Agency in International Trade, A Study in Comparative Law

PART 1. THE CONCEPT OF AGENCY AND LEGAL REALITY

CHAPTER I. INTRODUCTION

Agency is a universally recognized legal notion. It is equally known in the countries of the civil law and the common law and in those of free market economy and socialist State planning. The civil law and the common law have developed theories an agency which are inherently logical and in their modern form sophisticated but by no means identical.

Legal theories are the creation of the human mind. The Jurist who proposes a new theory wants us to believe that the facts of social and economic life correspond to his abstractions. Unfortunately this is not always the case. Sometimes these attempts at systematization break down on the harsh realities of life. Life is a many-splendoured thing. It it of infinite variety and devoid of a logic other than that dictated by the self-interest of human beings in their social and economic intercourse. The Panglosses of the law, in their omniscience, try to explain the non-conformity of their theoretical speculation with legal reality by an elaborate system of rules, exceptions and counter-exceptions. The modern Jurist rejects this approach. He attempts to define the interests active in society and to determine the regulation which results from their constantly changing interplay in the community in which they operate.

This functional approach is particularly rewarding in the law of international trade. This branch of private law is largely governed by the principle of Party autonomy, also called freedom of contracting, which, subject to qualifications of different degree, is recognized by all countries of the world. The merchants engaged in trade across the frontiers have developed their own legal regulation, and it is this regulation, admitted by leave and licence of the national sovereigns, which makes the wheels of international trade turn. The function of the lawyer interested in the regulation of international trade is to discover the practice which the merchants observe in the day-to-day conduct of international transactions. This study will enable him to comprehend the forces which motivate international trade. He will find that the realities of international Business have produced essentially the same legal solutions in every country although the theoretical approach differs widely according to the traditional and historical idiosyncrasies of the various national legal systems. And he will conclude that in the conditions of the modern world the establishment of a uniform regulation of international trade law is not only a necessity but is also well within the reach of practical possibility.

In no branch of the law of international trade is the cleavage between legal theory and commercial reality greater than in the law of agency. It is obvious that international Business can only be conducted by the interposition of intermediaries between the contracting parties. Many types of intermediaryship exist in international trade. Exporters and importers use
ordinary agents, mercantile agents and factors, agents with general power of procuration and special agents, confirming
agents, commission agents, Brokers, carriers, insurance agents, Bankers and many other types of intermediaries. The
legal characteristics of these types of intermediaryship have been elaborated by commercial practice and are often at
variance with the concepts of agency developed by legal theory.

Our first task is, then, to indicate the Impact which the reality of international trade has made on the theory of agency in
the civil and the common law. This will be attempted in the first Part of these lectures. It will be necessary to give a Brief
survey of the theoretical Basis of agency in these two legal families and to contrast it with the forms of intermediaryship
developed by commercial practice. This examination will, it is hoped, indicate the criteria which international practice
considers essential for the various types of intermediaryship and which determine the choice of the one or the other form
in an export transaction. In the second Part of this study the criteria which

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have emerged from the confrontation of theory and practice in the first Part will be applied to the various classes of
international intermediaryship and thus the correctness of our conclusions will be tested. In the third Part problems of
agency relationship in private international law will be considered and the possibility of unification of this branch of
international trade law will be discussed.

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CHAPTER III THE THEORY OF AGENCY IN THE COMMON LAW

The Historical Development of Agency in the Common Law

In the common law, the modern theory of agency is the product of many historical influences. In the early middle ages the
common law, like every primitive law of non-mercantile character, did not know the idea of agency as a general legal
concept. It admitted representation only slowly. Three main Strands can be discerned in this development.

First, as Holdsworth tells us,¹

"In the twelfth and early thirteenth centuries the power to appoint an attorney was a privilege which must be given by royal grant, and the
appointment must be formally made in Court² But a series of statutes beginning with the Statute of Merton (1235-6)³ gave everyone the right
to appoint an attorney".

This gave rise to the emergence of a class of professional attorneys in legal matters. In fact, it became already necessary
to regulate them by an ordinance of 1292, i.e., by the same ordinance which regulated the pleaders;⁴ these attorneys
became the predecessors of the later solicitors.

Secondly, canon law contributed to the development of the agency concept in the common law. A monk suffered civil
death but an abbot retained some civil capacity,⁵ and already in 1307 a case was reported⁶ in which, in the words of
Maitland, "an abbot was sued for the price of goods purchased by a monk and come to the use of the convent". Maitland⁷
concludes that “the legal deadness of the monk favoured the growth of the law of agency”.

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Thirdly, the custom of the merchants, who at that time were already engaged in lively trade in Europe, made the admission
of some instances of agency unavoidable. Holdsworth observes⁸ that "from an early date the records of the fair Courts
Show that some sort of commercial agency must perforse be recognized". In 1389 a case was tried at Guildhall in the City
of London,⁹ in which the "apprentice and attorney" of a London merchant bought 10 tons of wine from a French merchant
in Sandwich in England. The apprentice did not pay and the seller obtained judgment against him, and as the apprentice
apparently was unable to satisfy the judgment, he was committed to prison. He then sued his master, alleging that the
latter had ordered him to go Sandwich and buy the wine and had approved the bargain. The mayor and aldermen of the
City of London decided that the master must pay the price directly to the French seller "according to the law merchant and
the custom of the City" as the apprentice had bought the wine "for the use and profit of his master". The apprentice was
ordered to be set free and so justice was done. The remarkable feature of this case is that a direct Claim by the third party
was admitted against the principal, though in a rather circuitous way. Further the action of account, originally applied to
the Claim by the Lord of the manor against his estate manager, the bailiff, was extended to quasi-bailiffs, such as factors
and similar agents *ad merchantizandum* who hell property of their principals or transacted business on their behalf.

In the 14th and 15th centuries "the liability of the master or principal was no longer seen as a matter of debt, but begins more and more to be seen as a matter of contract". This was due to two causes: a greater flexibility of the originally very rigid system of actions which need not be discussed here, and the growing importance and solidification of the *lex mercatoria*. In 1469 it was decided that-

"if I command my servant to buy certain things, or if I make someone my factor or attorney to buy merchandise, etc., and he buys the merchandise from another, in that case I shall be charged by this contract even though the goods never come to my hands and even though I have no knowledge of (what the agent has done), and the reason is because I have given him such a power (to purchase)."

It follows that the common law developed already in the 15th century—considerably earlier than the civil law—the principle that the principal was in direct contractual relationship with the third party. Thus the foundation was laid for a theory of agency.

In the 17th and 18th centuries the influence of mercantile law which was embodied into the common law, led to the emergence of two classes of mercantile agents, the factors and the brokers. The expression "agent" came into use and the "confusion of the principal-agent relationship with that of master and servant" began to disappear. The Court of Chancery took notice of the relationship between principal and agent and began to treat it as if it were a relationship between a beneficiary and trustee, but Holt C.J. who was Chief Justice from 1689 to 1710 secured the law of agency for the Court of King's Bench by developing it as a branch of the common law; he did so by employing rules originally used "by the Court of Admiralty in respect of the relations of shipowners, masters, and merchants".

From the 18th century onwards we find in English law references to the undisclosed principal, a concept which was to become peculiar to that legal system. The historical origin of that concept is obscure. It is thought that it arose from the practice of employing factors on a commission basis. Stoljar observes rightly:

"This picture radically changed when at the turn of the eighteenth century trade much increased both in volume and speed. As a commission agent the factor's interest therefore was to keep the volume of sales as high as possible, and this commercial expansion would also tend to make the factor into a more independent adventurous merchant."

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**The Theory of Identity**

The common law has adopted the doctrine of identity of principal and agent as the theoretical foundation of agency. This doctrine is usually expressed in the phrase *qui facit per alterum facit per se*. We find a reference to this rule already in Coke on Littleton (1628) and Holmes regards it as the "common term", the fundamental concept of the theory of agency in the common law.

The theory of identity of principal and agent constitutes the direct antithesis of Laband's theory of separation. It implies that the alter ego of the principal, the agent, is duly authorized and acts within the limits of his authority. The doctrine of identity is the clearest expression of the idea which we found in the pre-Laband codifications on the European continent that *représentation* is the consequence of *mandat* and, in theory at least, inseparable from it. It is possible that this doctrine of English law shares a common ancestry with the older continental view in so far as both appear to be derived from the canon law. But on the continent of Europe the development of that theory was stunted by the adoption of Laband's doctrine of separation, while in the common law it could flower and grow without being retarded by a spurious logic and artificial systematization. The common law thus gained a general concept of agency which avoided the complexities of fragmentation typical of the continental Situation. This general concept could be used as the theoretical basis of all forms of agency encountered in practice and, even beyond this, as the foundation of partnership law. The general nature of this concept can be gathered from the following observations taken from the current edition of the leading English reference book an Agency:
"General agent, special agent. This distinction is relevant to the question of the nature and extent of the authority conferred on an agent, but the matter is one of degree, and though the distinction is a well-established one, it is doubtful whether it is of much utility. Brokers, factors. The distinction between these was of great importance in earlier centuries . . . A Broker differs from a factor, but there are many types of Brokers, and general propositions about them are nowadays unfruitful".

Reconciliation with Commercial Reality

Although the adoption of the theory of identity of principal and agent as a general Basis of agency in the common law constitutes a jurisprudential achievement of considerable value, it cannot be denied that that theory is as doctrinaire in character as Laband's theory of separation. The two theories, though opposite poles of the scale, are founded on the common assumption that a general theory of agency can be devised under which can be subsumed all instances in which this Institution is found in practice. The question then arises whether this basic assumption is correct or whether the theory of identity, like that of separation, has to make major concessions to the realities of commercial life.

It is obvious that the area of conflict between theoretical logic and commercial reality is smaller in the common law than in the civil law because the theory of identity is more flexible than that of Separation. We find that that conflict is limited to the problem of protecting a third party who has transacted Business with an agent who was not authorized to transact that Business. This, of course, is one of the central problems in the law of agency which the doctrine of separation, in principle, seeks to solve by protecting the third party. The doctrine of identity cannot adopt this solution. On the contrary, it seeks to protect the principal and adopts the maxim that the unauthorized act of the agent does not bind him. However, on this point the doctrine of identity has to make concessions because commercial exigency compels in certain Cases the protection of the third party who acts in good faith. The difference between these doctrinal attitudes is similar to that affecting the passing of property in goods. German law, e.g., contains a general provision protecting the good faith purchaser of movable property but the common law proceeds on the Basis of nemo dat quod non habet. The different juris-

prudent attitude of the theories of separation and identity corresponds to this difference in the law relating to the acquisition of moveable property by the good faith purchaser.

English law admits two qualifications of the theory of identity as concessions to commercial reality. The one is provided by statute and the other by case law. The former is contained in the Factors Act 1889 and the latter in the doctrine of authority by estoppel.

The Factors Act 1889

This Act regulates, inter alia, transactions carried out by a "mercantile agent". Such a person is defined as-

"a mercantile agent having in the customary course of his Business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods".

Where a mercantile agent, with the consent of the owner, is in possession of goods or documents of title, a third party to whom the agent sells, pledges or otherwise disposés of the goods or documents in the ordinary course of his Business is protected if that third party "acts in good faith and has not at the time of the disposition notice that [the agent] has no authority to make the same". In that case the disposition shall be "as valid as if [the agent] were expressly authorized by the owner of the goods to make the same".

The English Factors Act 1889 is remarkable in several respects. First, it adopts, in the provisions just referred to, a distinction between mercantile and other transactions which generally is not admitted by English law. As is well known, that legal system does not acknowledge mercantile law as a specific branch of its legal order, as does, e.g., French or German law. Secondly, the main test adopted by the Act for the protection of a third party accepting in good faith a disposition by the mercantile agent is that the goods or documents were "entrusted" to him by their owner. This test operates irre-
perspective of whether the mercantile agent carried out the unauthorized disposition in his own name - as will often be the case - or in the name of his principal. In 1818 it was said of a factor, as the mercantile agent was then called, that he "normally sells in his own name without disclosing that of his principal", but in 1883 it was held that "there may be a factor who as between himself and his principal is not justified in selling except in his principal's name". Here is a significant difference between the common law of mercantile agency and its European continental counterpart. In the latter, the decisive distinction is, as we have seen, whether the representative acted in the name of the principal (as Handelsvertreter) or in his own name (as Kommissionär). In the common law, however, this question is regarded as irrelevant and it is the "entrusting" of the goods or documents which makes a person a mercantile agent. This difference reflects accurately the difference in emphasis between the doctrines of separation and identity: the theory of separation has an outward direction and considers as important the question in whose name the agent has acted to the third party. The doctrine of identity, on the other hand, pays more attention to an internal event, viz. whether the goods or documents of title came into the possession of the agent by consent of their owner.

Thirdly, the rules relating to mercantile agency indicate the Limits to which the common law of agency will go in its protection of the third party. When we compare these rules with those on the German Prokura which represents the Limit of protection in the commercial agency systems of the civil law, it is evident that the theories of identity and of separation lead to different practical results. In mercantile agency the third party who accepts the disposition of the agent is only protected if he has acted in good faith, but in the law of the Prokura, as set out in the German Commercial Code, good faith is not required of the third party and he can claim protection even if he knows that the Prokurist has exceeded the limits of his authority.

The doctrine of agency by estoppel

This doctrine, also called the doctrine of ostensible authority, is founded on a general principle of English law, estoppel by conduct. Lord Denning M.R. describes the basis of this doctrine thus:

"The basis of it is that a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct".

Applied to the agency situation, this means that a person who has not given authority to another but has conducted himself as if he had done so, cannot later repudiate his conduct and must accept to be treated as having authorized the other, if a third party relied on the apparent authority. In short, in spite of absence of genuine authority, the "principal" who has vested the "agent" with the mantle of ostensible authority is treated by the law as if he were a true principal, provided that the third party relied on that representation. If the third party knows that the agent has no authority, the principal would not be bound.

The essential feature of the doctrine of agency of estoppel is that the principal has represented, by word or conduct, that the agent has his authority. A mere representation by the agent, unsupported by some act or conduct by the principal, would be insufficient. The doctrine of estoppel has been criticized on the ground that, "if strictly applied, it concentrates perhaps overmuch on the fault of the principal, direct or indirect, whereas the emphasis should rather be on the position of the third party". This criticism has some justification but it is firmly established in English law that nobody need suffer to be treated as principal unless he conducted himself Either to specific persons or the public at large as having given authority to the agent. It is therefore correct to consider estoppel as the basis of this theory.

The interesting and important effect of this doctrine is that here the link between mandat and représentation is broken and a person may be liable on the abstract representation although he never gave a mandate to the person purporting to act for him. But this Separation of the mandate and authority - in itself exceptional in the common law - is, as may be repeated, qualified in two respects, viz. it applies only if the principal has made a representation and if the third party has relied on it, i.e., has acted in good faith. In the last analysis, the ratio
of the Factors Act 1889 is likewise founded on the doctrine of estoppel by conduct.

Conclusions

The following conclusions can be drawn from this survey of the development of the theory of agency in the common law:

1. The theoretical foundation of agency in the common law is the doctrine of identity of principal and agent.

2. By adopting this theory, the common law has developed a unitary conception of agency and avoided the fragmentation typical of the civil law.

3. Few exceptions are admitted to the doctrine of identity, and they are all qualified by the requirement of good faith of the third party.

4. From the unitary concept of agency, the common law was able to develop the doctrine of the undisclosed principal. The essence of this doctrine is that, when a duly authorized agent has acted in his own name, without disclosing his representative capacity, so that the third party is unaware of the existence of the principal, nevertheless in certain well-defined cases a direct contractual bond can later be constituted between the principal and the third party. These two persons will then become parties to the main contract and the intermediaryship of the agent who originally contracted in his own name will be disregarded.

The doctrine of the undisclosed principal requires further examination later on.

CHAPTER V. THE LIABILITY OF THE AGENT TO THE THIRD PARTY

Liability of Agent in Ordinary Agency Situations

Privity of contract between principal and third party

Certain principles of the law of agency are common to all legal systems and need not be elaborated here.

All legal systems provide that, if a direct agent has acted for his principal within the authority which the latter gave him, privity of contract exists only between the principal and the third party and the agent is not liable to the third party nor does he acquire rights against him. In the common law this follows from the doctrine of identity of principal and agent, and in many civil law systems, notably in French, German and Swiss law, this is provided in the Code. The Roman principle that the agent is liable to the third party in an actio directa and the principal in an actio adjecticiae qualitatis, is rejected by all modern legal systems.

The unauthorized agent (falsus procurator)

It is equally generally accepted that a falsus procurator, i.e., an agent acting in the name of a principal without authority or exceeding his authority, is in a precarious position.

The principal may ratify the unauthorized act and such ratification has retrospective effect, relieving the agent from liability to the third party. The German Commercial Code favours ratification in the case of certain commercial agents; if a commercial agent authorized to procure contracts concludes them in the name of the principal or an agent authorized to conclude contracts exceeds his authority, the principal must reject at once after being aware of the agent's unauthorized act, otherwise it is deemed to be ratified. In English law, ratification is only possible if the unauthorized agent has acted in a representative capacity, i.e., for a named or unnamed principal, but if the agent has acted for an undisclosed principal, the latter cannot ratify the unauthorized act of the agent. The reason for this remarkable restriction is that in English law the assignment of a right requires the written form and if the ratification of an unauthorized act of an agent by an undisclosed principal were admitted, that would, in fact, amount to the admission of an assignment of a right without compliance with the prescribed form. This means that agency is admissible in English law only if at the time when the agent contracts this relationship
can be determined either externally or internally: externally, by the agent acting in a representative capacity in which case it is irrelevant that he was not authorized as the principal can ratify ex post facto; or internally (i.e., by due authority) in which case it is irrelevant whether the agent acts in a representative capacity or for an undisclosed agent and a one-contract relationship can be constituted between the principal and the third party by intervention or election in the manner described earlier.\(^9\)

If the principal does not ratify, the agent is personally liable to the third party unless the latter knew-or, in some systems,\(^12\) ought to have known-the defect in the authority. Here, however, the various systems divide.

The French Civil Code gives the third Party a claim for indemnité.\(^13\) The German Civil Code\(^14\) provides that the third Party has a right of election as against the agent: he can claim specific performance or damages, but if the agent was unaware of his lack of authority he is only liable for the damages which the third Party has suffered by relying on the existence of the authority but not in excess.

of any loss which the third party suffered in consequence of the invalidity of the main contract. Similar is the statutory regulation of Swiss law; the Code of Obligations\(^15\) admits a claim by the third party for damages for invalidity of the main contract, but if the agent is at fault, i.e., if he knew of the lack of his authority or owing to negligence did not know, the judge may admit higher damages provided that this appears just and fair.

In the common law systems a statutory regulation of the liability of the unauthorized agent is absent and the doctrinal basis of his liability is not free from controversy. English law has developed the so-called doctrine of implied warranty of authority which is expressed by Bowstead\(^16\) as follows:

"Every person who professes to act as an agent is deemed by his conduct to represent that he is in fact duly authorized so to act, except where the nature and extent of his authority . . . are fully known to the other contracting party, or the professing agent expressly disclaims any present authority".

In other words, the agent who acts in the name of his principal is deemed impliedly to warrant to the third party that he has due authority, and if there is lack of authority, he is liable to the third party for breach of that warranty.

This doctrine was established in Collen v. Wright\(^17\) after the view that the agent had contracted personally if he had acted without authority had been rejected\(^18\) as not sustainable in principle.

The basis of the doctrine of implied warranty is contractual. The construction is that the third party, when contracting with the unauthorized agent, enters into two contracts: the apparent main contract with the principal which is invalid for lack of consent, and a collateral contract with the agent containing the agent's implied warranty of authority. If there is lack of authority and the principal does not ratify, the agent is liable in damages to the third Party for breach of the collateral contract.\(^19\) This ingenious construction appears, at the first glance, to be artificial and some writers prefer to regard the relationship between agent and third Party as an implied obligation of quasi-contractual nature.\(^20\) This interpretation, however, can hardly be reconciled with the realities of the situation, as Seavey\(^21\) points out:

"In exchange for the undertaking of the third Party to enter into a contract with the principal, the agent guarantees that he has power to make the principal a party . . . The doctrine of Collen v. Wright, instead of being a judicial creation, invoked to cure the imperfections in the law of torts, is based upon the fundamental facts of the situation. It recognizes the real act done by the agent and disregards the fiction of identity of principal and agent".

Two consequences result from the doctrine of implied warranty of authority in the common law. First, "the element of strict liability\(^22\) of the agent should be noted. Thus, in Yonge v. Toynbee\(^23\) an agent who was unaware that his authority had ended in consequence of the insanity of the principal was held to be absolutely liable to the third Party under the doctrine of implied warranty of authority. The agent is thus the guarantor or insurer of his authority vis-à-vis the principal.\(^24\) The principle of strict liability of the agent has been attacked as "an unduly harsh rule\(^25\) and it has been suggested that his liability to the third Party should be based on tort. Admittedly he is already liable, as the law stands at present, in deceit if he fraudulently misrepresents to the third Party that he has authority,\(^26\) but it is argued that the liability of the innocent
agent should be founded on the rule in Hedley Byrne & Co. v. Heller & Partners, i.e., he should be liable only if he negligently assumes that he has authority. This suggestion is, it is thought, of dubious value because it implies that of two innocent Parties, the agent and the third Party, the latter should bear the loss and it contravenes the fundamental principle

that the protection of the innocent third Party who contracts with an agent, is the paramount consideration of agency law. In any event, the contractual basis of the unauthorized agent's liability to the third Party and the attendant principle of strict liability are so firmly established in English law that they can only be altered by statute, and that is unlikely to happen.

The second consequence of the doctrine of implied warranty of authority is that the third Party can recover damages from the unauthorized agent only if he relied upon his misrepresentation and did not know the lack of authority; mere negligence on the Part of the third Party would not disentitle him. There is normally no duty on the third Party to inquire into the alleged authority of the agent but the circumstances may be such as to make it clear that the agent disclaimed authority, and he would then not be liable for breach of the implied warranty of authority.

On the whole, it can fairly be said that the liability of the unauthorized agent to the third Party is stricter in the common law than in the civil law but that the differences are not of fundamental nature.

Agents with Special Responsibility

We come now to a subject of major importance in the law of international trade, viz. the agent with special responsibility. He is an agent who, acting in a representative capacity, undertakes personal liability to the third Party. Prima facie, that the agent should be personally liable to the third Party is nothing extraordinary. This is the typical feature of the commissionnaire or other indirect agent who, vis-à-vis the third Party, acts as principal but is an agent in his relationship with the principal. The agent with special responsibility, however, acts in his representative capacity, normally for a named principal, but holds himself personally responsible to the third Party; in other words, he voluntarily jettisons the greatest benefit of direct agency, viz. the absence of personal responsibility to the third Party. That requires an explanation.

It is generally recognized that the relationship between the principal and agent is of fiduciary character and imposes a duty of loyalty and the agent; he must not allow his personal interests to conflict with those of the principal unless he first gives the principal full and fair disclosure. It is less widely realized that in international trade in many instances the third Party places greater reliance on the agent than on the principal, even if the name of the latter is disclosed to him and that he would not enter into a contract with the principal unless the latter is introduced by an agent well known to and trusted, by him. The Bond of trust and confidence between the agent and third Party, which is the raison d'être of agency with special responsibility is described by Hill as follows:

"The Basis of this acceptance of liability would appear to be the fact that the financial Standing of the special agent is often highly acceptable to the third Party, in preference to relying upon the creditworthiness of a principal who is probably completely unknown to him, i.e., the third Party may in many cases have established a regular trading Pattern with a particular agent acting from time to time for different principals".

Typical cases of agents with special responsibility are the insurance Broker, the stockbroker, the shipbroker, the forwarding agent, the advertising agent, and, above all, the confirming agent who is of such importance in international trade that he has to be treated more fully later; he is the Prototype of the agent with special responsibility.

From the legal point of view, agency with special responsibility can be created in three ways, viz. by statute, by trade custom, or by a agreement.

An Illustration of the creation of this type of agency by statute is the case of the insurance Broker. The Marine Insurance Act 1906 provides:
The personal liability of the forwarding agent for sea or air freight arranged by him on behalf of a client arises from trade custom, and that of the stockbroker under the rules of the Stock Exchange.

The liability of the advertising agent to the owner of the advertising medium and that of the confirming agent to the supplier of the goods is founded on contract.

It should be emphasized that apart from his undertaking to be personally responsible to the third party, the agent with special responsibility is in the same position as any other direct agent. His remuneration is the commission payable by the principal. The internal position between him and the principal is the same as that of an agent acting for a named principal, and, in particular, the property in goods obtained from the third party passes at once to the principal. This means that the agent who is personally liable to the third party requires protection, vis-à-vis his principal. The United Kingdom Sale of Goods Act 1893 affords him this by providing that "an agent who has himself paid, or is directly responsible for, the price" is entitled to the rights of an unpaid seller against the goods, including a lien on the goods. The special agent thus need not deliver or despatch the goods to his principal until he has been paid by him, unless, of course, he wants to allow him credit.

The concept of the agent with special responsibility has considerable potentialities. Hill observes rightly that the largely Victorian doctrine of principal and agent is, in its acknowledged form, outdated. He concludes: "It is possible that a new category of agency can be developed by the Courts under a name such as agency with dual responsibility'. The existence of such a class of agent, having liability to his principal according to the normal rules of agency and also a direct responsibility to the third party subject to a right of indemnity from his principal, would obviate the need for the Courts by fine distinctions to steer between these conflicting precedents, few of which offer positive guidance . . .".

The Confirming Agent

It has already been observed that the confirming agent who plays an important role in international trade is the prototype of the agent with special responsibility. This type of agency is conducted in Britain by export houses which have formed their own trade organization, the British Export Houses Association. Confirming agents are also found in other countries, notably in the United States of America.

Although the British Export Houses Association has not published standard conditions, the house conditions of the various British export houses are fairly standardized. I have described the activities of the confirming agent in detail in another connection, and it is sufficient here to indicate the main characteristics of that type of agency.

The economic objective of confirming agency is to relieve a supplier of the export risk inherent in an international sale transaction. Two typical illustrations will indicate this. P, of Lagos (Nigeria), wishes to place an order for electrical goods with T, of Birmingham (England). T accepts but makes his acceptance conditional upon confirmation by an English confirming house. P asks A, a confirming agent in London (England), to confirm P's order to T and A complies. More frequent is the situation in which P of Lagos addresses himself in the first place to A of London and asks A to buy on his, P's behalf, electrical goods from T in Birmingham. A complies, confirming P's order to T. It should be noted that in both instances the typical feature of the confirmation is that A and T have their place of business in the same country. The confirmation thus operates as a partial localisation device; it localises the aspects of the transaction which are most important from T's point of view, viz. payment of the price and Performance of the contract, in T's country. It operates, at the same time, as a conflict avoidance device, transferring these aspects from the international to the municipal level. It also relieves T of the necessity to inquire into the financial status of the foreign principal as he relies entirely on A's reputation, whereas A, who is an international merchant, is likely to be well informed about the Position in Lagos. Often the interposition of the confirming agent has financial implications; he allows credit to the foreign principal, charging an appropriate rate of
interest, and by prompt payment to the third Party secures a discount from him, which he would be entitled to retain if this is provided in the confirming agent's agreement with the principal, as is normally the case. Historically the activities of confirming agents have developed in England from those of the old indent houses.

The confirmation can be issued by the agent in two forms: he may place the order with the third Party as a principal, or he may pass on to the third Party his principal's order, adding his own confirmation. No presumption exists that the agent intends to confirm, even if he describes himself on his letter heads as export or confirming house; each individual transaction has to be evaluated on its terms. The first type of confirmation is in no way extraordinary; the confirming agent acts here as commission agent in the European continental sense. From the viewpoint of English doctrine, the legal construction of commission caused some difficulty until it was held in Ireland v. Livingstone that an intermediary could be Janus-faced, showing

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internally the face of an agent and externally that of a principal. Roche J. said in a later case.

"Between the commission agent . . . and a foreign principal there is no relation except that of agency; but as between the British sealer and the commission agent . . . as buyer there is no party to the contract except the commission agent . . . on that side".

The alternative, in which the confirming agent adds his own confirmation to the principal's order which he passes on to the third party, is a true case of agency with special responsibility. McNair J. described this type of confirmation as follows:

"The critical question is: What is the meaning of 'confirming order' or what is the meaning of 'confirming house'? . . . It seems to me, using the word in its ordinary sense, 'to confirm' means that the party confirming guarantees that the order will be carried out by the purchaser. In that sense he adds confirmation or assurance to the bargain which has been made by the primary contractor, just as a Bank confirms that a credit has been opened by the buyers in favour of the seller guarantees that payment will be made against the credit if the proper documents are tendered".

It is entirely fortuitous that the Cases which arose in the English Courts so far concerned a confirmation of the first type. Thus, in Sobell Industries Ltd. v. Cory Bros. and CO Ltd. Sobell obtained an order for radio Sets from buyers in Turkey and insisted on confirmation by Cory, who placed an order for the same goods in their own name with Sobell. The Turkish buyers accepted only Part of the goods and the confirming house-Cory-like likewise refused to accept the balance of the goods. McNair J. held that the confirmers were liable for damages for non-acceptance of these goods, founding his judgment on the simple ground that they had confirmed the order as principals when placing an order for the same goods with Sobell. The consequential Claim which Cory had against the Turkish buyer for indemnification with respect to the money which they had to pay to Sobell was not decided in this Case.

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That the confirming agent is bound, vis-à-vis the third Party, to pay the price and to pay damages in case of non-acceptance of the goods is obvious; this is the whole object of the confirmation device. In addition, the confirming agent undertakes to the client to give the third Party proper shipping instructions and to arrange transport, where necessary. But the confirming agent normally contracts with his principal that he shall not be liable for non-conformity of the goods with the contract. A typical clause to that effect is this:

"By confirming the order, we undertake full responsibility to pay the supplier for all goods delivered in accordance with our confirmation, but it is expressly agreed that we are to incur no other liability whatsoever in respect of the said contract and are not to be made Parties to any litigation or arbitration relating thereto".

The principal who wishes to make a Claim for defects of the goods supplied to him has to make it directly against the third Party.

Does the adoption of the one or the other of the two types of confirmation discussed earlier produce a different legal effect? As far as the liability of the confirming agent for the price or for damages for non-acceptance of the goods owing to unwillingness or inability of the principal is concerned, it is thought that no difference exists. The same would appear to be true if the main contract is frustrated by the imposition of an Import Prohibition in the principal's country; if the confirming agent has acted as principal, this result is obvious, and if he has only added his confirmation to the principal's order, that
confirmation has to be interpreted as intending to cover the non-performance of the main contract in consequence of a frustrating event. Differences, however, appear to exist in two respects: first, if the principal wishes to make a Claim against the third Party for the supply of defective goods; if the confirming agent has contracted as principal, the assignment of his Claim to the actual principal would be necessary, but if he has merely confirmed the actual principal's obligations, the latter can advance such a Claim without assignment. Secondly, if the confirming agent becomes insolvent the third Party has a direct Claim against the principal for goods which he has supplied to the agent on behalf of the principal.

Confirmation in Case of a Documentary Credit

Confirmation as a partial localization device is not only used in commercial agency but may also be employed in Bankers' documentary credits which are a common and widely used method of payment in international trade. Where the parties to an international contract of sale have agreed that the buyer shall provide finance under a confirmed documentary credit, the duty to open the credit falls on the Bank in the buyer's country (the "issuing Bank") and the confirmation will emanate from the "correspondent Bank" in the seller's country. This confirmation gives the seller assurance that, if he tenders the stipulated documents to the correspondent Bank, he will receive finance from that Bank in his own country.

Bankers' Documentary Credits are nowadays universally transacted under the Uniform Customs and Practice for Documentary Credits 1962, sponsored by the International Chamber of Commerce in Paris. The Uniform Customs state in Article 3 (2) and (3) with respect to confirmed credits:

"An irrevocable credit may be advised to a beneficiary through another Bank without engagement on the part of the other bank ('the advising Bank'), but when an issuing Bank authorizes another Bank to confirm its irrevocable credit and the latter does so, such confirmation constitutes a definite undertaking on the part of the confirming bank either that the provisions for payment or acceptance will be duly fulfilled or, in the case of a credit available by negotiation of drafts, that the confirming Bank will negotiate drafts without recourse to the drawer. Such undertakings can neither be modified nor cancelled without the agreement of all concerned".

That the confirming Bank is bound to honour its obligations to the seller even if the buyer instructs it not to pay the buyer was already decided in 1957 in Hamzeh Malas & Sons v. British Imex Industries Ltd. Jenkins L.J. said in that case:

"It seems to me plain enough that the opening of a confirmed Letter of credit constitutes a bargain between the Banker and the vendor of the goods, which imposes upon the Banker an absolute Obligation to pay irrespective of any dispute there may be between the Parties as to whether the goods are up to the contract or not".

A comparison between the undertakings of the confirming Bank and those of the confirming agent shows that these undertakings are not identical. Confirmation by the Bank relates only to the financial aspects of the international sales transaction, viz. the payment, but confirmation by a confirming agent goes further and relates, in the words of McNair J., to "the contract as a whole". "The confirmed credit has, thus, the merit of safety, in view of the financial status of the confirmer, but the acceptance of personal liability of the confirming house by way of a purchasing order has the merit of giving the seller protection in contingencies which are not purely financial".

Rejection of Foreign Principal Theory in Modern English Law

In former times, when communications were not as well developed as today, the Courts held that where an English agent acted for a foreign principal, a strong presumption existed that he intended to assume personal liability to the English third Party, but this presumption was always treated as rebuttable by clear evidence. In modern English practice opinions as to the existence of this presumption have changed. Bowstead expresses the view that the fact that the agent has acted for a foreign principal "raises a weak presumption of fact against the principal's liability and in favour of the agent's." Fridman considers the question of liability of the foreign principal and the English agent as a question of fact,
dependent on the circumstances indicating the Intention of the contracting parties.  

In my view, the presumption in favour of the personal liability of an agent acting for a foreign principal has ceased to exist, it is no longer appropriate in the age of the jet plane and modern telecommunications. Donaldson J. observed in a case decided in 1967:  

"The most that can now be said is that in deciding whether privity of contract exists between an English supplier and the foreign principal of an English agent [is that] the fact that the principal is foreign is a factor to be taken into account although its weight may be minimal".

Conclusions

1. In all legal systems, if the direct agent acts within the Limits of his authority, privity of contract exists only between the principal and the third Party and the agent is not liable to the third Party.

2. In all legal systems, if the direct agent is unauthorized, either because he has no authority or he exceeds his authority, and the principal does not ratify the unauthorized act, the agent is personally liable to the third Party.

3. The agent with special responsibility, having liability to his principal according to the normal rules of agency and also being directly liable to the third Party, is of particular importance in modern international trade.

It may be that here are the beginnings of a new modern conception of commercial agency which in course of time might overshadow the traditional forms. One might speculate that the outcome of this development might be a return to the Roman concept of agency in substance though not in form, namely a dual liability of agent and principal to the third Party, with the liability of the agent as the primary source of satisfaction for the third Party.

4. The confirming agent is the Prototype of the agent with special responsibility, but sometimes he acts as an ordinary commission agent.

5. Modern commercial practice has developed the confirmation as a partial localization device.

6. Confirmation by a bank under a documentary credit and confirmation by an agent do not have the same effect. The former extends only to the financial aspects of the transaction but the latter covers the whole contract.

[...]

1 For the Position of agents in Soviet foreign trade see D. M. Genkin, Der Aussenhandel und seine rechtliche Regelung in der UdSSR (German translation from Russian), East-Berlin, 1963, Chapter 29, 101 et seq.
4 20 Henry III c. 10.
5 They were the predecessors of the barristers.
7 Y.B.33-S Ed. I 567.
11 S. J. Stoljar, loc. cit., 39.
12 (1469) Y.B. 8 Edw. 4, Mich. fol. IIb, 9; Stoljar, loc. cit., 40.
16 G. H. L. Fridman, loc. cit., 5.
Stoljar, loc. cit., 205-206 (footnotes omitted).

Co. Litt. 258.

Holmes, loc. cit., 374.

The view of Stoljar, loc. cit., 15, that this implies the concept of a "sort of automation or tool" of the agent in the hands of the principal is, it is submitted, due to a misunderstanding of Holmes' thesis.

See p. 122, ante.


German BGB, s. 932.

The Factors Act 1890 merely extends the Act of 1889 to Scotland.

Factors Act 1889, s. 1 (1).

E.g., bills of lading.

Factors Act 1889, s. 2 (1).

The earlier Factors Acts and earlier Cases used the test of "agent entrusted" and it was only after the passing of the Act of 1889 that that phrase was dropped and the new term that the agent must have obtained possession "with the consent of the owner" came into use; Stoljar, loc. cit., 117-118.


See p. 125, ante. This subject is admirably treated in Fridman's Law of Agency, 2.6.


See p. 141, post.

1 See p. 129, ante.


3 German BGB, s. 164.

4 Swiss OR, Art. 32.

5 See p. 119, ante.

6 French CC, Art. 1120, German BGB, s. 184, Swiss OR, Art. 38.

7 German HGB, s. 91a.

8 Gierke, loc. cit., 158.

9 See p. 141, ante.


12 German BGB, s. 179 (3), Swiss OR, Art. 39 (1).

13 French CC, Art. 1120.

14 German BGB, s. 179 (1) and (2).

15 Swiss OR, Art. 39.


18 Bowstead, loc. cit., 397-399.


21 Stoljar, loc. cit., 264.


23 10 Columbia Law Rev. (1910), 567.

24 Bowstead, loc. cit., 398.


26 (1964) A.C. 465. See also American Restatement, para. 330.


28 Bowstead, loc. cit., 400-401; Stoljar, loc. cit., 265.

29 Bowstead, loc. cit., 127; Fridman, loc. cit., L24; Stoljar, loc. cit., 288; American Restatement, paras. 387-398.


31 See p. 154, post.

32 Marine Insurance Act 19U6, s. 54 (1). This Provision itself is founded an trade custom.

33 Italics added by author.


38 See p. 154, *post*.
39 Except in the case of the insurance broker who, by custom of the trade, receives commission from the insurer.
40 Sale of Goods Act 1893, s. 38 (2).
41 Hill, *loc. cit.*, 311.
43 See p. 152, *ante*.
46 Schmitthoff's *Export Trade*, 145-150.
48 Schmitthoff's *Export Trade*, 146.
49 (1872) L.R. S H.L. 395.
52 These Cases are treated in Schmitthoff's *Export Trade*, 145-150.
54 See p. 155, *ante*.
55 Schmitthoff's *Export Trade*, 199-220.
56 This means "unconfirmed", the author.
57 *Italics* added, the author.
59 Schmitthoff's *Export Trade*, 150.
64 *Fridman's Law of Agency*, 182.
65 Schmitthoff's *Export Trade*, 149.

Referring Principles:

- **II.1** - Prerequisites and effects of agency
- **II.3** - Agent acting without or outside his authority
- **II.4** - Agency by estoppel / apparent authority