisfactory results in the Ratification section. See 'Harmonisation and how not to do it: agency in the UNIDROIT Principles of International Commercial Contracts 2004', (2009] LMCLQ 57.

[26] Article 3:201.

Common Frame of Reference (DCFR).[27] More significantly, *Restatement, Third* also treats apparent authority as simply another form of authority, not only fixing liability on the principal but also allowing him to sue without ratifying. This gratifies any desire there may be for a tidy system that

does not have to be corrected by any imprecise doctrine of estoppel and enables *Restatement, Third* to isolate a function for (what we may call) 'true' estoppel, where representation and reliance as required by orthodox doctrine can be seen. That can be used on the edges of normal apparent authority reasoning, as where there is no authority, actual or apparent, but the sup- posed principal allows it to appear that there had been authority, or knowing that the third party had assumed that there was authority when there was not, he took no steps to correct the misapprehension. [28]

It appears that a proposal to adopt this second, objective approach was actually made (by Professor Lando himself) to the compilers of the PICC but rejected on the basis that ratification would be easy anyway. I personally find the idea that apparent authority is simply another type of authority, arising from the principal's manifestation to the third party as opposed to the agent, difficult to accept. It means that the normal safeguards against unfair ratification are not applicable. It also means, so far as I can see, that the principal who has not authorized an act can nevertheless sue on it if he proves that the third party was in a position to take advantage of the doctrine of apparent authority whether the third party wants to do so or not - an odd proposition. As I say in this book, only one case is cited in the *Restatement* as authority for such reasoning, and it does not seem to me one that could not have been solved in a different way.[29] In my view, treating apparent authority as carrying with it the principal's right to sue is not necessary or appropriate, and that of course casts doubt in general on the 'interpretation of contract' justification for apparent authority.

11. Tailpiece: Termination of Authority

One area in which common law, at any rate outside the United States, may well be behind the game is the effect of the death or incapacity of the principal on the agent's authority. There are few cases in England on the point, but as between principal and agent, the position seems to be still that death or incapacity of the principal removes the agent's authority whether the third party knew of it or not. The position taken by *Restatement, Third* that the *internal* authority continues until the agent learns or ought reasonably to have learned of the event is clearly preferable

[27] Article 11-6:103.

[28] In a well-known English case, the owner of a house who had not authorized his wife to sell it nor ratified the sale made by her behaved subsequently as if the sale had been authorized and was held liable purely on the ground of estoppel: *Spiro v. Lintern* (1973) 1WLR 1002.

[29] *Equitable Variable Life ln.5urance Co v. Wood* 362 SE 2d 741 (Va, 1987).

to modern eyes but would be difficult to achieve except by legislation. It would facilitate solution of the external situation also. Without such reasoning, in the area of apparent authority, it could still be argued that the principal had been removed from the scene, thus displacing apparent authority reasoning. There are now some quite vigorous judicial statements in England that apparent authority nevertheless continues.[30] The matter, however, is not easy to solve by sweeping rules, for there are here two competing claimants for protection: the third party who has reason- ably relied, and the estate or property of the deceased person or the person who has become mentally incapable. The

protection of the third party may not so obviously take preference in all situations; more detailed nuancing may be required. Rather similar problems arise in the case of insolvency. There is in England a small amount of rather complicated statutory protection relating to formal documents conferring authority (powers of attorney), dating back to the alarm caused by the decision first imposing strict liability on *afalsus procurator* in 1857.[31] The whole question needs tidying up in England, although other common law countries may be more fortunate in this respect. But this is not an area in which law reform wins the votes of the electorate.

12. Overview

In 1969, a very well-known English judge (and jurist) said, 'It may be that some wider conception of vicarious responsibility other than that of agency, as normally understood, may have to be recognized in order to accommodate some of the more elaborate cases which now arise when there are two persons who become mutually involved or associated in one side of a transaction.' [32] Forty years later, this has not happened (I note that he gave no indication as to what the wider conception might be) and we are still wrestling with the same problems. Analogies with vicarious liability for torts have in England become less likely to be thought suitable because of recent changes in the reasoning used in tort in some common law countries.

So, as far as I can see, all legal systems tangle, in the law of agency or representation, with complexities of theory that have not yet found a generally acceptable solution, but (as so often in comparative law) the results are much the same whatever the reasoning used. The similarity between the accounts given in the present book is in fact very striking; the problems set by the cases and the considerations taken into account in answering them are the same in all countries, and slight differences in doctrine (if there are such) make little difference in result. By whatever technique, legal systems judge situations in the same ways. The editors' 'Comparative Law Evaluation' [33]

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[30] *AMB Generali Holding AG v. SEB ']}ygg Liv Holding Aktiebolag* (2005] EWCA Civ 1237; (2006) 1 Lloyd's Rep 318.

[31] *Collen v. Wright* (1857) 7 E&B 647.

[32] Lord Wilberforce, in *Branwhite v. Worcester Works Finance Ltd* (1969] lAC 552, 587.

[33] Chapter 13.

sometimes suggests that common law adjusts toward the continental position (whatever that may be) or even towards the PECL or PICC (however that could be achieved). I see little opportunity and little need for this. Judges in all countries deploy rules of apparent authority or their equivalent to give appropriate solutions, and I do not know of any common law decision (outside some outdated reasoning used in the nineteenth and very early twentieth centuries, when the doctrine of apparent authority had not been fully worked out[34]) where common law doctrinal problems demanded an inappropriate result. Estoppel, and its possible requirement of 'detrimental reliance', which is represented as being a problem in common law, has not caused difficulty, and the analysis of Mr Justice Handley explains why, although it looks as if some of the technicalities of estoppel may have proved more significant in South Africa. But it is in any case not easy to see how the great corpus of reasoning that surrounds the common law notion of estoppel could or should easily be eradicated.

In all of this a fresh code-like production such as *Restatement, Third* enables the adoption of cleaner reasoning in common law. (The difficulty with PECL and PICC is that they are too terse and neither is sufficiently *motive* to indicate the theory (if any) behind them.[35]) But it is still difficult to see much difference of result. As Dr Busch and Ms Macgregor say[36] 'Each legal system attempts to carry out a type of uneasy compromise', and that is the overall picture which in my view emerges from this book.

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[34] A dramatic example was *Grant v. Norway* (1861) 10 CB 665, concerning signature of a bill of lading for goods not on board. A key decision in the evolution of the doctrine is *Hambro v. Burnand* (1904] 2 KB 10.

[35] I omit reference to the DCFR of 2008 and 2009, which as yet has no comments or notes.

[36] At p. 398.