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Yuliia POKHODUN

Doctoral Dissertation

CONCEPTUAL FOUNDATIONS OF INTEREST ALIGNMENT IN INTERNATIONAL COMMERCIAL AGENCY: A CIVIL AND COMMON LAW PERSPECTIVE

SOCIAL SCIENCES,
LAW (S 001)
VILNIUS, 2025

Mykolas Romeris University

MYKOLAS ROMERIS UNIVERSITY

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MYKOLO ROMERIO UNIVERSITETAS

Yuliia Pokhodun

KONCEPTUALŪS INTERESŲ DERINIMO TARPTAUTINIUOSE KOMERCINIO ATSTOVAVIMO TEISINIUOSE SANTYKIUOSE PAGRINDAI: KONTINENTINĖS IR BENDROSIOS TEISĖS PERSPEKTYVOS

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LIST OF ABBREVIATIONS

UNIDROIT	UNIDROIT Principles of International Commercial Contracts
UNCITRAL	United Nations Commission on International Trade Law
HCCH	Hague Conference on Private International Law
CISG	Geneva Convention on Agency in Contracts for the International Sale of Goods
PECL	Principles of European Contract Law
DCFR	Draft Common Frame of Reference
CCU	Civil Code of Ukraine
BCC	Belgium Civil Code
DCC	Dutch Civil Code
BGB	German Civil Code
HGB	German Commercial Code

INTRODUCTION

Research problem and the relevance of this dissertation is conditioned by the complexity and challenges linked to the reconciliation of the interests of participants to international commercial agency relationships, especially in the light of fundamental differences between the approaches of civil law and common law systems. Interestingly, with a large number of studies on agency doctrine the comparative understanding of causes leading to the misalignment of interests of the subjects in international commercial agency and mechanisms of their control remains under-explored. Striking differences exist across the jurisdictions in application of legal principles, doctrines, and practices, that lead to misunderstandings, conflicts, and inefficiencies in cross-border commercial transactions.

The term international commercial law refers to a set of international conventions, model laws, and uniform trade terms that regulate private law rights and obligations of parties to international commercial transactions[1]. Such definition excludes institutional law, consumer law and public law[2]. Therefore, the focus of international commercial law is on private law issues.

Being one of the key areas of commercial law, agency law in the broad sense concerns the relationship where an agent performs legal acts, and is authorised to act, on behalf of the principal[3]. By creating a flexible system of getting into the foreign market, the principal takes advantage of the agent's knowledge and connections on the local market and avoids unnecessary commitments required by the establishment of a branch or subsidiary. Naturally, the parties are not equal in their information awareness of the local market and legal background, and such inequality would lead to the situation of moral hazard increasing the costs to the principal-agency relationship[4]. It is essential to examine the reasons triggering the situation of moral hazard and misalignment of incentives among participants to agency to minimise the negative consequences, including agency costs.

In theory, international commercial agency relations are beneficial for both parties, however, they are also extremely complex and usually involve many participants, whose interests can be misaligned, affecting the efficiency of agency relationships, and increasing agency costs, prolonged negotiations, and potential conflicts. The present research addresses this issue by proposing frameworks that can mitigate these

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1 Goode, Royston Miles. *Commercial Law in the next Millennium.* The Hamlyn Lectures 49. London: Sweet & Maxwell, 1998.

2 Horn, Norbert, Clive M. Schmitthoff, and J. Barrigan Marcantonio, eds. *The Transnational Law of International Commercial Transactions.* Studies in Transnational Economic Law, v. 2. Deventer, the Netherlands; Boston: Kluwer, 1982.

3 Bonell, Michael Joachim. 'The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles'. *Uniform Law Review* 23, no. 1 (2018): 15–41.

4 Croson, David C., and Michael G. Jacobides. 'Agency Relationships and Monitoring in Electronic Commerce'. *International Journal of Electronic Commerce* 1, no. 3 (April 1997): 65–82. [visited 14-06-2020] https://doi.org/10.1080/10864415.1997.11518290.

uncertainties.

Multi-layered relationships essentially presume potential problems as interests of the participants to commercial agency relationships might differ because of many reasons, however, the most frequent one is information asymmetry. It influences agents' decisions and creates opportunities for self-dealing caused by a systemic gap in the incentives of both the principal and the agent. Such misalignment of interests not only conflicts with the main principal's incentive for wealth maximisation, but also leads to the increase of agency costs, potential agent's liability for the breach of contract, damages and other penalties depending on how blatant the breach was.

The opportunism of agents that appears in the abovementioned cases is usually the result of a systemic gap between the agent's and principal's social preferences. The law usually protects the interests of third parties, since they are considered weaker parties without the possibility of checking the agent's authority or deciding with whom to contract, however, their interests should not be unconditionally defended at the expense of other participants in an agency relationship[5]. The principal, in his turn, is often treated according to the "deep pocket" principle and should always assume the risks of the agent acting outside the scope of authority[6]. For this reason, the interests and acts of the parties should be not only properly aligned but also properly protected, otherwise, the representation as a way of implementation of civil rights becomes not so effective.

The principal's main aim will always be profit maximisation with the set of compensation schemes that are available to the agent. Among these schemes, the one should be chosen that satisfies both the interests of the agent and maximises the principal's welfare. Agents are less free in their actions, being sensitive to profits; they are trying to choose the compensation package with the best coverage of the work done. Every agent's action is usually associated with certain difficulties, expenses, and time; therefore, reasonable compensation is needed to keep the agent motivated.

Remunerations are inherent outcomes of all commercial relationships and when are not satisfactory, it can generate pathological incentives. Adoption of a proper compensation package can be considered a mechanism of balancing the interests between the agents and principals and increasing the efficiency of agency relationships. As an internal mechanism it is suggested to refer to the incentive contract that would provide an increased volume of damage compensation and constrain the agents' personal interest motivating them to act loyally and with due care.

According to the continental European company laws, the agency is explained through the doctrine of separation, which is based on the distinction between the

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5 Jurkevičius, Vaidas, and Raimonda Bublienė. 'Towards Sustainable Business Relationships: Ratification Doctrine in the Case of Unauthorised Agency'. *Entrepreneurship and Sustainability Issues* 5, no. 1 (2017): 72–90 at 72. https://doi.org/10.9770/jesi.2017.5.1(6).

6 Bisso, Juan Carlos, and Albert H. Choi. 'Optimal Agency Contracts: The Effect of Vicarious Liability and Judicial Error'. *International Review of Law and Economics* 28, no. 3 (1 September 2008): 166–74. https://doi.org/10.1016/j.irle.2008.06.005.

internal and external relationships, where the internal mostly represents the fiduciary side of agency relationships while the external level is formed between the agent and the party they are interacting on the principal's behalf. The agent might be able to choose the counterparty by himself or following the principal's instructions[7]. Hence, the civil law follows the two-contract construction when creating agency relations, and these two contracts, are immutable[8].

On the contrary, the common law study that identifies the agent and principal, fails to make a distinction between the internal and external relationships, but simply involves the contract of only two persons. The theory of identity is more focused on the protection of the principal, allowing the agent to act outside the scope of the authority granted without binding the principal himself[9].

The national law of some states questions the inclusion of external relations into the concept of commercial representation, stating that they result from the initial internal relationship and should not be included in the agency institution[10]. At the same time, others like Germany, and Sweden together with the international legal instruments take a different approach by providing regulation only to external agency relations[11].

Commercial representation under the civilian approach acknowledges only the direct agency where the third party is fully aware of the principal's existence, denying the agent's ability to form valid relationships between the principal and the third party if the latter is unaware of agency relationship. The common law approach made it possible for the principal to remain undisclosed when he wants to and let the agent contract with the third party personally. The third party in this case is not aware of the existence of the principal and treats the agent as the direct counterparty in the transaction, avoiding the usual for the civil law two-contract construction[12]. As a result, the contract will be concluded between the agent and the third party, and it will not matter, whether the agent had the intention to act for a principal or was he duly authorised to act.

Considering various approaches to understanding of commercial agency

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7 Цюра Вадим *Інститут представництва в цивільному праві України// Institute of representation in civil law of Ukraine*: dissertation. cand. Legal science: 12.00.03./ Kyiv. national T. Shevchenko university – p.535, 2017.

8 Lawson, F.H. *The Roman Law Reader: Edited by F. H. Lawson*. Docket Series. N.Y., Oceana Publications, Incorporated, 1969. https://books.google.lt/books?id=UvSR0AEACAAJ. at p. 140.

9 Schmitthoff, Clive M., and Jiarui Cheng. *Clive M. Schmitthoff's Select Essays on International Trade Law*. Dordrecht; Boston: London: M. Nijhoff; Graham & Trotman, 1988. at p.15.

10 Грабовий, О.А. Договір комерційного представництва у цивільному праві України: дис. на здобуття наук. ступ. докт. філософії та докт. наук. Київ. 2021 [visited 2024-01-24]. https://uacademic.info/ua/document/0821U102702

11 Article 1(3), Convention on Agency in the International Sale of Goods (Concluded on 17 February 1983, Not Entered into Legal Force)'. [visited 2024-05-01]. https://www.unidroit.org/instruments/agency/.

12 Gavrilovikj, Borka Tushevska. 'Civil Law Versus Common Law Concept of Freight Forwarders'. *Balkan Social Science Review*, no. 4 (2014): 45–67, at 46.

relationship across the legal systems, a lot of confusion exists regarding the set of its participants, and their characteristics.

Commercial agents are independent self-employed intermediaries who are appointed to sell or purchase goods on behalf of their principals. By such actions, agents' main aim is to create a direct relationship between the principal and the third party without binding themselves. Commercial agents also cannot be employees as they must always remain separate legal personalities with the principal. Therefore, employment relationships are excluded from the concept of agency, since the former imply that the agent is fully dependent on the principal and the principal is always vicariously liable for the agent's acts.

Distributors, franchisees, and licensees, although could be compared with agents, however, do not represent the manufacturers since they act for their own account and become bound to the transactions with their counterparties[13].

Classic model of agency relationship presumes the existence of three parties: the agent, the principal and the third party. In the case of a commercial agency, the situation will be the following: the owner of property rights for both tangible and electronic products[14] including gas and electricity[15] confers the rights to the commercial agent to conclude sale or purchase transactions with potential buyers (i.e. third parties). Nevertheless, it is currently being discussed that with the expansion of commercial agency, tripartite relationships are too narrow and do not fully reflect the real complexity of international business relationships. Therefore, besides the principal, the agent and the third party, currently the existence of the fourth parties is being debated. This category may include external stakeholders who are not directly involved into the relationship but are affected by agent's actions through the second transaction. Although they act outside the immediate tripartite agency relationship, these stakeholders are also entitled to protection due to their reliance on the validation of contracts concluded between the principal and the third parties[16].

The relevance of the thesis reveals in its systematic evaluation of the most pressing conceptual matters associated with reconciling the interests of key stakeholders, including agents, principals, third parties and fourth parties from the comparative perspective and practical solutions towards the balancing of rights and lawful interests of stakeholders to international commercial agency as well as enhancing the efficiency of international commercial representation in general.

The research is limited to revealing the problems of private law issues such as the regulation of the rights and obligations of parties to an international commercial agency, part of the agent's authority to the reconciliation of interests with the principal,

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13 Goode, Royston Miles, Ewan McKendrick, and Herbert Kronke. *Transnational Commercial Law: Text, Cases, and Materials*. Second edition. Oxford, United Kingdom: Oxford University Press, 2015.

14 The Software Incubator Ltd v Computer Associates (UK) Ltd C-410/19 (CJEU 17 December 2020

15 Tamarind International Ltd v Eastern Gas (Retail) Ltd Times (CJEU 27 June 2000

16 Busch, Danny, and Laura J. Macgregor, eds. The unauthorised agent: perspectives from European and comparative law. Cambridge University Press, 2009.

potential conflicts of agents' acting without authority as well as liability of *falsus procurator*, and mechanisms of balancing the interests between all the related parties in such cases. The thesis also includes references to insolvency-related issues while analysis the available means of principal's protection against the insolvent agent.

The scope of the research excludes issues connected of e-commerce, software agents, and artificial intelligence due to the focus on conceptual legal research analysing the most common problems arising in theory and jurisprudence.

The main scientific problem of the current research is formulated in this way: how to ensure the balance of rights and lawful interests for the participants (agent, principal, third parties) and other related (fourth) parties to international commercial agency relations.

The problem will be studied from the perspectives of civil law and common law. Even though the perception of legal institutions via just these legal systems has been widely critiqued as being too simplistic on both theoretical and empirical grounds[17], a closer look at these systems shows that approaches vary greatly regarding what mechanisms of controlling and minimising the conflicts of interests are the most effective[18].

The object of the thesis is the reconciliation of interests between the main stakeholders to international commercial agency, including agents, principals, third parties and fourth parties through the norms of civil law and common law systems and their practical implementation.

To reveal the object of the thesis, the author investigates main principles and concepts of agency such as undisclosed agency, apparent authority, unauthorised agency, and ratification from the perspective of balancing the interests of the parties both to internal and external agency relationships.

The aim of the research is to provide a fundamental analysis of the most common problems associated with the misalignment of interests between the participants to international commercial agency relationship from the comparative perspective, and practical mechanisms of reconciliation of rights and lawful interests between the participants (agent, principal, third parties) and other related (fourth) parties involved in cross-border commercial agency relationships by investigating the legal frameworks governing agency relationships across civil law and common law jurisdictions.

To serve the aim of the thesis, the following tasks are set:

1. To define the conceptual peculiarities of international commercial agency, development of the legal regulation, and identify law applicable to the international commercial agency agreements from the comparative perspective;

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17 Coffee, John C. Jr. 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control'. *Yale Law Journal* 111 (2001): 1-82; Armour, John, Simon Deakin, Prabirjit Sarkar, Mathias Siems, and Ajit Singh. 'Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis'. *Journal of Empirical Legal Studies* 6, no. 2 (2009): 343–80. https://doi.org/10.1111/j.1740-1461.2009.01146.x

18 Filatotchev, Igor, Gregory Jackson, and Chizu Nakajima. 'Corporate Governance and National Institutions: A Review and Emerging Research Agenda'. *Asia Pacific Journal of Management* 30, no. 4 (2013): 965–86 at 975 https://doi.org/10.1007/s10490-012-9293-9.

2. To determine the conflict areas within the internal agency relationship, analysing the mechanisms of reconciliation of interests between the agent and the principal;
3. To provide the analysis of the relationship between the parties to an external agency relationship, identifying the mechanisms that would facilitate the reconciliation of interests and provide protection in case of agency malfunctioning.

Scientific novelty of the research and the significance of the thesis are associated with the specificity of the subject involving the relationship between the participants to international commercial agency from the comparative perspective and identifying the mechanisms of reconciliation of their interests in order to preserve the value of agency itself. Commercial agency is a rather classical legal construction, involving three parties: the agent, the principal and the third party. Nevertheless, the thesis also raises the debatable issue of the expansion of tripartite relationship to the inclusion of fourth parties. This category may include external stakeholders who are not directly involved into the relationship but are also entitled to protection due to their reliance on the validation of initial agency contracts. Thus, the question arises as to how to balance the interests of the fourth parties who act in good faith toward the other participants in commercial agency relationships. Problems are particularly prevalent in cases of unauthorised agency.

Also, the thesis identifies the main grounds for conflicts between the agent and the principal from the legal perspective and suggests the innovative ways of conflict minimisation within both internal and external agency relationship by adopting adequate compensation schemes by the implementation of the common law contingent fee system as a commercial agent's remuneration scheme could indeed promote fairness and equality.

The thesis dedicates a great amount of attention to the doctrine of apparent authority and its part in ensuring the balance of interests between the commercial agency participants. Application of the doctrine solely to protect third parties could negatively affect the utility of the agency relationship, infringing upon the principal's autonomy of will. The thesis provides a deep analysis of the differences between the implied and apparent authority, reconciliation of the parties' interests when applying the doctrine of apparent authority as well as the interrelations of the doctrine of ratification and the doctrine of apparent authority.

Doctrine of apparent authority as well as doctrine of ratification have been created as a resort of third-party protection under which the principal can become bound and liable under the contract. Specific hierarchy between ratification and apparent authority precludes the principal to refer to the doctrine apparent authority where the unauthorised agency is established. By invoking the doctrine of apparent authority, the third party indirectly acknowledges that the agent was not duly authorised at the time of a contract conclusion and the principal needs to grant him authority retroactively by ratifying the action. Such a position contradicts the primary condition of the doctrine of apparent authority which presumes that the third party genuinely believed

that the agent was duly authorised and never doubted his authority. Although when the ratification cannot be invoked, the third parties should not be denied the right to protect the interests by relying on apparent authority.

Interestingly, most of the existing agency problems and conflicts that arise between the participants are studied from the perspective of accountancy, finance, economics, sociology and marketing. Profound differences established in both legal systems regarding organisation of basic elements of agency, definitions of the commercial agents, principals, fourth parties, fiduciary duties. The divergence of approaches may be seen not only in different legal systems but also within one legal system.

As far as the scientific works in the chosen field are concerned, most of the studies are concentrated on agency problems arising in well-developed countries like Germany, France, the UK, and the USA; therefore, there is a need for some comparative research to be done in international regulation of relationships in commercial agency. Apart from the national law of the mentioned countries, the work evaluates the provisions of the main international and European Union law instruments as well as soft law instruments regulating the agency relationships (the choice of analysed legal systems in this work is revealed while describing the research methodology).

The results of the research may also be relevant in various practical aspects to the legislators of analysed jurisdictions, court practice, and legal doctrine.

For the legislators, the research may be useful for eliminating the gaps and deficiencies in the legal norms regulating international commercial agency to complete the regulation of these relations and to ensure the balance of interests of subjects participating in them.

The Courts may use the results of this scientific research to avoid mistakes in explaining and implementing the norms of civil law and commercial law regulating agency relations, and to find the proper legal solutions that would consider the interests of all the parties to agency relations. Depending on whether the country has a monist or dualist legal system, commercial law could be either incorporated into the civil law norms or not. Such a difference is considered while providing further analysis.

Considering the issues raised above, the present research is considered to be a pilot scientific work that will systematically evaluate the legal regulation of commercial agency from a comparative perspective, analyse the concept of authority, nature and causes of imbalance of interests between the subjects to international commercial agency. It is aimed at providing theoretical insights as well as practical solutions that would enhance efficiency, reduce conflicts, increase trust in cross-border commercial relationships and ensure the balance of the legitimate interests of all parties involved.

This research contributes to both academic discourse and practical implementation that would be a significant contribution to the development of the international doctrine of agency. The research shows the problems of the legal regulation of international commercial agency relationships and its implementation in practice, offering a fresh perspective that incorporates two significant legal traditions in the context of global commerce. It is also believed that this work will encourage further research including the issues raised by the reviewer with regard to technological development and

digital transformation and will have value to scientists who analyse separate aspects of similar problems and to the institute of representation in general.

Defence statements of the dissertation:

1. International commercial agency relationship involves a specific set of parties different from other relationship of representation, whose characteristics are derived from the type, purpose and nature of activity involved.
2. The enforcement of proactive risk mitigation strategies, supplemented by fiduciary duty remedial mechanisms and a contingent fee system for the agent's compensation, can help reconcile the interests within the internal agency relationship and maximise the efficiency of the agency itself.
3. The balance of interests between the principal and the third party can be reached by awarding them with the corresponding methods of interest protection and distributing the risk between the participants in case of agency malfunctioning.

Approval of research results. The results of the study are published in the scientific paper Entrepreneurship and Sustainability Issues in 2018 in the article "The Doctrine of Apparent Authority as a Precondition for Sustainable Business"[19].

Research results were presented at the international conference of young researchers "Social Transformations in Contemporary Society 2021" (STICS 2021) organised by the MRU Doctoral Students' Association. As a result of the presentation the publication of the article followed revealing the topic of "Minimizing the Agency Problem and Aligning the Interests in International Commercial Agency"[20].

The overlapping with the dissertation topic problems were also discussed during the 12th International Scientific Conference "Business and Management 2022" (VILNIUS TECH) in Vilnius, Lithuania where the research paper "Peculiarities of International Commercial Agency Agreements from a comparative perspective[21]" was presented in co-authorship with Vaidas Jurkevičius and Raimonda Bublienė, which further received publication in the conference proceedings.

In November 2022 the research results were presented on the XI International Scientific Conference on Social Innovations (SOCIN'22) with the topic of the presentation "Sustainability and International Commercial Agency Agreements". After the conference, the article "Sustainable Commercial Agency Agreements in Civil Law and Common Law" in co-authorship with Jurkevičius, Vaidas and Bublienė Raimonda has

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19 Jurkevičius, Vaidas and Pokhodun, Yuliia. 'The Doctrine of Apparent Authority as a Precondition for Sustainable Business'. Entrepreneurship and Sustainability Issues 6, no. 2 (2018): 649–61. https://doi.org/10.9770/jesi.2018.6.2(13)

20 Pokhodun, Yuliia. 'Minimizing the Agency Problem and Aligning the Interests in International Commercial Agency' Contemporary Research on Organization Management and Administration (CROMA Journal). Vilnius: Akademinė Vadybos Ir Administravimo Asociacija (AVADA), (2021), Vol. 9, Iss. 2. https://cris.mruni.eu/cris/entities/publication/2d135302-d02f-449c-9cfb-90e128c06291.

21 Jurkevičius, Vaidas, Yuliia Pokhodun, and Raimonda Bublienė. "Peculiarities of international commercial agency agreements from a comparative perspective." In *12th International scientific conference "Business and management 2022", May 12–13, 2022, Vilnius, Lithuania. Vilnius: Vilnius Gediminas Technical University, 2022, bm. 2022.750. ISBN 9786094762888.* 2022.

been published in the peer-reviewed International Journal of Learning and Change in 2024[22].

RESEARCH OVERVIEW

Agency theory is regarded as very pragmatic and widely applied. It has roots in different academic fields and its usefulness is very extensive and prominent. Evidence is found in accounting, finance[23], economics[24], sociology[25] and marketing[26]. Nevertheless, no comprehensive comparative legal research has been held concerning the problem of balancing the interests among the participants to the international commercial agency.

On the European level, respective legal instruments related specifically to the commercial agency agreements started to appear only in the 19th century and instantly became of interest to legal practitioners and courts. Before that modern commercial agency, franchising and distribution contracts were regulated only by the principles of general contract law.

The most comprehensively examined topic is revealed in the monograph edited by Danny Busch and Laura J. Macgregor[27], which presents the main concepts of agency doctrine including authority and unauthorised representation in individual states (France, Belgium, the Netherlands, Germany, the United States of America, England, Scotland, South Africa) and soft law instruments UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law, Draft Common Frame of Reference, Restatement (Third) of Agency, and European Contract Code that are aimed to unify the rules, create the common approach to dealing with agency issues and to eliminate the conflict of laws. This paper mainly analyses the specific legal consequences of unauthorised representation for the external aspects of direct representation relations, as well as legal consequences arising in the internal relations

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22 Jurkevičius, Vaidas, Yuliia Pokhodun, and Raimonda Bublienė. "Sustainable commercial agency agreements in civil law and common law." *International Journal of Learning and Change* 16, no. 2-3 (2024): 242-261.

23 Fama, Eugene F. "Agency problems and the theory of the firm." *Journal of political economy* 88, no. 2 (1980): 288-307; Jensen, Michael C. 'Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers'. *The American Economic Review* 76, no. 2 (1986): 323–29.

24 Jensen, Michael C., and William H. Meckling. 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure'. *Journal of Financial Economics* 3, no. 4 (1976): 305–60. https://doi.org/10.1016/0304-405X(76)90026-X..

25 Adams, Julia. 'Principals and Agents, Colonialists and Company Men: The Decay of Colonial Control in the Dutch East Indies'. *American Sociological Review* 61, no. 1 (1996): 12–28. https://doi.org/10.2307/2096404.

26 Bergen, Mark, Shantanu Dutta, and Orville C. Walker. 'Agency Relationships in Marketing: A Review of the Implications and Applications of Agency and Related Theories'. *Journal of Marketing* 56, no. 3 (1992): 1–24. https://doi.org/10.1177/002224299205600301.

27 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16.

between the representative and the principal.

The discussion of conceptual issues of international commercial agency may be found in scientific papers intended to generally discuss the institution of representation (both as an independent object of research and as one of the areas of contract law). The doctrine of states in the common law tradition is particularly rich, where individual scientific works have been published on agency. The subject is most comprehensively reviewed in the works of Marianne Dickstein, Cristelle Albaric[28], Luciana Bassani[29], Ellen Eftestol-Wilhelmsson[30], Susan Singleton[31], Eric Rasmusen[32] who analysed the commercial agency agreements and the applicable law. The general concepts of agency including the comprehensive review of the fiduciary nature of relationship of representation, concepts of authority and liability were discussed by Roderick Munday[33], Francis Martin Baillie Reynolds and Peter George Watts[34], Deborah DeMott[35], Wolfram Müller-Freienfels[36], Samuel J. Stoljar[37], Vadim Tsiura[38], Oleksandr Grabovyi[39]. Also, scholars looked for the legal definition of the unauthorised agency that would reflect the interests of all three parties to an agency agreement and would be directed to protect their interests. Certain answers may be observed in statutory and case law.

From the comparative perspective, agency issues are analysed in scientific works by Michael J. Bonell[40], H. L. E. Verhagen[41], Hans H. Lidgard, Claude D. Rohwer and

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28 Albaric, Cristelle, and Marianne Dickstein. *International Commercial Agency and Distribution Agreements: Case Law and Contract Clauses*. Kluwer Law International B.V., 2017.

29 Bassani, Luciana, Rebecca Bedford, Arthur L. Pressman, Jean-Philippe Turgeon, and Dagmar Waldzus. 'Applicable Law and Jurisdiction in Franchising, Commercial Agency and Distribution Agreements'. *International Journal of Franchising Law* 13 (2015): 3.

30 Eftestol-Wilhelmsson, Ellen. "The EU Directive on Self-Employed Commercial Agents-Applicability and Mandatory Scope." *Tul. Mar. LJ* 39 (2014): 675.

31 Singleton, Susan. *Commercial Agency Agreements: Law and Practice*. Bloomsbury Publishing, 2020.

32 Rasmusen, Eric. "Agency law and contract formation." *American Law and Economics Review* 6, no. 2 (2004): 369-409.

33 Munday, Roderick. *Agency: Law and Principles*. OUP Oxford, 2010.

34 Bowstead, William, Francis Martin Baillie Reynolds, and Peter Watts. *Bowstead and Reynolds on Agency*. Sweet & Maxwell, 2018.

35 DeMott, Deborah A. 'The Fiduciary Character of Agency and the Interpretation of Instructions'. In *Philosophical Foundations of Fiduciary Law*, edited by Andrew S. Gold and Paul B. Miller, 321–38. Oxford University Press, 2014.

36 Müller-Freienfels, W. 'Law of Agency'. *The American Journal of Comparative Law* 6, no. 2–3 (1 May 1957): 165–88. https://doi.org/10.2307/837515.

37 Stoljar, S. J. *The Law of Agency: Its History and Present Principles*. London: Sweet & Maxwell, 1961.

38 Цюра В. *supra note* 7.

39 Грабовий О. *supra note* 10.

40 Bonell M. J., *supra note* 3.; Bonell, Michael Joachim. 'The 1983 Geneva Convention on Agency in the International Sale of Goods'. *American Journal of Comparative Law* 32 (1984): 717.

41 Verhagen, Hendrikus Leonardus Engelbertus. *Agency in private international law: the Hague convention on the law applicable to agency*. Martinus Nijhoff Publishers, 2023.

Dennis Campbell[42], Vaidas Jurkevicius[43], Séverine Saintier[44], Danny Busch[45], as well as UNIDROIT Principles of International Commercial Contracts[46], European Contracts in the comments of the legal principles[47], and the outline of the general system of principles[48].

Despite the extensive use of literature, the present study pursues a unique aim and offers specific insights into the necessity for reconciling the interests of parties involved in commercial agency relationships. It highlights the unique characteristics of commercial agency and the various stakeholders from a comparative perspective. Significant differences between the common law and civil law approaches create a notable gap in the regulation of international commercial agency agreements and the mechanisms for aligning the interests of these parties. To the best of the author's knowledge, no comprehensive research has been conducted on this topic from the perspective of agency law.

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42 Lidgard, Hans Henrik, Claude D. Rohwer, and Dennis Campbell, eds. *A Survey of Commercial Agency*. Deventer, Netherlands; Boston: Kluwer Law and Taxation Publishers, 1984.

43 Jurkevičius, Vaidas. 'Neįgaliotas Atstovas Civilinėje Teisėje: Lyginamoji Analizė'. Daktaro disertacija / Doctoral dissertation (ETD_DR), Romerio universitetas, 2014; Mitkus, Sigitas, and Vaidas Jurkevičius. *Agency Law in Business Relationships: The Main Characteristics from a Comparative Perspective*. Vilnius Gediminas Technical University, 2014. https://etalpykla.vilniustech.lt/handle/123456789/154378;

44 Saintier, Séverine, and Jeremy Scholes. *Commercial Agents and the Law*. Lloyds Commercial Law Library. London: LLP, 2005; Saintier, S. Agency and Distribution Agreements chapter in DiMatteo, Larry A., Andre Janssen, Ulrich Magnus, and Reiner Schulze, eds. *International Sales Law: Contract, Principles & Practice*. First edition. München, Germany: Baden-Baden, Germany: C.H. Beck; Oxford, United Kingdom: Hart; Nomos, 20166 pp. 918-967. Nomos Verlagsgesellschaft GmbH & Co. KG.

45 Busch, Danny. *Indirect Representation in European Contract Law: An Evaluation of Articles 3:301-304 of the Principles of European Contract Law Concerning Some Contractual Aspects of Indirect Representation against the Background of Dutch, German and English Law*. The Hague: Frederick, MD: Kluwer Law International; Sold and distributed in North, Central and South America by Aspen, 2005.

46 UNIDROIT. 'UNIDROIT Principles of International Commercial Contracts', 2016. [visited 2023-07-25] https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/.

47 Lando, Ole, and Hugh Beale. 'Principles of European Contract Law - Parts I and II - Combined and Revised', *The Hague: Kluwer Law International*, 2000.

48 Bar, Christian von, Eric M. Clive, Hans Schulte-Nölke, H. G. Beale, Study Group on a European Civil Code, and Research Group on the Existing EC Private Law, eds. *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. Outline ed. Munich: Sellier, European Law Publishers, 2009.

METHODOLOGY

Research methodology in the current thesis is aimed at revealing all the significant features of aligning the interests of commercial agency actors in common law and civil legal systems. The scientific work is based on the view and principles of qualitative methodology as it permits an intensive study of a discrete phenomenon to discover its new perspectives without the need to come to a preliminary view of the nature of the problem set. As there is a lack of comprehensive scientific studies that examine cases in which the representative acts without authority or exceeds it in the context of both internal and external representation relations, the author intends to carry out such investigation. In addition, given that this work is focused on theoretical and practical problems of powerless representation, the position of pragmatic knowledge is supported[49].

The work is also based on methodological legal research norms, matching the ideas of normative (statistic) and sociological law theories. The problem of interest alignment of commercial agency actors as a social phenomenon is precisely analysed in this thesis. Since there is a lack of complex scientific research which would analyse the cases when the interests of the participant to the international commercial agency (principals, agents, third parties, and fourth parties) do not coincide and their possible influence on the agency's quality, exactly this perspective will be used by the author to execute his research. Keeping in mind that this thesis focuses on both the theoretical and practical aspects of agency problem, the use of pragmatic knowledge will be employed to address the associated challenges. This approach will help to build a connection between theoretical approach to agency problems and their practical implementation in case law by providing an analysis of how pragmatic strategies can balance interests between agency participants.

Based on these methodological foundations of the scientific research and considering the established work goals and tasks, methods of data collection and data analysis were used during the research. The main data collection method used during the research is the document analysis method.

The documents selected for the topic under consideration can be divided into the following groups: 1) Legal acts of the selected jurisdictions, as well as sources of international law and European Union law; 2) international private law unification instruments (soft law); 3) Court practice cases of civil law and common law jurisdiction; 4) articles, monographs, textbooks, and other scientific works. When collecting material for the research, Lithuanian library funds and subscription databases, and scientific resources were used, which were available for internship at the Uppsala University (Uppsala September – November 2022).

According to the formulated purpose and goals of the thesis, the most important data analysis method is a method of comparative legal research. When performing

49 Corbin, Juliet, and Anselm Strauss. *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory*. SAGE Publications, 2014.

the analysis of the agency problem, the research is executed from the comparative perspective by contrasting the problem of aligning the interest of participants and the mechanisms of its solution in selected legal systems.

Implementation of the comparative method in this research is evident from several aspects. Firstly, the thesis includes the analysis of norms regulating the agency problems in general and interest alignment in particular in countries with continental law and court practice of common law legal systems along with the mentioning of international sources of commercial agency regulation. The present research analyses national law and the court practice of the following jurisdictions like Germany, France, Ukraine, the Netherlands, the UK, and the USA will be conducted. The thesis includes the inspection of the legal provisions taken from the German Civil Code[50], German Commercial code[51], Dutch Civil Code[52], French Civil Code[53], Ukrainian Civil Code[54], Ukrainian Commercial Code[55].

Secondly, the traditional method of comparison in law based on the three biggest "families of law", i.e. Roman, German, and Anglo-Saxon representing the law of the countries of Germany, France, and England was used in the current work. Finally, the research has been conducted based on the so-called international approach to comparative law considering international and European Union sources of legal systems. It is important to note that despite the significant differences between the continental and common law traditions, there is a tendency for the unification within the doctrine of commercial representation. This can be seen especially when analysing the soft law instruments.

The choice of legal systems analysed in this study was guided by the international approach to comparative law, a methodology proposed by Professor Thomas Kadner Graziano in the field of comparative contract law. This approach involves grouping

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50 German Civil Code (BGB). [visited 2024-05-01]. < https://www.gesetze-im-internet.de/englisch_bgb/>.

51 German Commercial Code (HGB) [visited 2024-05-01]. http://archive.org/stream/germancommercial00germuoft/germancommercial00germuoft_djvu.txt .

52 The Civil Code of the Netherlands [visited 2024-05-01]. http://www.dutchcivillaw.com/civilcodebook033.htm .

53 The Civil Code of France,1804 [visited 2024-05-01]. http://files.libertyfund.org/files/2353/CivilCode_1566_Bk.pdf .

54 Цивільний кодекс України. Кодекс України; Закон, Кодекс від 16.01.2003 № 435-IV, 2003. [visited 2024-05-01]. https://zakon.rada.gov.ua/go/435-15.

55 Господарський кодекс України. Кодекс України; Закон, Кодекс від 16.01.2003 № 436-IV. [visited 2024-05-01]. https://zakon.rada.gov.ua/laws/show/436-15#Text . On 9 January 2025, the Parliament of Ukraine adopted draft Law No. 6013 "On Particularities of Regulation of Activities of Legal Entities of Certain Organisational and Legal Forms in the Transitional Period and of Associations of Legal Entities" which was enacted on 28 February 2025. According to the Law, the Commercial Code will be fully abolished on August 28, 2025, and its provisions are integrated into other regulatory legal acts, in particular, the Civil Code. Since the thesis was written during 2018-2024, some of its parts still indicate specific provisions of the Commercial Code of Ukraine.

different legal systems based on the similarity of solutions they offer to specific legal issues[56]. From this perspective, the study explores the problem of reconciling interests among participants in international commercial agency relationships, identifying common issues across multiple jurisdictions. Thus, it compares these solutions, assessing their respective advantages and drawbacks. It's worth noting that legal systems may differ significantly in how they address the balancing of legal interests due to variations in legal doctrine and judicial practice. Therefore, the analysis in this paper considers not only solutions proposed by major legal systems but also other jurisdictions, such as Austria, Italy, Lithuania, Sweden, etc.

In addition to foreign jurisdictions, sources of international and European Union legal systems are also used for comparative analysis. Relationship of commercial agency are also regulated in two international treaties - 1978 The Hague Convention on the Law Applicable to Agency[57] (hereinafter referred to as the Hague Convention) and 1983 Geneva Convention on Agency in Contracts for the International Sale of Goods[58] (hereinafter - the CISG). At the level of the European Union, Council Directive 86/653/EEC has been adopted on the harmonisation of the laws of the member states related to independent commercial agents, Rome (I) Regulation outlining the law applicable to international contracts[59]. To reveal the research issues as fully and comprehensively as possible, the work also examines relevant international private law unification instruments - UNIDROIT Principles of International Commercial Contracts[60] (hereinafter - UNIDROIT principles), Principals of European contract law principles[61] (hereinafter - PECL), Draft Common Frame of Reference[62] (hereinafter - DCFR), Restatement (Third) of Agency[63] and the European Contract Code[64].

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56 Kadner Graziano, Thomas, Eleanor Grant, and Thomas Kadner Graziano. *Comparative Contract Law: Cases, Materials and Exercises*. Basingstoke: Palgrave Macmillan, 2009.

57 Convention on the Law Applicable to Agency (Concluded on 14 March 1987, Entered into Legal Force on 1 May 1992)'. [visited 2024-05-01]. http://www.hcch.net/index_en.php?act=conventions.text&cid=89 .

58 Convention on Agency in the International Sale of Goods, *supra note* 11.

59 Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, 382 OJ L § (1986). [visited 2024-05-01]. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31986L0653; Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 177 OJ L, 2008. [visited 2024-05-01]. http://data.europa.eu/eli/reg/2008/593/oj/eng .

60 UNIDROIT Principles (2016), *supra note* 46.

61 Lando, O., & Beale, H. G. *supra note* 47.

62 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

63 American Law Institute, ed. *Restatement of the Law, Agency: As Adopted and Promulgated by the American Law Institute at Philadelphia, Pennsylvania, May 17, 2005*. St Paul, MN: American Law Institute Publishers, 2006.

64 KC, Oliver Radley-Gardner, Hugh Beale, Reinhard Zimmermann, and Reiner Schulze. *Fundamental Texts on European Private Law*. Bloomsbury Publishing, 2016.

The application of the comparative method in this study is explained by the need to find effective solutions to the problem of misalignment of interests between the participants to commercial agency relationship through the comparative analysis of the conceptual questions of the agency including the concept of apparent authority, ratification, and liability of *falsus prokurtor*.

Lastly, an integration of institutional theory and corporate governance studies into agency theory requires new research methodologies. Therefore, apart from the comparative method, the method of qualitative content analysis is used to combine statistical studies based on surveys and published information. It is used to provide a better data analysis along with systemic, linguistic, teleological, logical, and other methods of law explanation that are already settled in the science of law, and which are equated to the common scientific research methods in jurisprudence. This will lead to providing better answers to many research questions and help provide a more realistic and policy-relevant understanding of what makes agency relations effective.

STRUCTURE OF THE DISSERTATION

Considering the previously formulated research goals, the preliminary structure of the thesis would be comprised of four chapters.

The first chapter discusses the conceptual questions of the misalignment of interests in international commercial agency. The evolution of the legal regulation of the agency relationships both in common law and civil legal traditions will be reviewed, along with the nature of the relationships, and the basis of their occurrence. In addition, tendencies in regional and international unification of commercial agency will be presented in the first chapter with the analysis of the relevant provisions of the soft law legal acts. Due to the complexity of the agency relationship, main characteristics of its participants will be analysed, legal regulation of international commercial agency relationships under both the EU law and national law of different states following civil law and common law legal traditions as well as deciding on the law applicable to disputes arising from commercial agency agreements. The chapter will discuss the concept of commercial agent, principal, third parties and fourth (related parties) within common law and civil law legal systems.

The second chapter will be dedicated to the analysis of the internal agency relationship and maintaining the balance between the interests of the principal and the agent. The attention will be paid to the basis for the emergence of internal commercial agency relations together with the analysis of the nature of agreement between the participants. Also, the regulation of the fiduciary duties' regime will be discussed as a way of balancing the interests between the agent and the principal under commercial law. The chapter determines main conflicts arising between the agent and the principal as a result of the breach of fiduciary duties and ways of minimising the agency conflict within internal agency relationships. Special attention will be dedicated to the question of the introduction of incentives schemes for minimising agency costs as well as describing the interdependence of agency costs reducing mechanisms and the legal

environment. This chapter will conclude by discussing the concept of authority between the agent and the principal and the scope of implied authority.

The third chapter is deemed to research the external agency relationship including the relationships with the third parties and other related (fourth parties). Peculiarities of the relationship with the undisclosed and unidentified principal will be analysed from the perspective of the third party's interests. The doctrine of apparent authority is considered as part of the external agency relationship due to the inherent participation of third parties in determining the scope of authority, thus the chapter will also involve the analysis of the doctrine and its part in ensuring the balance of interests between the commercial agency participants. Attention will be dedicated to analysing the actions of the agent without the proper authority and possible ratification. The questions of apparent authority and ratification will also be discussed from the perspective of the fourth parties as those whose legal interests are being affected by the manifestation of authority or the principal's approval of an unauthorised act. The Chapter will conclude by revealing the problem of agent's contractual liability while acting without the due authority.

At the end of the thesis, conclusions will be made, and suggestions and recommendations will be offered.

1. CONCEPTUAL QUESTIONS OF INTERNATIONAL COMMERCIAL AGENCY

1.1. Evolution of the concept of international commercial agency

1.1.1. Theoretical definition of agency relationship

One of the most important tasks of modern legal science is enhancing existing concepts and establishing new terminology, providing a foundation for advancing theoretical and practical aspects, notably in civil law. This confirms the relevance of theoretical and legal research on the concept of representation and the definition of its main features in modern civil law.

Within legal scholarship, achieving a definitive and unbiased understanding of terms can be challenging due to the complexity and ambiguity of a legal phenomenon. In contemporary civil law studies, scholars offer diverse interpretations of the term "representation," ranging from laconic formulations to complex theoretical overstretched constructions.

It is crucial to outline that there are various ambiguous definitions of agency, which can lead to a misunderstanding of its essence. The confusion is added by the different terminology used in common law and civil law legal systems that apply different terms to the same concepts. For instance, the term 'agent' is customary for common law-countries while 'representative' is used in civil law[65]. Within the current thesis the terms "representative" and "agent" will be used interchangeably. In both civil law and common law systems, these terms essentially refer to a person who acts on behalf of the principal, representing their interests and holding the authority to influence the principal's legal position in dealings with third parties. Consequently, these terms will be treated as synonymous throughout this comparative analysis of both legal systems.

Ukrainian scholar Vadim Tsiura defines representation in civil law as a civil organisational legal relationship, under which one person (representative) has the opportunity to perform transactions and other legitimate legally significant actions within the limits of the powers granted to him on behalf and in the interests of another person (principal), concerning the third parties, with the knowledge the latter about it, by which he directly creates, changes or terminates civil rights and obligations and bears responsibility to the person he represents[66].

Typically, an agent's actions are authorised by the principal, empowering the agent

65 In § 1.01 American Law Institute. (2006) *supra note* 63, agency is described as follows: "The fiduciary relationship that arises when one-person (a 'principal') manifests assent to another person (an 'agent') that the latter shall act on behalf and in the principal's control and the agent manifests assent or otherwise consents so to act". Para. 1 of Art. 237 of Civil code of Ukraine *supra note* 54 defines representation as follows: "Representation is a legal relationship in which one party (the representative) is obliged or has the right to perform an act on behalf of the other party that it represents".

66 Цюра В. *supra note* 7 at p.174.

to influence the principal's legal status. However, for these actions to be valid, both parties must have the capacity to consent and enter into a contract, both mentally and physically. Only then a fiduciary relationship can be formed, making the agency legitimate.

Representation is seen through the concept of "legal relationship" since any activity becomes legal and important only when implemented through relationships regulated by law. In our case, for the representative to perform acts on behalf and in the interests of the principal, initially the relationship should be established between them, which consequently would lead to the empowerment of the representative to act[67].

For the legal relationship of representation to be established, it is not sufficient to merely have the parties involved with their respective rights and obligations. Specific legal facts must also exist to serve as the basis for the emergence of this legal relationship. These legal facts are the foundational events or circumstances that give rise to the representation agreement between the principal and agent.

Traditionally, legal facts are classified according to the presence of the will of its participants. Thus, we can outline two groups of legal facts: events – the emergence of which does not depend on the will of a person (birth and death of a person, etc.), and actions that are carried out at the volition of subjects - individuals and legal entities (contract conclusion, performance of an obligation, etc.).

Based on such differentiation, scholars usually define two types of the relationship of representation: contractual (voluntary) and non-contractual (ex lege). Such terms most accurately define the private-law nature of relationships, being based on the principles of freedom of contract and autonomy of will. Such distinction is absent in the common law system, where the term agency is seen as a wide concept which covers every situation in which one person acts on behalf and in the interests of another and can create valid legal relationship between the person who is being represented and the third party[68].

Thus, agency relationship in a broad sense can be defined as a fiduciary legal relationship (whether contractual or non-contractual) where one individual holds the authority to influence and control another person's legal standing concerning third parties by performing either legal or physical actions within the limits of the granted authority.

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67 Доманова І. Ю. Інститут добровільного представництва в цивільному праві України [Текст]: дис... канд. юрид. наук: 12.00.03 \ Київський національний ун-т ім. Тараса Шевченка. - К., 2006. - 234 арк., .at 213.

68 Rigaux, François. Le Statut de La Représentation: Étude de Droit International Privé Comparé cited in Бабкина Е. В. Розвитие теории представительства в коммерческих отношениях. *Белорусский журнал международного права и международных отношений.* 1999. № 4. С. 28–33 at p.30.

1.1.1.1. Defining the concept of commercial agency

Commercial agency despite the general similarities with the general concept of agency, still differs from it due to the object of commercial agency, specific characteristics of its participants, and the nature of activity. Moreover, commercial representation is regulated by the norms of both Commercial and Civil Codes, while norms on civil representation are generally included in the norms of the Civil Code.

The relationship of commercial representation, has been discussed by Roderick Munday[69], Francis Martin Baillie Reynolds and Peter George Watts[70], Deborah DeMott[71], Wolfram Müller-Freienfels[72], Samuel J. Stoljar[73], Vadim Tsiura[74], Oleksandr Grabovyi[75] as well as number of legal instruments such as The Hague Convention[76], the Geneva Convention[77], Council Directive 86/653/EEC[78], PECL[79] DCFR[80], etc.

To understand how the commercial agency relationship can be created, we shall discuss the definition of commercial activity in general. The concept of commercial activity (from the Latin mercium - trade) is used in an economic and legal sense. Currently, the concept of "commerce" is often understood as any business (entrepreneurial) activity arising out of the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation, or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail, or road[81]. From an economic perspective, the main purpose of entrepreneurial activity is to maximise the profit. However, unlike entrepreneurial activity, commercial activity is carried out only as an intermediary between producers and consumers during the turnover of economic goods. At the same time, the intermediary's commercial interest is calculated for an indefinite number of actions, the purpose of which is to obtain profit.

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69 Munday, R. (2010). *supra note* 33.

70 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34.

71 DeMott, D. (2014) '*supra note* 35.

72 Müller-Freienfels, W. (1957), *supra note* 34.

73 Stoljar, S. J. (1961). *supra note* 37.

74 Цюра В. *supra note* 7.

75 Грабовий О. *supra note* 10.

76 Convention on the Law Applicable to Agency *supra note* 57.

77 Convention on Agency in the International Sale of Goods, *supra note* 11.

78 Council Directive 86/653/EEC *supra note* 59.

79 Lando, O., & Beale, H. G. *supra note* 47.

80 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

81 Law Insider. 'Commercial Relationship Definition'. [visited 2024-05-01] https://www.lawinsider.com/dictionary/commercial-relationship.

Therefore, commercial activity should be understood as a separate type of activity, which is regulated by norms of civil and commercial law. Commercial agents act as intermediaries between the producer and the consumer, and do not carry out production activities.

Definition of the commercial agency can be derived from the definition of the commercial agent in the Article 1(2) of the Directive86/653/EEC where the commercial agent is described as "a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that principal"[82].

Therefore, commercial representative is aimed at concluding legal actions that are aimed at establishing, modifying or termination of legal relations. In cases where the nature of relationship assumes only physical actions (i.e. agent empowered only to negotiate the transactions), commercial representation *sensu stricto* shall presume implementation of legal actions.

According to the main features of the commercial agency there can be outlined the following:

- as per the type of activity - they are carried out exclusively in entrepreneurial (commercial) activity;
- as per the purpose of activity – aimed at establishment, modification, termination of contractual relations between entrepreneurs;
- by the nature of the activity - systematic, paid activity, which is carried out on a professional basis;

Considering the specific object of agency relationship, which is commercial activity aimed at maximisation of profit, the fiduciary nature of the agreement is questionable and switched to payment. Nevertheless, the presence of trust in the agreement cannot be denied. The principal prioritises professional qualities of the agent, experience, and ability to act in the market. Thus, despite the presence of the duty of loyalty and care, no personal trust arises, unlike in the relationships of legal representation[83].

The aim of all the types of commercial activity is receiving a profit. Thus, activities of commercial agents are carried out professionally since the effective achievement of legally and economically significant results in the field of trade is ensured by business and professional competence. The aim of commercial agency relationship may get into conflict of the fiduciary nature of general agency based on the duty of loyalty and care. This issue will be researched further though.

Extending the definition to international law, it can be assumed that parties of international legal relations perform their commercial activities related to sale of goods internationally, concluding cross-border transactions. Thus, the relationship of international commercial agency is a contractual one due to the specificity of participants and the object.

Based on the above analysis, the commercial agency relationship differs from the

82 Council Directive 86/653/EEC, *supra note* 59.

83 Грабовий О. *supra note* 10 at 69.

civil representation in a number of features such as object, type, purpose and nature of legal activity as well as the set of participants. International commercial representation can be defined as a legal relationship between the parties involved in the international business activity where one party (commercial agent) undertakes, for a fee, to perform actions on their behalf and at the expense of the other party (principal) to facilitate the sale of goods with the third party. This relationship facilitates business development internationally while leveraging the local knowledge, connections, and expertise of the agents.

1.1.2. Development of concept of representation in continental law

Legal issues surrounding the appointment, performance, termination of international agency and representative arrangements have always been part of every day's life of legal practitioners and courts. However, despite their prevalence, agency contracts have received late attention in European legal regulation and have remained undertheorised by scholars. The fundamental principles, operational mechanisms, and theoretical underpinnings of agency contracts do not enjoy widespread popularity in the academic realm among lawyers, judges, and legal scholars.

In many countries, modern commercial agency, distributorship, and franchising contracts have typically been regulated by the general principles of national tort and contract law. While these principles have formed the foundation for establishing the contractual and tort liability, they often fall short of providing a comprehensive explanation of the doctrine[84].

Nonetheless, during the development of commercial relations, representation plays a crucial role in facilitating business transactions, representing principals, and managing commercial interests. Since commercial activities can be performed through the representatives, entrepreneurs start using services of intermediaries more often which allows to expand the business despite the physical inability to be in several places at the same time.

Surprisingly, despite the advancement of Roman law, the theory of agency was never fully acknowledged until the 17th century. The explanation can be that Roman law at first considered doctrine of representation as an invasion into the purely personal character of contractual obligations. Thus, it was rejected at first that an intermediary can establish valid contractual and commercial relationships between the principal and the third party.

Starting from the late 17th century, the first mentioning of agency appeared in the works of the eminent scientists-lawyers who contributed to the formation of two main

84 Albaric, C., Dickstein, M. (2017) *supra note* 28.; Dalley, Paula J. 'A Theory of Agency Law.' *University of Pittsburgh Law Review* 72 (2010): 495.

agency theories – the theory of separation and the theory of identity[85]. The recognition of the doctrine of agency in the field of civil law happened when German scientist Hugo Grotius in his famous work *"The Rights of War and Peace (1625)*[86]*"* explained the idea of an autonomous institute of representation where a procurator based on his mandate could acquire rights directly for his principal. The scholar overruled the ancient Roman concept and argued that the procurator could acquire rights directly in favour of the person who he represents by the conclusion of a contract with a third party in accordance with the given assignment.

In the second half of the 19th century R. von Jhering and P. Laband were the first explicitly to make a distinction between the agency and the commission, separating it from the concept of mandate (mandatum), i.e. the contract between the principal and agent. While Jhering still considered that mandatary (party to mandate (internal) contract) and agent (party in relationship towards the third persons) are two sides of the same legal relation, although without any influence on each other[87]. Laband expanded his definition and declared a theory where the agent's power to create legal rights and obligations for his principal and the inner contractual relationship governing the personal rights and duties between principal and agent are completely autonomous relations which can overlap[88].

Due to such separation the new theory was created which distinguished the concept of mandate and authority. "Separation theory" clarified that the mandate regulates the internal contractual relations between the principal and the agent, while authority is essential for the agent's ability to act in relations with third parties externally[89].

German civil law regulates only "direct representation," where the agent's actions have legal effect and create legal consequences for the principal, and when third parties are aware that they interact with the agent. "Indirect representation" is not being developed since the separation theory follows two-contract construction when creating agency relations (contract between the third party and the agent and between the agent and the principal), and these two contracts are immutable[90]. In case of "indirect representation" two-contracts construction is avoided creating a fiction that is not

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85 Fridman, G. H. L. *The Law of Agency*. 7th ed. London; Charlottesville: Butterworths, 1996; Powell, Raphael. *The Law of Agency*. London: Pitman, 1952; Munday, R. (2010), *supra note* 33; Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34; Saintier S. (2005), *supra note* 44.

86 Grotius, Hugo. *The Rights of War and Peace: Including the Law of Nature and of Nations*. M.W. Dunne, 1901.

87 Rudolf von Jhering, 'Mitwirkung für fremde Rechtsgeschäfte' (part 1), in Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts (1857) vol. 1 cited in Muller-Freienfels, Wolfram. 'Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty'. *American Journal of Comparative Law* 13 (1964): 193 at p.198.

88 Laband, Paul Die Stellvertretung bei dem Abschluß von Rechtsgeschäften nach dem allgem. Deutsch. Handelsgesetzbuch, ZHR (1866), 183 cited in Muller-Freienfels, W. (1964) *supra note* 87 at p.198.

89 Цюра, Вадим. (2016). Генеза дослідження інституту представництва у зарубіжній правовій доктрині. Jurnalul juridic national: teorie şi practică, 20(4), 129-132.

90 Дawson, F. H. *supra note* 7, at p.140.

known to the separation theory.

The creation of "separation theory" was acknowledged as a "legal discovery" and gradually was adopted by modern civilian legislators. First, the concept was adopted by German Civil Code (*Bürgerliches Gesetzbuch (BGB)*) and the Code of Commerce (*Handelsgesetzbuch (HGB))*, and the relations of representation were governed by both named confidential acts.

So, as it can be traced, main provisions of the "German" approach to understanding the representation are revealed in the following provisions:

- Relations under the mandate (internal relations) are different from the relations of representation (external relations) – the "separation theory" by Paul Laband;
- The relationship of the representation is the object of a unilateral act addressed by the principal to third parties, which is associated with granting of authority to the agent;
- External relations are independent of internal; therefore, the basis of their occurrence is not usually important, as well as restrictions established by such a basis or law;
- The rights and interests of third parties in respect of whom a representative performs actions on behalf of the principal, are a subject of absolute protection, despite cases where such parties were aware of the fact that representative acted in an unauthorised way[91].

Unlike the German model, the French law on representation does not distinguish between mandate and authority. The founder of the theory Francois Rigaux[92] believed that the mandate included the authority which basically denied the Laband's theory of separation. He stated that the principal is acting himself, although his will is expressed by the agent. This particular approach was laid down in further codifications like Prussian Civil Code 1794 (*Allgemeine Landrecht fur die Preussischen*) – the first European codification of civil law, French Civil Code of 1804, etc.[93].

Thus, it can be traced that the theory of separation has been incorporated into the continental law governing the representational activity. Although from its beginning it has certain practical shortcomings, it was essential for creation of logical thinking and to consolidate the concepts available at that time. Such approach enables to separate representation into an independent institution of civil law with its inherent principles, functions, the purpose of legal regulation and the mechanism of normative influence on relevant civil law relations.

Paul Laband formulated his concept being a theorist of law which was a merely technical deduction from the general legal concepts. When the provisions of the theory faced the realities of commercial turnover and the variety of forms of commercial agency, it was difficult to adapt the provisions of concept to the existing relations. The main difficulty was that all forms of representation are relatively abstract, and the

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91 Muller-Freienfels, W. (1964) *supra note* 87.

92 Rigaux, F. (1963) *supra note* 68.

93 Müller-Freienfels, W. (1957), *supra note* 34.

limitation of the agent's authority in some forms of representation is more obvious than in others[94].

The only solution was to analyse all forms of mediation, and to determine the limits of authority required for each of them. Thus, modern German law contains the most detailed and scientifically substantiated typology of various forms of mediation. There are 13 different forms of mediation regulated by both HGB and BGB, among which are: non-commercial agent (Vertreter), holder of legal powers (Prokurist), holder of general commercial powers (Generalhandlungsbevollmaghtigter), holder of special commercial powers (Specialhandlungsbevollmaghtigter), commercial agent (Handelsvertreter), commercial assistant (Ladenangestellter), commission agent (Kommissionar), commercial broker (Handelmakler), small broker (Kramermakler), insurance agent (Versicherungsvertreter), sales agent (Spediteur), inland carrier (Frachtfuhrer), carrier of goods by sea (Verfhachter) . In comparison to German approach, the French civil code does not have a separate Chapter on representation but includes only general provisions on a few types of intermediaries: brokers, commission agents, agents, and sales intermediaries[95].

Substantive difference between the continental and common law is seen in division of representation/agency in direct and indirect. Direct representation presumes agent acting on the name and on behalf of the principal (*Handelsvertreter* in Germany, *agent commercial* in France, *handelsagent* in the Netherlands). At the same time, indirect representation exists whenever the agent is acting in his own name although on behalf of the principal. In civil law countries such relationship exists in the form of commission, which separates it from the commercial representation where the agent act in the name and on behalf of the principal[96].

Thus, today the theory of separation in continental law and in general in civil law countries is firmly rooted and is gradually spreading in all legal systems. It is seen that in modern conditions this approach is the most acceptable and, given the wealth of forms of mediation in practice, provides an opportunity to regulate relations and the grounds for their occurrence in more detail. At the same time, this approach enables a clear separation of representation into an independent institution with its inherent principles, functions and legal regulation.

1.1.3. Development of commercial agency in common law

In comparison to civil law countries, the modern theory of agency in the context of common law is the product of many historical influences. In medieval ages the

94 Schmitthoff, C. M. *supra note* 9.

95 German Civil Code (BGB) *supra note* 48; German Commercial Code (HGB) *supra note* 51; Art 74, 94 of Commercial code of France (Code de commerce), (2000) [visited 2024-07-30]: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000005634379 .

96 See Art. 383. German Commercial Code (HGB) *supra note* 51; Chapter 13 of Commercial code of France *supra note* 95.

common law had a non-mercantile character where the principal entered in direct contractual relationship with the third party and no idea of agency was known. The influence of mercantile law was recognised a couple of centuries later when the expression of "*agent*" came into use and the concept of undisclosed principal became peculiar to common law system[97].

It emerges from the practice of employing factors on a commission basis. Stoljar rightly observes: "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 merchant[98]."

Since the early 18th century, the foundation of the theory of agency in the common law is the *"doctrine of identity"* of the principal and agent. The core principle of doctrine is usually expressed in the phrase *"qui facit per alium, est perinde ac si facit per se ipsum" ("whoever acts through another acts as if he was doing it himself"),* though such a complete identification is often regarded as inappropriate. However, at the same time this approach brings a certain degree of unity to the law applicable to situations where one party represents or acts for another. The first references to this doctrine are contained in the work of Edward Coke, the prominent lawyer of the 16th century, *"Coke upon Littleton" (1628 p.)* who consider it as the "common term", the fundamental concept of the theory of agency in the common law[99].

The doctrine of identity constitutes the direct antithesis of Laban's theory of separation. It assumes that the principal has the *alter ego*, the agent, who is duly authorised to act within the limits of authority[100]. The common law approach is based on the "*externalised*" theories stating that agency situations should be explained from the third party's point of view, meaning that common law fails to make a proper distinction between the internal relation between principal and agent and the external relation between the agent and third parties, but simply involves the contract of only two persons.

From the perspective of commercial life, "external" approach provides some exceptions in order to protect a third party who could appear to be in a state of uncertainty if the agent had the appropriate authority to act. Third parties acting in a good faith are entitled to rely on manifestations of agency, even if they suspect the agent of acting without authority[101].

The balance of the protection of the rights of the principal and third parties was achieved by introducing the concept of "*implied authority*," which implies that the empowerment may come from the behaviour of the parties. This concept illustrates the

97 Fridman G.H. (1996) *supra note* 85. at p. 5.

98 Stoljar, S. J. (1961), *supra note* 37, at 53.

99 Coke, Sir Edward, Sir Thomas Littleton, and Thomas Coventry. *A Readable Edition of Coke Upon Littleton*. Saunders, 1830.

100 Schmitthoff, C. M., *supra note* 9, at 15.

101 Müller-Freienfels, W. (1957), *supra note* 34.

presumption of the expression of the principal's will. Since no representation can be established without the principal's consent, the consent can be both express and implied[102].

Due to the externalised approach, common law does not distinguish between the direct and indirect representation, since the concept of agency covers all cases, where the agent can create binding legal relationship between the principal and third parties. There is also no division whether the agent is acting in the name of the principal or in his own name. However, unlike the continental law countries, common law regulates both cases whether the agent is acting on behalf of the disclosed and undisclosed principal. While the case of disclosed principal is similar to the concept of representation in continental law, describing the situating where the agent informs the third party that he is acting on the principal's behalf who is ultimately bound under the contract with the third party.

In case with undisclosed agency, the two – contracts construction is avoided as the third party does not know about the existence of the principal considering the agent as the party to a contract. In other words, under the civil law view on agency, the agent must at least disclose his intention of contracting as an agent or the third party must be able to imply this from the situation. Otherwise, the contract between the agent and the third party will be considered as concluded on the agent's behalf, and it will not matter, whether he had the intention to act for a principal or was duly authorised to act. The third party may treat either the agent or the principal as a party to a contract and consequently to hold either of them liable[103].

In the common law, there is no division of representation into legal and voluntary, general civil and professional-commercial. Simultaneously with the granting of powers to the agent, he is given consent to perform all legal actions that are considered permissible for the performance of agreement within the limits of his authority[104]. The approach of identification of two different subjects (the principal and the agent) is more practical and brought certain legal flexibility to the law of agency and was more justified from the standpoint of the needs of commercial relations, than the doctrinal and abstract method of separation.

1.1.4. Trends in regional and international unification of international commercial agency

Following the analysis above there are many differences between the civil law and common law systems with regard to commercial agency law. Moreover, contrasts are present even among the continental legal traditions. Some of them consider the agent's

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102 Цюра В. (2016). *supra note* 89.

103 Karsten, I.G.F. 'Explanatory Report on the 1978 HCCH Agency Convention'. Conférence de la Haye de droit international. [visited 2023-07-01] https://www.hcch.net/en/publications-and-studies/details4/?pid=2947 .

104 Sec. 2/art. 3.202., 3.201, Lando, O., & Beale, H. G. *supra note* 47.

authority to be independent from the underlying contract between the agent and his principal[105]; others see the authority of the agent as a mere aspect of the underlying contract and therefore ignore such distinction[106].

Development of international trade through the expansion of communication means, and the expansion of domestic markets, determines the need to develop the efficient system of International Commercial Law, through the creation of common rules[107]. However, until the middle of the 20th century the unification was continental in character, viewing agency as an abstract authority granted by one person to another to perform legal acts towards the third parties[108].

When it comes to international commercial agency, for several decades, the Hague Conference on Private International Law (HCCH), the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT) have been preparing uniform law texts that promote the progressive harmonisation and modernisation of commercial agency law. Other international governmental and non-governmental organisations have also made significant contributions at the global and regional levels.

Over time, the HCCH, UNCITRAL and UNIDROIT have produced a series of complementary documents, enlightening specifically the issues of Agency law: 1978 Hague Convention on the Law Applicable to Agency[109] and 1983 Geneva Convention on Agency in the International Sale of Goods[110]. At the level of European Union, a Directive 86/653/EEC[111] has been passed by the Council regarding the convergence of the laws related to self-employed commercial agents of member states. Among the relevant international instruments of private law unification, there can be mentioned: UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law[112], Draft Common Frame of Reference[113], Restatement (Third) of Agency[114], and European Contract Code[115].

Uniform international law is aimed at achieving a harmonised and global set of rules, eliminating legal obstacles to the flow of international trade, strengthening

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105 The theory of the abstract or autonomous character of authority in para. 164 et seq. of BGB.

106 The concept of "contrat de mandat" in the Article 1984 of the French Code Civil.

107 Stiefel, Ernst, and James Maxeiner. 'Why Are U.S. Lawyers Not Learning from Comparative Law?' *The International Practice of Law: Liber Amicorum for Thomas Bär and Robert Karrer (Nedin Peter Vogt, et al., Eds.)*, 1997, 213–36.

108 Art 4. Draft Convention Providing a Uniform Law on the Contract of Commission on the International Sale or Purchase of Goods: With Explanatory Reports, April 1961. Editions 'Unidroit', 1961.

109 Convention on the Law Applicable to Agency, *supra note* 57.

110 Convention on Agency in the International Sale of Goods, *supra note* 11.

111 Council Directive 86/653/EEC, *supra note* 59.

112 Lando, O., & Beale, H. G. *supra note* 47.

113 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

114 American Law Institute. (2006) *supra note* 63.

115 Radley-Gardner, Zimmermann, R., & Beale, H. (2003), *supra note* 62.

commercial relations among States and opening new investment opportunities. At the same time, international conventions often risk remaining a dead letter, either because they have not been ratified by a sufficient number of States[116] or, even if they have entered into force, the parties might make multiple reservations not to apply certain provisions.

There has always been a distinction between national and international rules, which may seem to be one of the biggest obstacles to introducing the unified codification. While it is true that domestic laws may be unsuitable for application in international transactions, this argument has a limited application in Europe with highly developed contract law[117].

International relations penetrate domestic systems, which require unified codifications to provide more than just a set of rules. Modern commercial law requires these codifications to be sustainable in the time of change and offer a deductive reasoning to come up with the solution[118].

Obviously, when we consider the agency relationships at the international level, the choice of law would be the most topical issue to consider. Providing activities from more than one country might cause real problems when the rules are not harmonised or provide different levels of protection to the parties. Conflicts are inherent to relationships where the principal, the agent and (in some cases) the contractor reside in different countries, each of which has its own (sometimes) conflicting rules. Therefore, uniform no-conflict rules are essential in aligning the interests of all parties to agency relationships and preservation of the value of the agency itself.

1.1.4.1. International regulation of commercial agency

In order to make the rules compatible, a huge number of international legislative initiatives have been offered, one of those is the Hague Convention of 14 March 1978 on the Law Applicable to Agency (the Hague Agency Convention), which offers flexible choice of law rules that work in a variety of factual situations and represent a reasonable accommodation between the diverse approaches in this area taken by common law and civil law States.

The Convention has currently been ratified by four states (the Netherlands, France, Portugal and Argentina), but several countries have enacted legislation inspired by it, for the interpretation of which the Convention may have significance. Moreover, now that it has entered into force (in 1992), it is not unlikely that it will be ratified by more

116 Goode, Roy. 'International Restatements of Contract and English Contract Law'. *Uniform Law Review* 2 (1997): 231; Basedow, Jurgen. 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts'. *Uniform Law Review* 5 (2000): 129.

117 Vogenauer, Stefan, and Stephen Weatherill. *The Harmonisation of European Contract Law: Implications for European Private Laws, Business and Legal Practice*. Bloomsbury Publishing, 2006, at 17.

118 Rosett, Arthur. 'Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law'. *American Journal of Comparative Law* 40, no. 3 (1992): 683–98, at 688.

states.

The general scope of the Convention is described in the Article 1 where it is stated that: "The present Convention determines the law applicable to relationships of an international character arising where a person, the agent, has the authority to act, acts or purports to act on behalf of another person, the principal, in dealing with a third party"[119]. Though the definition is rather broad, it does not define the term international character, and the question arises as to the criteria for deciding whether an agency relationship should be characterised as international.

Also, the question of authority is described ambiguously in the Art.1 (1) of the Convention, since it is not specified whether the narrow continental law approach or the broader common law where the notion of authority is not necessarily linked with acting in the name of someone else. The issue is clarified to some extent in the Art.1 (3) that makes the Convention applicable to cases of both disclosed and undisclosed agency relationships[120]. Such inclusion aligns with the common law approach and covers cases where the agent is acting in the name of the principal or in his own name.

Moreover, the Hague Agency Convention addresses both internal and external relationships, as outlined in Chapters II and III of the Convention. The regulation of internal conflicts between the agent and the principal within agency relationships is a particularly sensitive issue for a couple of reasons. Firstly, as it was discussed in Subsection 1.1.3. common law does not distinguish between internal and external relationships, seeing the agent and the principal as a single unit. Secondly, most international instruments do not include such provisions, as they do not consider the internal relationship between principal and agent to fall under agency law conflicts, instead being governed by general contract law. At the same time, internal conflicts, such as those related to salary, damages, and other compensation, occur much more frequently in litigation than other aspects of agency[121].

When it comes to the choice of law in international agency, the Convention gives priority to party autonomy in determination of the law applicable between the principal and the agent in case of a conflict. When no choice of law was made by the parties in the agreement, so the law must be designated by conflict rules based on objective connecting factors[122]. Therefore, the Convention allows several scenarios of the choice of the applicable law: agent's place of business, agent's habitual residence, law of the State where the agent is primarily to act if that State coincides with the principal's place

119 Art.1(1) Convention on the Law Applicable to Agency *supra note* 57.

120 Art.1(3) Convention on the Law Applicable to Agency *supra note* 57 states that: "The Convention shall apply whether the agent acts in his own name or in that of the principal and whether he acts regularly or occasionally".

121 Hay, Peter, and Wolfram Müller-Freienfels. 'Agency in the Conflict of Laws and the 1978 Hague Convention'. *The American Journal of Comparative Law* 27, no. 1 (1 January 1979): 1–49 at 39. https://doi.org/10.2307/839937,.

122 Verhagen, H. L. E. *supra note* 41, p. 111-115.

of business or, habitual residence[123]. Application of the connecting factor rule ensures consistence, since the agent is treated as having authority to act within the country has the same authority to act over the borders. Such an approach adopted in the Art. 6 of the Convention was characterised by Hay and Muller-Freienfels as: "a compromise between flexibility and predictability which the interests of the parties require"[124].

The rules also encompass both commercial and non-commercial agency and regular and casual agency. It is also intended to include the cases of ratification of the acts of a *falsus procurator* and *negotiorum gestio*[125].

Another important step towards the unification of international trade law has been made by the adoption in 1983 of the Convention on Agency in the International Sale of Goods drawn up by the UNIDROIT (hereinafter the CISG Convention)[126].

Similarly to the Hague Agency Convention, for the purposes of CISG Convention, it is irrelevant whether the agent has acted in the name of the principal, whereas the limits of his authority and the awareness of the third party about the character of the transaction are essential. Such solution aims to reconcile the contrasting positions of the common law and the civil law systems by the adoption of the general principle that "the acts of the agent shall directly bind the principal and the third party to each other" [127]. By following this principle, in case the agent is operating outside the scope of his authority, the principal fails to become a formal party to the contract concluded between the agent and the third party and also loses the right of direct action against the third party, as well as the third party fails to exercise the analogous right of against the principal.

To align with common law principles by recognising a direct link between an undisclosed principal and the third party, the CISG Convention allows the principal and the third party to sue each other directly for performance of the sales contract. This applies if they are genuinely interested in the transaction and must take responsibility for the agent's non-performance[128].

Besides all the progressive norms in the Convention, its value is reduced by the fact that it deals only with the external relations between the principal or agent on one hand, and the third party on the other leading to conflicts and uncertainty between the parties. Unlike the Hague Agency Convention, CISG Convention applies only to agency in the purchase or sale of goods, leaving other important transactions unregulated. Moreover, the entire Convention seems to be non-mandatory, following the provision in Article 2, para. 1b, which states that the Convention will apply where

123 Art. 5,6, Convention on the Law Applicable to Agency, *supra note* 57.

124 Hay, P., & Müller-Freienfels, W. (1979). *supra note* 119 at 41.

125 Pfeifer, Michael George. 'The Hague Convention on the Law Applicable to Agency'. *American Journal of Comparative Law* 26 (1978): 434.

126 Convention on Agency in the International Sale of Goods *supra note* 11.

127 Convention on Agency in the International Sale of Goods *supra note* 11.

128 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34.

the forum's conflict rules lead to the application of the law of a Contracting State[129]. In reality, it would mean that where the Convention is ratified by a State and becomes an integral part of the law of that State. However, Article 28 expressly excludes the application of Article 2, para. 1b, requiring the application of the uniform rules only where the conditions in cases when the requirements of the Article 2, para. 1a are fulfilled, making the provisions of the Convention of a declaratory nature[130].

Although both international documents greatly contributed to unification of agency rules, both of them tend to harmonise only separate issues, omitting the problems of defining capacity of the principal and the agent, defects in consent, the abuse of power in general, etc[131]. Such selective approach diminishes the practical importance of international legal instruments, leaving the regulation of a vast number of issues for the disposition of national law.

1.1.4.2. Regulation of commercial agency under the law of the European Union

The biggest concern of the modern Agency theory is that no uniform or standardised law has been adopted to regulate agency agreements within the European Union (the EU). This serves the reason why franchise, distribution and agency agreements within the EU are either governed by the law that the parties chose in their agreement, or, in absence of such agreement, the applicable law is determined by the EU regulations.

Each EU Member State has its own statutes and regulations governing the contractual relationship of two parties, however, majority of them still do not sufficiently regulate agency relationships and most of the rules that govern contractual agency relationships are incorporated into the more general set of rules[132].

At the European level respective legal instruments related specifically to the commercial agency agreements appeared only in the 19th century and instantly became of an interest to legal practitioners and courts[133]. Before them commercial agency, franchising and distribution contracts were regulated only by the principles of general contract law. Both contract and tort law still regulate agency relationship, however, they focus mainly on the national issue of liability of the principal regarding the contracts concluded by the agents as well as torts[134].

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129 Article 2, para. 1b Convention on Agency in the International Sale of Goods: (1) This Convention applies only where the principal and the third party have their places of business in different States and: (b) the rules of private international law lead to the application of the law of a Contracting State *supra note* 10.

130 Bonell, M. J. (1984) *supra note* 40 at 729.

131 Bonell, M. J. (1984) *supra note* 40 at 748.

132 Bassani, L., et. al. (2015), *supra note* 29.

133 German Commercial Code (HGB), *supra note* 51; The Civil Code of France, *supra note* 53.

134 Albaric, C., Dickstein, M. (2017) *supra note* 28.

The lack of a decent international legal framework regarding the regulation of the international commercial agency agreements often urges the parties to rely on national laws that vary from country to country, not considering the international nature of the contract. Moreover, the lack of uniform legal regulation and application of national laws may encourage opportunistic behaviour among the parties who may choose to litigate in a forum that suits best their interests. This creates a risk of increased fraudulent behaviour among the parties or the desistance from commercial activity at all.

Council Directive 86/653 on the coordination of the Member States, relating to self-employed commercial agents[135] is a remarkable achievement in agency law unification, considering that it was implemented to the national legislation of Member States.

The European Court, in Ingmar v Eaton Leonard[136], decided that the Directive must be applied in the case where an agent performed his activities in a Member State, even if the principal was established in a non-member country, and (under the normal conflict rules) the agency contract was governed by the law of that country. In addition, the scope of application of the overriding mandatory provision shall be determined according to the law of the enacting country in the European Union. In case of doubt, national courts in the Member States involved in the case will have to comply with the CJEU decisions about the applicability of the Directive[137].

The United Kingdom and Ireland did not implement the Directive until 1 January 1994, due to multiple conflicts with the national common law system. Also, Italy was exempted from the obligation to implement the provisions related to the regulation of indemnity and compensation for damage. Certain extensions with the adaptation of the Directive into the national law were also offered to the states who are signatories to the EFTA and EEA Agreements[138].

The main aim of the Directive was to unify the national law of the Member States and to reconcile the fundamental differences in the concept of commercial law in the civil law and common law systems applicable to the internal relationship between the principal and the agent, to protect the weaker party (the agent) and to maintain the security of commercial transactions[139].

The Directive presents concepts, sharply contrasting with the common law understanding, thus limiting the broad common law conception of agency to the civil

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135 Council Directive 86/653/EEC, *supra note* 59.

136 Ingmar GB Ltd v Eaton Leonard Technologies Inc, No. Case C-381/98 (CJEU 9 November 2000).

137 Aljasmi, Ali Essa. 'Choice of Law in Respect of Agency Relationships in the European Union and the United Arab Emirates'. Phd, University of Essex, 2015. https://repository.essex.ac.uk/16227/.

138 Bogaert, Geert, and Ulrich Lohmann, eds. *Commercial Agency and Distribution Agreements: Law and Practice in the Member States of the European Union*. 3rd ed. AIJA Law Library. The Hague; Boston: [Brussels]: Kluwer Law International; Association internationale des jeunes avocats, 2000, at p. 25.

139 Goode, R., Kronke, H., & McKendrick, E., *supra note* 13, p. 350.

law concept of direct representation "on behalf of and in the name of the principal"[140]. While adopting the Director, the Law Commissioners were unable to identify a particular social group the intermediary described in the Directive, since the proposed form widely differed from the forms of agents already existing in the common law tradition, which caused a reluctance of the UK lawmakers to implement the Directive into the national legislation[141].

For the Directive to be implemented into the national legislation, the national Regulations[142] had to be enacted. The national courts were requested to interpret the Directive 86/653/EEC (including the Regulations 1993) as far as possible to achieve the prescribed aim[143].

The Directive stipulates that each party shall be entitled to conclude a written agency agreement that includes any term that was prior negotiated by parties without the right to waive it[144].

Regarding the principal's duties, the Directive obliges the principal to provide the compensation to the agent for the conclusion/negotiation of agreements with third parties or provision of any other agreed activities on behalf and in the name of the principal[145]. The agent's right to compensation is, however, limited to the period of agency contract and geographical area where the agent is assigned to[146]. Therefore, the commercial agent should be entitled to receive compensation for the agreements concluded within the assigned district, otherwise the agent's right to receive compensation would be denied. Later, the CJEU extended the rule in the case Georgios Kontogeorgas v Kartonpak AE by holding that the agent may receive compensation for the agreements concluded within the assigned area even where those agreements were concluded without his intervention[147].

Having continuing authority to negotiate the sale or the purchase of goods on behalf of and in the name of that principal the agent can perform multiple repeated actions on the principal's behalf[148]. Nevertheless, the Directive limited the interpretation of the Article 7 by granting an automatic right to commission on repeat transactions

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140 Mavrona & Sia OE v Delta Etaireia Symmetochon AE Case C-85/03 OJ 2004 C94/17 stating that the Directive must be interpreted as meaning that persons who act on behalf of a principal, but in their own name, do not come within the scope of that directive.

141 Campbell, D., Lidgard, H. H., & Rohwer, C. D. (1984), *supra note* 42.

142 The Commercial Agents (Council Directive) Regulations 1993. King's Printer of Acts of Parliament. [visited 2023-03-08] https://www.legislation.gov.uk/uksi/1993/3053/contents/made.

143 Marleasing SA v La Comercial Internacional de Alimentacion SA, No. Case C-106/89 (CJEU 13 November 1990), paras 7-8; Centrosteel Srl v Adipol GmbH, No. Case C-456/98 (CJEU 13 July 2000) paras 16-17

144 Art. 13, Council Directive 86/653/EEC, *supra note* 59.

145 *Ibid*. art. 6.

146 *Ibid*., art. 7, 7(2).

147 Georgios Kontogeorgas v Kartonpak AE, No. Case C-104/95 (CJEU 12 December 1996).

148 Art. 1, Council Directive 86/653/EEC, *supra note* 59.

with customers previously acquired by the agent. Following the ruling in Rigall Arteria Management Sp z oo sp k v Bank Handlowy w Warszawie SA, Article 7(1) of the Directive offers a choice to parties who are free to agree the level of the agent's remuneration under the Article 6, and the wording of Article 7(1)(b) does not suggest any departure from that principle[149].

According to the Directive, the agent is obliged to carry out the activities dutifully and in a good faith[150]. The legal instrument does not set any minimum or maximum term for the validity of agency agreement, however, according to the Article 14, the agreement concluded for the fixed period of time is converted in the contract with the indefinite period if the parties continue to perform activities prescribed by the contract after its expiration[151].

The termination of the contract stated in the Directive applies mainly to contracts with the indefinite period (fixed-term contracts terminate upon their expiration). The directive imposes the minimum notice periods for the termination notices to be sent to the agent in case the principal intends to terminate the contract. For instance, rules related to termination such as, minimum notice requirements for termination:

- one month for first year;
- two months for the second year;
- three months for the third year and subsequent years[152].

The notice periods cannot be shortened, only prolonged by the rule of national laws. Moreover, the Directive allows the Member states to apply national laws where the immediate termination is available for parties in case the breach of obligation or where other exceptional circumstances arise[153].

Therefore, one cannot disregard the fact that on a practical level the Directive 86/653 achieved the most significant purpose: that is, to protect freedom of establishment for all commercial agents and the operation of undistorted competition in the internal market. Moreover, by incorporating its rules into the British legislature, it also achieved the goal of preventing the principals from abusing their dominant position over an agent and, upon termination, to give agents appropriate compensation for the goodwill that they create for their principals after the agency agreement has been terminated[154].

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149 Rigall Arteria Management Sp z oo sp k v Bank Handlowy w Warszawie SA, No. Case C-64/21 (CJEU 13 October 2022).

150 Art. 3(1), 4(1) Council Directive 86/653/EEC, *supra note* 59.

151 Art. 14, Council Directive 86/653/EEC *supra note* 59.

152 *Ibid*., art. 15.

153 *Ibid*., art 16.

154 Ingmar BG Ltd v Eaton Leonard Technologies Inc. (2000) *supra note* 134.

1.1.4.3. Unification of international commercial agency through soft law instruments

Speaking about soft law instruments in the field of private law, they provide certain regulation on this topic that tried to combine the most characteristic features of both legal families. Documents like UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law, Draft Common Frame of Reference, Restatement (Third) of Agency, and European Contract Code are aimed to unify the rules, create the common approach to dealing with agency issues and to eliminate the conflict of laws[155].

Reconciling the differences between the two legal systems and incorporating the most practical approaches shall be the main goal of unification. As defined before, continental legal system does not acknowledge the cases of indirect agency where the agent is acting without disclosing the principal to the third party.

The UNIDROIT Principles of International Commercial Contracts[156] – the most important soft law instrument in the field of general contract law, first published in 1994 and now in their fourth edition (2016) – could constitute a valid alternative to the traditional State-law centred conflict-of-laws approach. It should be noted that its provisions apply to both direct and indirect representation, the authority of the agent and the internal relationship between principal and agent.

Despite being carefully balanced, the act failed to eliminate the civil law condition "in the name of the principal" from the definition of the agent. Narrowing the concept of authorisation can result in liability issues when the third party discovers that the contracting party was the agent. The agent can no longer influence the contract creation, and the third party can no longer perform the contract by paying the agent. The agent, in his turn, retains a lien on the principal's goods or substitutes that are in the agent's possession as security for their claim against the principal[157].

The described scenario highlights that none of the parties involved actually achieve the desired outcome from the transaction. In continental law, the clear distinction between acts performed in the name of the principal and those done in agent's own name stems from the principle that contractual liability for one person excludes liability for the other. Conversely, in the common law perspective, the third party who interacts with an agent acting on behalf of an undisclosed principal may hold either the agent or the principal liable. As a result, a strict division in continental law is inconsistent with the dynamic nature of commercial relations, burdened by overly complicated sets of rules.

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155 During the 80th and 90th of the 20th century the first initiatives of academic and non-official source lead to the formation of various working groups (Lando Commission, Academy of jurists of private law of Pavia, Common Core Group, the Study Group on a European civil Code, Acquis Group).

156 UNIDROIT (2016), *supra note* 46.

157 Gronfors, Kurt. 'Unification of Agency as a Legislative Challenge'. *Uniform Law Review* 3 (1998): 467, at 471.

In 1999 European Commission of Contract Law European Contract law, led by Ole Lando, started to work on the principles of European contract law that regulated the material relations of representation, including unauthorised representation[158]. The scope of the PECL for agency relationships is essentially analogous to the UNIDROIT Principles; however, PECL puts more emphasis on the individual representation types, characteristics and details of the persons involved in the legal representation relations, rights, and obligations.

These acts also contain certain provisions on the question of apparent authority, but UNIDROIT Principles accept the common law position, whereas the European Principles try to enforce the continental approach. In addition, PECL, in contrast to UNIDROIT principles also apply at the national level (not only to international commercial contracts) and consumer relations.

Rules almost analogous to PECL, there were presented in the study of the European Civil Code Study Group on a European Civil Code and European Community private law (Acquis Group), which can be regarded as updated and supplemented PECL version.

The main purpose of the CFR project was to increase the coherence of the *acquis communautaire* in the field of contract law, to promote the uniform rules targeted to a proper functioning "of cross-border transactions and, thereby, the completion of the internal market", confirming all the strategic importance to design a 'European civil code"[159].

It is important to note that the DCFR, in accordance with civil law tradition, not only separates internal and external relations of representation, but, unlike other soft law, pays special attention to the regulation of internal relations.

The European Code of Contract Law[160] drawn up by a working group set up by the European Academy of Private Lawyers (the so-called Pavia Group) could also be mentioned as a soft law act.

The main feature of this document is that contrary to the soft law mentioned earlier, it only attributes to the agency relationship cases where the agent acts exclusively on behalf of and in the interests of the principal. In other words, indirect representation does not fall within the scope of the European Contract Code. This document, like other soft law, lays down rules on alleged representation, approval of the actions of an unauthorised representative, and the civil liability of a false procurator[161].

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158 Lando, O., & Beale, H. G. *supra note* 47.

159 This has nevertheless been rejected by the Council in its conclusions of 29 November 2005, Doc. 15322/05, p. 4. – See however the European Parliament Resolution on European Contract Law (7 sept. 2006) in which it expresses support for the preparation of a wide CFR project covering general contract law issues and not only consumer contract law cited in Cashin Ritaine, Dr. Eleanor. 'The Common Frame of Reference (CFR) and the Principles of European Law on Commercial Agency, Franchise and Distribution Contracts'. *ERA Forum* 8, no. 4 (1 December 2007): 563–84. https://doi.org/10.1007/s12027-007-0039-y.

160 Radley-Gardner, Zimmermann, R., & Beale, H. (2003), *supra note* 62.

161 Jurkevičius, V. (2014), *supra note* 43 at 23.

Speaking about an unauthorised agent in the United States, fundamental elements of the doctrine are laid down in the Restatements of Agency[162]. Restatements include basic concepts of actual and apparent authority; doctrines of estoppel and ratification also rules about unauthorised agency are included. Although, Restatements are merely advisory guidelines offered by academic experts and lack mandatory legislative force, US courts sometimes can apply these conflict rules in case resolution.

To sum up, within the agency law many different approaches have elaborated and the solution to a given problem may not be the same under different national laws. The existing diversity of theoretical and practical approaches causes legal uncertainty for all three parties involved in an agency relationship. Therefore, the unification of national material laws on agency at least those that apply to international contracts are essential. During half of the century some ambiguous attempts have been made to harmonise rules on international commercial agency, however, most of them were doomed to failure because of the existing unbridgeable differences between the two legal systems.

1.2. Main features of parties to international commercial agency relationships

1.2.1. Definition of participants in commercial agency relationships

Prior to describing the main features of agency participants, it is essential to define who these parties are and what role they are assigned in a commercial agency relationship.

In the general theory of law, legal subjects could be either physical or legal persons who have the legal capacity to act and acquire legal rights and obligations. To realise these rights and obligations, legal subjects become participants in legal relationships. Thus, the term legal subject is more general than the term participant to the legal relationship as the latter exercises, not all the rights available to him but only those required for participating in a specific relationship[163].

As regards the relationship of commercial representation, there are different approaches to defining the parties due to the distinction between internal and external relationships. An internal relationship is created between the representative and the principal (the one who is being represented), while an external relationship of representation arises between the principal and the third party as a result of the agent's actions.

While the presence of internal relations between the agent and the principal does not cause any disputes as to whether they are included in the concept of representation, the existence of the external relationship is being questioned by stating that the representation is the relationship between the agent and the principal that emerges

162 American Law Institute. (2006) *supra note* 63.

163 Цюра В. *supra note* 7 at p.174.

from the conclusion of the mandate agreement. Under Ukrainian law, scientists argue that relations between the agent and the third party (including the ones with the principal and third party) are secondary and result from of the initial internal relationship and should not be included in the agency institution[164].

As I have analysed above, the EC Directive on Commercial Agents, along with Commercial Agents Regulations 1993, the Hague Convention in Relation to Agency, and the French Commercial Code hold the same opinion since they regulate only the internal relation between the agent and the principal. At the same time, Germany, Italy, and Sweden limited the concept of agency to regulation only external relations, while the relation between the agent and the principal is excluded from the concept of agency[165]. CISG Convention takes the same approach and regulates only the external relations[166].

By limiting the circle of participants only to the agent and the principal, the concept of agency is being limited as well. Therefore, within the current thesis, it is considered that both internal and external agency relationships into the agency doctrine, meaning that the set of participants in commercial agency relationships consists of the commercial agent, principal, and the third party. The legal characteristics of each group of participants will be discussed further.

Currently, the scholarship discussion also presumes the existence of the fourth parties in the representation relationship. These can be external stakeholders who are not directly involved in the relationship; however, they are closely related to it by using the second transaction, as a result of which they have interest either in parties conceding the primary transaction or share the interest with the third parties on the same object. If the third parties are included to the agency relationship because of the need to become a beneficiary to the transaction, related (fourth parties) are designated as those who are not initially intended to be beneficiaries, however, because of being substantially influenced by the initial transaction, they may receive the right to sue in order to protect the infringed right.

It is worth mentioning, however, that under the normal circumstances of duly authorised agency, fourth parties are not included in the agency relationship. Most of the problems arise in case the agent outside the scope of the granted authority enters into the transaction with the same object that the principal (either directly or through a representative) enters into with the fourth party. Fourth parties can be granted the right to demand fulfilment obligation in kind under the rules of apparent authority along with the third parties.

Thus, fourth parties can be tied to the initial relationship of representation either through the link with a third party, e.g., the vendor who launched the production of furniture, which was the object of the initial transaction concluded by the agent, or the buyer of the principal's property from the third party. However, we cannot strictly

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164 Грабовий О. *supra note* 10 at 50.

165 Aljasmi, A. (2015), *supra note* 135 at 91.

166 Article 1(3), The Convention on Agency in the International Sale of Goods, *supra note* 11.

consider fourth parties only as the further layer in the chain of agency participants, since in certain cases, they may be related to the third parties or have secondary relationship with the principal[167].

Although the existence of the fourth parties is still debatable in legal doctrine, the Dutch civil code[168] together with the soft law instruments[169] and case law[170] already provides protection to parties who are not directly related to the agency relationship. The development of more protection mechanisms in the future could contribute to the creation of a modern protective rule within agency doctrine.

1.2.2. Definition of agents in civil law and common law legal systems

Having concluded that the agent is one of the main participants in a commercial agency relationship, it is essential to analyse the main features of this group.

The term "agent" is broadly used in economics literature to define any relationship in which one person engages another to perform a service under circumstances that involve delegating some discretion over decision-making to the service-performer[171]. However, it is relatively common for persons to be designated as agents although they do not have the authority to act as such.

For instance, a sales agent is more likely to be a distributor than an agent, and even an "estate agent" will not probably meet the requirements of an agency when selling properties to clients, since he will rarely be empowered to bring his principal into direct contractual relations with a third party purchaser.[172] Agency should be distinguished from other relationships, such as trustee, bailey, independent contractors (that will be discussed later), person supplying services, etc. For example, the trustee holds money or property for another, whereas an agent performs actions on the other's behalf.

Thereby, the problem of distinguishing genuine cases of agency from other legal relationships is very urgent and not a new one. To prove this, the observation of Lord

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167 See Busch, D. Unauthorised Agency in Dutch Law. In Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, p. 162. "A grants a right of pledge on a claim to third party T1 on a claim belonging to principal P. Thereafter, P grants a right of pledge on the same claim to third party T2 and subsequently ratifies the grant of pledge to T1. The right of pledge of T2 takes priority above the right of pledge of T1".

168 Art. 3:69(5) DCC *supra note* 52.

169 Art. 3:207(2) PECL *supra note* 40.

170 Smith v. Henniker-Major & Co [2003] EWCA Civ 762, [2003] Ch 182, per Robert Walker LJ at [71]; American Society of Mechanical Engineers Inc. v. Hydrolevel Corp. 456 US 556 (1982) at 566.

171 Jensen, M. C. Meckling W. H. (1976) *supra note* 24: "We define an agency relationship as a contract under which one or more persons (the principal(s) engage another person (the agent) to perform some service on their behalf which involves delegating some decision-making authority to the agent."

172 Munday, R. (2010), *supra note* 33, at p.2.

Herschell in *Kennedy v. De Trafford*[173] may be considered:

"No word is more commonly abused than the word "agent". A person may be spoken of as an "agent" and no doubt in the popular sense of the word, he may properly be said to be an "agent", although when it is attempted to suggest that he is an "agent" under such circumstances that create the legal obligations, attaching the agency, that use of the word is only misleading".

Therefore, a wide variety of agents who have just the title, but not the characteristics of such. For instance, company directors, partners, employees, and independent contractors do not possess the true legal characteristics of an agent but are often named as such in the literature.

Moreover, even if used correctly, the definition of an agent can vary across different legal systems. Thus, in common law countries, the agent is defined as follows:

"The fiduciary relationship that arises when one-person (a 'principal') manifests assent to another person (an 'agent') that the latter shall act on behalf and under the principal's control and the agent manifests assent or otherwise consents so to act"[174].

This definition brings out the following distinctive legal features of an agent: 1) agent's fiduciary duty regarding the fiduciary nature of the relationship; 2) principal's power and the right to interim control; 3) in most instances, the relationship between the principal and the agent will be consensual, very often contractual; 4) and the parties' legal capacity to perform actions.

From the definition is it clear that common law operates on the "externalised" theories thus, relationship of only two persons is included into the definition. Moreover, the notion omits the requirement "in the name of" is covering both cases of disclosed and undisclosed agency by omitting the requirement of acting "in the name of the principal" and allowing the agent to act in his own name in regard to the third parties. What distinguishes the agency from all other legal relations is the fiduciary duty owed by the agent to the principal, which is undertaken at the beginning of their relations. The fiduciary character of a relationship instantly implies additional duties imposed on the person who acts as an agent, requiring the agent to act loyally and with due diligence in the principal's interest as well as on the principal's behalf[175].

Speaking about the definition of an agent in countries with civil law system, traditionally a representative is described as a person who is obliged or is granted a right to perform in the name of another person being represented[176]. Also, the Dutch civil code provides a similar definition of an agent within the meaning of a procuration: "A 'procuration' (or 'power of attorney') is the authority granted by a person, the principal, to another person, the representative (agent), to perform one or more juridical

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173 Kennedy v. de Trafford LawSuit (UKCA) 124', 1896. citation in McCullagh, Adrian. 'The Validity and Limitations of Electronic Agents in Contract Formation'. SSRN Scholarly Paper. Rochester, NY, 28 February 2013. https://doi.org/10.2139/ssrn.3312527.

174 § 1.01 American Law Institute. (2006) *supra note* 63.

175 *Ibid*.

176 Art. 237 (1) Civil Code of Ukraine (2003) *supra note* 54.

acts in the name of the principal [and, with that, immediately for the account of that principal]"[177].

Taking into account the essence of the notion of a representative, the following features can be distinguished: 1) representative has legal capacity to perform legally significant actions; 2) the scope of authority limits representative's actions; 3) agent is acting in the name and on behalf of the principal; 4) the representative acts only in relation to third parties; 5) the representative acts against third parties and such persons are informed that they are dealing with the representative; 6) the representative's actions directly create, change and terminate the civil rights and obligations of the principal; 7) the principal's awareness of the transactions and actions committed by the representative;

In continental law, the legal definition contains the specification "on behalf of," providing a clear distinction between acts performed in the name of the principal and those done in agent's own name stems from the principle that contractual liability for one person excludes liability for the other. When the agent performs legal and other actions on his own behalf, even though following the principal's instructions and at the principal's expense, such contract would not relate to agency stricto sensu. In such a case, the relations of agency service contracts would prevail with the different rules applicable[178]. Conversely, in the common law perspective, the third party who interacts with an agent acting on behalf of an undisclosed principal may hold either the agent or the principal liable.

One more requirement of agency relations is that a person should be properly authorised to perform a legal act that would have a certain effect on the principal. According to the Article 6:102 of the DCFR a "representative" is a person who has authority to directly affect the legal position of another person, the principal, in relation to a third party by acting on behalf of the principal[179].

On the contrary, according to common law, the agent can still affect principal's relations with third parties although not properly authorised, but acting loyally and on the principal's behalf. This is considered to be a case of "incomplete" agency, which is possible because of the nature of the fiduciary relationship[180]. Such a definition is wider than the one in civil law, where the agent has a limited right to affect the principals' legal positions[181]. The fiduciary nature of agency relationships in common law will be discussed further in the thesis.

In this work, both terms "representative" and "agent" would be used, as in countries with civil and common law, they basically mean the same. They describe a person who has the capacity and necessary authority to act in the name, on behalf of the

177 Art. 3:60(1) DCC *supra note* 52.

178 Mitkus, S., & Jurkevičius, V. (2014), *supra note* 43, at 124.

179 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

180 § 1.01 American Law Institute. (2006) *supra note* 63, referring to "acting on behalf" of the principal for an agent without authority, but still being able to affect the principal's relations with third parties.

181 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, para. 1-019- 1-020.

principal, and under his instructions to create, modify, or terminate a relationship between the principal and the third party.

All the characteristics of agency relationships and the agent in particular, particularly the agent, are broad and could be interpreted differently in different legal environments. Therefore, a wide variety of agents who have just the title, but not the characteristics of such. For instance, distributors, franchisees, and licensees could be compared with agents, however, do not represent the manufacturers since they act for their own account and bind themselves to the transactions with their counterparties[182]. Commercial agents always act on behalf of the principal, who later becomes bound under by the transaction with the third party.

Therefore, for this thesis, it is important to define specific characteristics of a commercial agent that would help distinguish them from other types of intermediaries.

1.2.2.1. Distinguishing features of commercial agents

The concept of "commercial agent" was introduced to the European law in 1986 under the already mentioned here Council Directive of December 86/653/EEC"[183], and later, in 1993 it was implemented into the UK common law system with the Commercial Agents Regulations[184], amending the traditional concept of "agent" in common law understanding.

The complete definition of the commercial agent is given in Article 1(2) of Directive 86/653/EEC where the commercial agent is described as 'a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that principal[185].

From this definition, the Directive excludes from its scope the commercial agents who:

- are not self-employed;
- do not have continued authority[186];
- are not active in the sale or purchase of goods (e.g. insurance brokers[187]);

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182 Goode, R., Kronke, H., & McKendrick, E., *supra note* 13.

183 Council Directive 86/653/EEC, *supra note* 59.

184 The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139.

185 Council Directive 86/653/EEC, *supra note* 59.

186 "Having continuing authority" refers to the need for commercial agents to act for their principal continuously over a certain period, not depending on the number of transactions concluded (differentiating them from brokers who act only on a one-off basis). See Poseidon Chartering BV v Marianne Zeeschip VOF and Others, No. Case C-3/04 (CJEU 16 March 2006) where the CJEU held that 'given the renewal of the contract over several years, there can be no doubt that the intermediary has continuing authority'.

187 Opinion of AG in Ergo v Barlikova Case C-48/16 (12 December 2017) excluding from the notion of goods financial and insurance products.

- do not conclude the sale or purchase of goods on behalf and in the name of the principal (e.g. independent car dealers);
- Unpaid agents;
- Officers of the company, partners, insolvency practitioners, etc.

Also, courts, including the CJEU, exclude from the definition of commercial agents are persons whose activities as commercial agents are seen as secondary[188].

Therefore, the Directive requires commercial agents to be self-employed, distinguishing them from employees and officers of the company who have representational authority. The word self-employed in the meaning of both Directive 86/653/EEC and the Regulations 1993 stands for the feature of being independent, separate from the principal, not being dependent on him[189]. Therefore, it can be considered that independent contractors who are engaged in representational activities professionally are indeed covered by the scope of both legal instruments.

Thus, the main distinguishing factor is the level of the agent's subordination to the principal's instructions and liability of the principal that makes it possible to exclude employment relationships from the concept of commercial agency.

The Directive is, however, silent if the agent can be considered "independent" when providing activity on the principal's premises. Therefore, the Directive could also be extended to those who perform their activities on the principal's premises as long as such a situation does not affect the agent's independence. Thus, the presence of the agent in the principal's premises must not lead to (i) subordination to the principal's instructions or (ii) material advantages for the agent regarding the organisation of their activities and the economic risk associated with them[190].

As for the meaning of 'sale goods' within Article 1(2) of the Directive, this is presumed to include the agreement of transfer the ownership rights regarding all the products (both material and electronic) that have monetary value and can be a subject of commercial transactions[191]. The CJEU provided some certainty regarding the inclusion of software products; however, the characteristic of 'perpetual' was added, which limited the protection granted by the Directive to software products that are limited in time. Also, it seems possible to extend the notion of goods to gas and electricity[192].

The agency agreement is fundamentally based on trust, and the involvement of fiduciary duties, along with and other characteristics, makes it relational. The theory of relational contracts is relatively new and was developed in the US by scholars Ian

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188 Tamarind International Ltd v Eastern Gas (Retail) Ltd Times (CJEU 27 June 2000); Eur LR 708 at para.28; AMB Imballaggi v Pacflex Ltd [1999] 2 All ER (Comm) 249 at 254.

189 AMB Imballaggi Plastici Srl v Pacflex Ltd [1999] 2 All ER (Comm) 249.

190 Zako SPRL v Sanidel SA. Case C-452/17, Judgment of the Court (Fourth Chamber) of 21 November 2018, paras.32,33.

191 The Software Incubator Ltd v Computer Associates (UK) Ltd C-410/19 (CJEU 17 December 2020).

192 Tamarind International Ltd v Eastern Gas (Retail) Ltd Times (CJEU 27 June 2000); Eur LR 708 stating that: "it is impossible coherently to explain why gas and electricity are any more tangible property than the Software"

Roderick Macneil and Stewart Macaulay. According to them, some contracts should be viewed as relationships rather than mere transactions; they involve a mutual incentive to provide quality services based on good faith and mutual benefit[193].

A relational contract's main characteristics are longevity, implied good faith, integrity and fidelity, collaboration, trust and confidence, a high degree of communication, and loyalty[194]. Although this list is not exhaustive, it is clear that the commercial agency contract is indeed relational. Given all the listed characteristics, relational agreements do not allow for the easy transfer of rights and obligations to third parties.

According to Directive 86/653/EEC and the Regulations 1993, an agency relationship ends automatically in the event of the death of a commercial agent due to its personal nature, and the agent's heirs are entitled to claim compensation[195].

The Court, in the case AMB Imballaggi Plastici Srl v Pacflex Ltd also concluded that companies, along with partnerships, can also be considered commercial agents. The issue, however, arises as regards the compensation in case of the agent's 'death'. Both legal instruments define the right to agent's compensation in case of death. If the agent is the legal entity and one of the partners dies, would the contract be terminated (with the right to compensation) or the principal should continue to work with another partner? What if the principal does not trust another partner, shall he continue the relationship in this case? It would probably be concluded that the rule does not apply to companies acting as agents. However, the level of personal attachment shall definitely be considered, which may make the termination clause applicable.

Under German law, the death of the principal does not lead to the termination of the mandate[196]. This statement is doubtful, though, since the death or incapacity of the person without whom the agency cannot be performed would terminate the relationship due to impossibility but would not give the sufficient grounds for the agent to terminate the relationship.[197] Therefore, a natural person can act as a commercial agent. Also, the Directive does not apply to representative activities in the field of services.

One of the features that enjoys the biggest attention is the agent's power 'to negotiate' prescribed by the Directive. As I have discussed before, the agents solely act under the principal's instructions and do not have the freedom to deviate from the set prices or the terms of business, while this power to negotiate is included in the definition of Article 2 of the Directive.

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193 Macneil, Ian R. "Contracts: Adjustment of long-term economic relations under classical, neoclassical, and relational contract law." *Nw. UL Rev*. 72 (1977): 854. Macaulay, Stewart. "Non-contractual relations in business: A preliminary study." *In The Sociology of Economic Life*, pp. 198-212. Routledge, 2018.

194 Bates v Post Office (No 3) [2019] EWHC 606 (QB); See also Essex County Council v UBB Waste (Essex) Limited [2020] EWHC 1581 (TCC) stating that: "a "relational" contract would typically imply a duty to act in good faith; be long-term in nature; require a high level of communication and co-operation between the parties; and otherwise show an intention that the parties perform their duties with integrity, trust and confidence".

195 Art. 17 (4) Council Directive 86/653/EEC, *supra note* 59. Art. 17(8) The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139.

196 § 672, German Civil Code (BGB*) supra note* 50.

197 *Ibid*., § 275(1).

CJEU defines the term "negotiate" as an autonomous concept of European Union law that must be interpreted in the context of the objectives of the Commercial Agents Directive. Thus, while performing the actions in the interests of the principal, agents may be involved in some promotional activities such as persuasion to buy, acquisition of new customers providing information and advice, and by conducting meetings without the authority to negotiate the price and other commercial terms of a sales contract[198].

Thus, the Court holds the restrictive interpretation of the agent's power to 'negotiate' under the Directive 86/653, which excludes the power to modify prices during the negotiations with third parties.

Nevertheless, the Directive serves the minimum protection requirements, and the states, while implementing it, enjoy discretion on its interpretation. Thus, it is usual that national courts broaden the interpretation of certain provisions. For instance, the French Court of cassation while interpreting Article L. 134-1 of the French Commercial Code, considered that the authority to negotiate necessarily includes the power to change prices to apply the status of commercial agent[199].

However, in a judgment of 4 June 2020 (Trendsetteuse, C-828/18), the EUCJ ruled that Article 1(2) of Directive 86/653 reversed the French Court's ruling by reminding that the term shall be interpreted in a restrictive manner. Therefore, the Commercial Chamber of the French Court of Cassation followed the ruling[200].

Considering the number of cases where the local courts used different interpretations, it could be a solution to provide a more extensive definition into the directive to avoid a 'loophole' situation. The CJEU has confirmed the way of interpreting the agent's power to negotiate multiple times and seems consistent in it. Nevertheless, the decisions of the CJEU are obligatory only for the involved parties. Therefore, to avoid misguidance, the definition could be extended and specified as follows:

"A commercial agent is a self-employed natural or legal person who is not bound by an employment contract nor having the power to change the prices of such goods or services, has the continuing authority to negotiate and to possibly conclude contracts with third parties relating to sale or purchase of goods in the name of and on behalf of principals and under their control".

1.2.2.2. Separation of independent professionals acting as agents from employees

Since a commercial agent could be an independent contractor, a clear definition should be provided as to who is an employee and who is an independent contractor, since both terms are intensely factual and often unpredictable.

198 Engie Cartagena SL v Ministerio para la Transición Ecológica, No. Case C-523/18 (CJEU 19 December 2019).

199 Cour de cassation, civile, Chambre commerciale, 10 Octobre 2018, 17-17.290, Inédit, (Cour de cassation 2018).

200 Trendsetteuse SARL v DCA SARL, No. Case C-828/18 (An Chúirt Bhreithiúnais 4 June 2020).

Both definitions of employee and independent contractor are concentrated on the question of control. "Employment" relationships with independent contractors, as a rule, would not result in vicarious liability for the employer as the latter is not liable for the negligent conduct of such worker. The "employer" lacks control over such a contractor and cannot be made liable for the unauthorised act of the contractor, even if the manifestation of authority made the third party believe that the agent is duly authorised.

Restatement (Second) of Agency defines an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking[201]". Restatement (Third) of Agency, in its turn, tends to abandon the term *"independent contractor"* but notes that it is "equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are non-agent service providers[202]". The latter Restatement does not use the term "independent contractor".

A commentary to Restatement (Third) of Agency tried to capture those characteristics:

"[T]he principal may exercise the agreed extent of control over details of the agent's work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place of performance; the length of time during which a principal engages the agent; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship[203]".

Various courts have developed different tests, with the result that a person may be an employee for some, but not for other, purposes[204]. One such test was developed by the California Supreme Court in the case S.G. Borello & Sons v. Dept. of Industrial Relations[205], the so-called "right-to-control-test" which stipulates that "[t]he principal test of an employment relationship is whether the person to whom service is rendered, has a right to control the manner and means of accomplishing the result desired…[206]".

Thus, the degree of control the employer exercises over the individual's work can

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201 American Law Institute. (2006) *supra note* 63; § 2(3) American Law Institute. Restatement (Second) of Agency. 1958.

202 *Ibid*.

203 § 7.07 American Law Institute. (2006) *supra note* 63.

204 Loewenstein, Mark J. 'Agency Law and the New Economy'. *The Business Lawyer* 72, no. 4 (2017): 1009–46.

205 S. G. Borello & Sons, Inc. v. Department of Industrial Relations 48 cal.3d 341, 1989.

206 Machuskyi, Volodymyr. 'Ukrainian Law Blog: The Concept of Independent Contractor Is Under Assault—Especially in California'. *Ukrainian Law Blog* (blog), 2016. http://ukrainianlaw.blogspot.com/2016/08/the-concept-of-independent-contractor.html.

serve as a useful criterion for distinguishing between employees and representatives in legal relationships and obligations.

There could be defined the following distinguishing factors between the employee and independent contractor:

- Degree of control and supervision over how and when the work is done;
- Financial control;
- Type of compensation;
- Type of contract that serves the basis.

Labour laws typically govern the rights and duties of employees, and their authority of an employee is typically delineated in the job description, work contract or other documents. The employer oversees different aspects of the work, such as working hours, performance, methods doing work. This is important for employment relationships as the employer could be vicariously liable for an employee.

While the work of independent contractors who act as commercial agents presumes application of legal norms applicable to commercial agents with the scope of authority defined in the mandate agreement. They often enjoy greater autonomy and independence in carrying out their duties. Agents have more discretion in decision-making and do not require direct supervision from the employer. They could be entitled to negotiate agreements, undertake decisions related to business transactions, and represent the interests of their employer in external dealings.

On the other hand, the extent of an employee's authority to act on behalf of the employer varies based on their current position. It may be implied from the employee's duties or other factual circumstances surrounding the employee's role. Despite the lack of explicit mention, the employer is still bound by actions performed by the employee, and the same legal consequences arise as those from express agent's powers[207]. For instance, individuals in managerial roles, such as department heads, may possess broad authority to represent the company. However, they may not be considered commercial agents as they do not possess the main characteristic of being self-employed.

Also, agency relationships are per se of a fiduciary nature, meaning that the agent must act loyally in the principal's interest as well as on the principal's behalf. Fiduciary duty extends to various aspects, including handling property owned by the principal, safeguarding confidential information concerning the principal, and more[208].

Although employees can also have fiduciary duties towards their employer, especially in cases where they are entrusted with confidential information, intellectual property, or financial resources, the division here lies in whether a person has been granted corresponding rights to act on behalf of the principal, to enter into contracts, or to make decisions that legally bind the employer.

Therefore, commercial agents can act as independent contractors and be responsible for upholding their own contractual obligations while acting in the best interests of their principals.

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207 Jurkevičius, V. (2014), *supra note* 43.

208 § 1.01, American Law Institute (2006) *supra note* 63.

1.2.2.3. Challenges of identifying agents within legal entities

It is generally a widely discussed topic whether transactions conducted on behalf of a legal entity by its organs—such as officers, directors, or executives—can be classified as representation according to the civil law[209]. Within the rules of the common law, directors are considered as types of agents of the company that delegates to them a duty to represent its interests[210].

This aligns with the doctrine of identity, according to which the agent and the principal are intertwined and not differentiated regarding performing actions towards the third party. Thus, the agent's actions are considered to be the company's actions.

In the countries with the continental legal system, the view differs, though. Although they are authorised to act on behalf of the entity within the scope of their designated roles and responsibilities, their actions are viewed as direct actions undertaken by the entity itself through its authorised representatives. Thus, the bodies of a legal entity are its essential components and are directly tied to the entity's ability to function. The activities undertaken by the organs of a legal entity are considered expressions of the entity's own will, and they do not require additional delegation of functions to a separate representative.

Therefore, transactions conducted by the organs of a legal entity do not fall within the traditional framework of agency relationships, where one party acts on behalf of another. Instead, they are regarded as manifestations of the legal entity's own decision-making and operational activities carried out by individuals empowered to act on its behalf within the scope of their official roles[211].

Article 92 of the Civil Code of Ukraine establishes that a legal entity acquires civil rights and obligations and exercises them through its bodies that act in accordance with the statutory documents and the law. In cases established by law, a legal entity may acquire civil rights and obligations and exercise them through its participants[212]. At the same time, civil procedural legislation distinguishes between the participation of legal entities in the process through their bodies and representatives, since Part 3 of Article 58 of the Civil Code of Ukraine established that "a legal entity participates in a case through its manager or a member of the executive body authorised to act on its behalf by the law, statute, regulation (self-representation of a legal entity), or through a representative"[213].

Ukrainian scholars argue that it is unacceptable from the point of view of theory and practice to identify the director of the legal entity and its representative, since they have completely different statuses, although formally, according to the provisions of

209 Watts, Peter. "Directors as Agents–Some Aspects of Disputed Territory." *Agency Law in Commercial Practice* (2016).

210 Aberdeen Railway Co. v Blaikie Brothers (1854) 1 Macq 461 (HL).

211 Jurkevičius, V. (2014), *supra note* 43.

212 Art. 92 Civil Code of Ukraine (2003) *supra note* 54.

213 *Ibid*.

the Procedural Civil Code of Ukraine, they are considered as representatives of the entity[214].

The organ of the legal entity cannot be considered a separate subject since they still act according to the statutory documents of the legal entity and not a power of attorney. In cases when the manager or another authorised person represents the legal entity based on the founding acts, according to the court procedures this will be considered a self-representation[215]. If the director or an employee of the company is acting based on a power of attorney, legal norms regulating representation relations will be applied directly[216].

In Ukrainian legal literature, two theories were formed regarding the relationship between a legal entity and its body in terms of representative relations. Proponents of the first and oldest of them believe that company's bodies and officials act as representatives of a legal entity, representing and protecting its rights and interests in relations with third parties[217]. Proponents of another theory, summarise that the body of a legal entity as its representative "is not subject to any rights and obligations, separate from civil rights and obligations inherent to the legal entity itself[218]. Although the second approach appears more acceptable, both lead to a conclusion that a legal entity lacks legal capacity, since only acts through its representatives, which is obviously incorrect.

While describing the representation of a legal entity by its organs, it is undeniable that some features of representation are present. Organs of the company indeed possess certain amount of authority to represent the company, however, we cannot consider the classical concept of representation because of a few reasons:

1. A relationship of representation presumes the existence of two parties - the representative and the principal. The view that a legal entity and its constituents are different subjects of law does not correspond neither to the provisions of the current legislation or to law enforcement practice.
2. A representative performs significant action in the interests of the person, while in this case, the principal and the representative legally act as the same person.
3. There is also no causal relationship that characterises the relationship of representation: the actions of the representative directly generate, change, and terminate the civil rights and obligations of the person he represents.

Therefore, such type of representation is deemed to be a *quasi-representation*,

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214 Немеш, П. Ф. 'Розмежування Законного Представництва Та Інших Видів Представництва у Цивільному Процесі, Що Не Пов'язані з Видачею Довіреності'. *Адвокат*, no. 7 (2011): 23–25.

215 Art 58, Цивільний процесуальний кодекс України. *Офіційний вебпортал парламенту України*. 2004. [visited 2022-12-03] https://zakon.rada.gov.ua/go/1618-15 .

216 *Ibid*.

217 Спасибо-Фатеева И. В. Акционерные общества: корпоративные отношения [Текст] / И. В. Спасибо-Фатеева. – Харків: Право, 1998. – 252 с.

218 Будзан Л. Д. Представництво в адміністративному судочинстві України [Текст]: автореф. дис. ... канд. юрид. наук: 12.00.07 / Л. Д. Будзан; Держ. вищ. навч. закл. «Запоріз. нац. ун-т» М-ва освіти і науки, молоді та спорту України. – Запоріжжя, 2013. – 16 с.

which in its essence is not endowed with the fundamental features of representation as such, but in connection with the presence specific scope of powers granted to the representatives of a legal entity to perform externally towards the third parties is similar to voluntary of representation as such[219].

Despite the views in scholarship, legal rules of representation may indeed apply subsidiarily in external relations when the agents interact with the third parties[220]. DCFR indicates that the rules of representation regulate the application of powers granted within the company towards third parties[221].

When assessing the director's and the company's internal relationship as a fiduciary relationship, the question of whose interests the company represents remains unanswered. Some views expressed that such transactions should be declared void. Under Lithuanian law, there are provisions that state that agency rules cannot be applied to disputes arising out of relations between a corporation and its organs. The opposite opinion is applied when the representative is acting outside the scope of authority; in such cases the company cannot claim for annulment or invalidity of a transaction formed by its body or any other representatives unless the law of the state where the domicile or the head office of the other party to the transaction is located provides any restrictions on their representative powers, and the other party knew about such restrictions[222].

In the comments to DCFR, it is expressly stated that the provisions of the chapter on representation should apply to the authority of directors of a corporation, since company law often deals with the granting of authority to the company's legal representatives. It seems reasonable that the general rules on representation should be applicable to bodies of the legal entity unless the national law provides certain restrictions to that[223].

While we can agree that directors can possess the characteristics of an agent, it is difficult to consider them true commercial agents. While discussing the rules applicable to commercial agency, only labour agreements are excluded from the scope of Directive 86/653/EEC[224], while directors are usually independent parties with separate agreements, which impliedly can be covered by the rules if commercial agency according to the provisions of DCFR. It is advisable to make an express exclusion of contracts concluded by directors with regards to the sale of goods from the scope of commercial agency.

The company's director is a natural person who is a separate legal personality from

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219 Цюра В. *supra note* 7 at p.415.

220 Jurkevičius, V. (2014), *supra note* 43 at 40.

221 Bonell, Michael Joachim. Agency. In Towards a European Civil Code. 4th rev. and Expanded ed. Alphen aan den Rijn: Kluwer law international, 2011.

222 Mitkus, S., & Jurkevičius, V. (2014), *supra note* 43, at 123.

223 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

224 Art. 1(3) Council Directive 86/653/EEC *supra note* 59 excludes from its scope "a person who, in his capacity as an officer, is empowered to enter into commitments binding on a company or association".

the legal entity. A legal entity is endowed with civil legal capacity and legal capacity, it may be plaintiff and defendant in court, however, by virtue of its nature and organisational structure is forced to exercise its procedural rights and obligations through the institution of representation[225]. Therefore, logically, directors could be named as representatives of a legal entity, or representatives of a specific interest group. Such an approach is incorporated into the common law system.

One would expect that most managing directors are usually authorised to enter into contracts within the company´s ordinary course of business, however, it is doubtful whether the board of directors would be expected to delegate total management power to a managing director[226]. Directors indeed have a fiduciary duty to act in the best interests of the company, considering the interests of various stakeholders such as shareholders, employees, and creditors. Directors could be considered fiduciaries having powers to make daily regarding the company operation[227].

In summary, although directors could be considered representatives of the company, their role extends beyond mere agency representation as they have powers to act in the company's best interests, and the broader context of corporate governance and legal regulation. However, it is doubtful that the definition of commercial agent could apply to the company bodies.

1.2.3. Principals in international commercial agency relationships

Continuing the designation of the parties to international commercial agency relationships, disputes arise as to the question of who may be called a principal. Within commercial agency relationships, the principal is a separate business undertaking or an individual on behalf of whom the agent is performing transactions. It is important to note that in a commercial agency a principal has a legal capacity; however, chooses to appoint an agent to carry out specific legal actions. Regarding international relations, such commercial agents are authorised to conduct business activities across borders.

Principals confer authority in agents to negotiate contracts, solicit business opportunities, market products or services, and undertake other activities in the principal's interests and according to their instructions.

According to Article 1 of the original version of the Decree No. 58-1345 of 23rd December 1958 supplemented and amended by Decree No 68-765 of 22nd August

225 Yakymchuk, Olha. 'The Representation of a Legal Entity by Its Head in Criminal Proceedings in the Aspect of the Introduction of Advocacy Monopoly'. Actual Problems of Law, no. 1 (2018): 167–72, at 168.

226 Rimpacific Navigation Inc. and Another v Daehan Shipbuilding Company Ltd [2009] EWHC 2941 (Comm) "The managing director of the company has a broad authority to make decisions for the company in the ordinary course of business, however, it is doubtful whether the board of directors would any longer be expected to delegate total management power to a managing director".

227 Glynn, Timothy P. 'Beyond Unlimiting Shareholder Liability: Vicarious Tort Liability for Corporate Officers'. Vanderbilt Law Review 57 (2004): 329 at p. 43.

1968, commercial agents can perform their activities on behalf of "manufacturers, producers, or merchants"[228].

Therefore, farmers could be considered producers, while a manufacturer could be someone who has the creates, assembles or designs goods to be placed on the market. The third category, however, is the broadest as it includes any person (legal or natural) who carries out any commercial transactions resulting from ordinary business.

Principals within international commercial agency can be designated as:

- companies including corporations, partnerships, or other business entities engaged in international trade or commerce who penetrate foreign markets;
- individuals, namely sole proprietors or entrepreneurs operating on an international scale;
- manufacturers or suppliers that produce goods or provide services to foreign markets;
- exporters or importers that require services of agents in facilitating international trade transactions with regards to importing goods from foreign countries or exporting goods to foreign markets, etc.;

As mentioned, principals in commercial agency relationships exercise a certain degree of control over agents. Principal may seek to exercise control in many ways, among them compensation and other incentive structures applicable to the agent, and instructions given to the agent[229]. All other actions beyond the scope of the principal's instructions undermine the efficiency of agency, creating unpleasant legal consequences for either party to this relationship.

The instructions are usually prescribed clearly; however, they can sometimes be ambiguous, so the agent has to interpret them reasonably and according to the fiduciary nature of the relationship. The fiduciary benchmark does not permit the agent to take advantage of gaps or ambiguities in the principal's instructions or engage in other self-interested behaviour without the principal's consent[230]. At the same time, the agent is not obliged to obey illegal directions or those that conflict with the ethical rules of their professions.

The reference to principal's ability to control the agent's actions and to give instructions is not directly stated in the definition of the commercial agent. However, this right of the principal could be inferred from other articles related to the obligations of the agent that presume that the agent must make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of; and comply with reasonable instructions given by his principal[231].

Reasonableness in these circumstances shall be guided by the criteria of what is

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228 Décret n°58-1345 du 23 décembre 1958 relatif aux agents commerciaux, 58-1345 § (n.d.). [visited 2023-04-15] https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000853181.

229 DeMott, Deborah A. 'Disloyal Agents'. *Alabama Law Review* 58 (2007): 1049. [visited 2023-03-22] https://scholarship.law.duke.edu/faculty_scholarship/1829

230 DeMott, (2014) *supra note* 35.

231 Art. 3(2) Council Directive 86/653/EEC, *supra note* 59.

objectively ascertained, having regard to the nature and purpose of what is being done, to the circumstances of the case and the applicable usages as well as what other persons acting as a commercial agent and principal in the same situation would consider reasonable[232].

The creation of legal relationships between the agent and principal is usually specified in the agreement executed by the parties. However, under the common law, a written agreement is not always required. Instead, to consider the relationship valid, a simple offer, acceptance, and consideration are required. Although simplified procedure seems beneficial for fast-paced commercial relations, simplified rules applied in common law may lead to miscommunication regarding the existence of relationships between the parties and result in questions about the existence of the agent's authority to act on behalf of the principal[233].

Principals and agents are always separate legal personalities in commercial agency relations, and thus, may not share the same goals and incentives. The principal's main goal is profit maximisation, which may include engaging in risky activities to meet this goal. The agent might be reluctant to engage in risky, even though profitable transactions to preserve stable compensation. As a result, the agents besides losing the potential profit maximisation, also create opportunity costs for risk-neutral principals who prefer that agents maximise their income in favour of investors or related parties[234]. It is important to align their incentives to increase the value of agency and minimise the agency costs. A remedy to this problem might be providing some insurance to the agent which will make his compensation less sensitive to his performance.

Following the analysis, a principal in an international commercial agency relationship can be defined as a business undertaking or a natural person involved in commercial activities who confers powers on an agent to perform legal actions on his behalf, in his interests, and under his control.

1.2.3.1. Maintaining the balance of interests in case of agents performing for multiple principals

The concept of multiple principals pertains to situations where agents conclude delegation contracts with more than one principal[235].

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232 Annex 1, Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

233 'Light & Ors v TY Europe Ltd, [2003] EWCA Civ 1238 | England and Wales Court of Appeal (Civil Division), Judgment, Law, Casemine.Com'. [visited 2023-09-16] https://www.casemine.com/judgement/uk/5b46f1fa2c94e0775e7ef4f1.Principal ceased to trade due to no assets, however the agents continued acting on their behalf. The Court of Appeal overruled the decision of the first instance and ruled that no compensation should be assigned.

234 Sappington, David E. M. 'Incentives in Principal-Agent Relationships'. Journal of Economic Perspectives 5, no. 2 (June 1991): 45–66, at 49. https://doi.org/10.1257/jep.5.2.45.

235 Nielson, Daniel L., and Michael J. Tierney. 'Delegation to International Organizations: Agency Theory and World Bank Environmental Reform'. International Organization 57, no. 2 (April 2003): 241–76. https://doi.org/10.1017/S0020818303572010.

Generally, the agent is not forbidden to act on behalf of multiple principals if that does not harm any of them. However, this right might be limited when principals conflict with each other. From the EU perspective, the duty to avoid conflict of interests is viewed under the Article 3 of the Directive 86/653/EEC[236], while under the common law, the agent is under the fiduciary duty to avoid conflict of interest with the principal.

In case the agent represents more than one principal in the same market, their line of business would likely be similar. To find out if principals compete or conflict with each other, the agent must analyse whether there is meaningful overlap between their businesses. For instance, if principals sell goods of the same type or produce same product, the possibility of conflict increases. By way of visualisation, the agent is acting on behalf of the principal X, who produces fabric of a certain quality and composition. The same agent also acts on behalf of principal Y, who designs clothes made from the same fabric principal X produces. In case principal X changes the composition of the fabric, should the agent inform principal Y about the change (if it essential)? How does the agent decide whether to maintain the duty of confidentiality or the duty to disclose?

In such cases, however, the essential duty of full disclosure to one principal may itself constitute the breach of the duty of confidentiality to another. Therefore, the question arises whether the agent is allowed to deviate from the fulfilment of the duty of confidentiality owed to one principal to the extent necessary to fulfil his duty to disclose material information to the second principal. The agent will be charged for disloyalty, where he uses his position to obtain information regarding the transaction concluded on behalf of one principal for the benefit of another. Such knowledge may distract the agent from accomplishing the transaction in the principal's best interests and bias his understanding of the principal's instructions[237]. The situation can be cured if the agent discloses to the principal all the information that could compromise him to the principal.

The exception to the duty to disclose can be found under the Article 21 where such disclosure would contradict the public policy. Thus, if the agent is covered by the obligation of confidence to principal X he would be precluded of revealing information to principal Y about the change[238]. Representing principals with conflicting interests may result in a range of fiduciary duties' violations, such as disloyalty and breach of confidentiality, making the agent liable for the breach of agency agreement.

It is especially possible whenever the agreement includes a clause precluding the agent from acting on behalf of competitor; otherwise, the agent will be charged for the material breach of the agency agreement. This will allow the principal to immediately terminate the agreement, although it is possible that the agent will retain the right to compensation under Article 17 of Directive 86/653/EEC. To deprive the agent of compensation, the breach shall be recognised as repudiatory.

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236 Art. 3, Council Directive 86/653/EEC *supra note* 59.

237 DeMott, D. A. (2007) *supra note* 229.

238 Art. 21, Council Directive 86/653/EEC *supra note* 59.

Whereas under the common law, an agent's failure to disclose may not necessarily lead to a breach of duty of loyalty, meaning that the agreement may not be terminated, however, the principal will be entitled to an indemnity claim to compensation for losses. Fiduciary law prescribes that an agent's breach of duty to disclose also triggers the duty to disclose the violation and all related material information. However, common law, with the traditional position of protecting the principal, does not contain many rules for the agent's protection. Therefore, Courts tend to deprive the agent of the right to compensation in case of performing on behalf of competing principals[239].

Similar circumstances were presented in Kelly v. Cooper[240] where the agent was performing on behalf of competing principals. While the Judicial Committee of the Privy Council in London, England, found the breach of the agent's fiduciary duty and denied the agent's entitlement to commission, the Court of Appeal held an opposing opinion.

The Court relied on the nature of the general agency contracts, where the conflict of interest between the principals would be unavoidable. Each principal needs to attract another purchaser; thus, estate agents should be free to perform for multiple principals; otherwise, they will be unable to perform their functions[241].

Another case that defined the requirements for the agents representing competing principals is Rossetti Marketing Ltd & Anor v. Diamond Sofa Company Ltd.

The Court outlined two situations where the agent is allowed to act for multiple principals who have conflicting interests:

"1. Where both principals agree. In such a case, it is for the agent to show the principal's consent but that the consent was given on a fully informed basis - i.e., that the agent had made full disclosure to the principal.

2. Where the principal must have appreciated that the nature of the agent's business (in that case, a residential estate agent) is 'to act for numerous principals' as in Kelly v. Cooper" [242].

Thus, before entering into a relationship with another principal that could potentially compete or conflict with the existing relationship, agents should ensure that they inform the latter of that and obtain the express consent to proceed. Moreover, an agent cannot treat silence by the principal as implied consent, which appears immaterial in this case.

The agent is expected to fully disclose to his principal about his intention to act for another principal with competing interests and receive consent before assuming new obligations[243].

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239 Randolph, Fergus, and Jonathan Davey. *Guide to the Commercial Agents Regulations*. 2nd ed. Oxford: Hart Publ, 2003.

240 Kelly v. Cooper (1993) AC 205 [visited 2023-08-22] https://www.uniset.ca/other/cs2/1993AC205.html.

241 *Ibid*.

242 Rossetti Marketing Ltd and Another v Diamond Sofa Company Ltd [2012] EWCA Civ 1021.

243 Srivastava, Dipti. 'Duties of a General Agent Towards the Principal'. SSRN Scholarly Paper. Rochester, NY, 2014. [visited 2023-11-30] https://ssrn.com/abstract=2483008

In cases where it is unforeseeable that principals may eventually become competitors, but competition arises once any of them expands their business during the validity of the agency agreement, the agent would be obliged to reconfirm the terms with both conflicting principals to continue their activities. If no such permission is possible to obtain, the agent should promptly terminate one of the conflicting relationships. This ensures that the agent acts by the duties of loyalty and avoids any potential conflicts of interest.

Agency relationships represent the fiduciary legal relationships where the agent acts on the principal's behalf and in the principal's best interests. The fiduciary nature also presumes the absence of conflicts between the agent and the principal. The duty of loyalty presupposes that the agent is restricted in his actions by two prophylactic rules: no conflict rule and no profit rule. They aim to keep the agent focused on the principals' interests by not engaging in the conflict of interests or receiving profit from the agency relationship from anyone else but the principal. Nevertheless, the application of such rules could be discredited for practical reasons that would not undermine the duty of loyalty itself. While conflicted transactions are not being banned, they are always subjected to equitable review. Thus, if the transaction can withstand the fairness test, it should be generally allowed[244]. Moreover, the duty of loyalty should not be considered compromised if the agent fully informed the principal about engaging in a relationship with another principal and the former approved it. Therefore, if the agent acting in the principal's best interests had fully disclosed the potential conflict and received approval, it cannot be considered as a breach of fiduciary duties.

1.2.4. Third and other related (fourth) parties to commercial agency relationships

The primary purpose of commercial agency is to create a valid contractual relationship between the principal and the third party with the participation of a duly authorised agent who acts on behalf of the principal. Thus, the agent deals with the third parties on behalf of the principal, performing the role of connecting link between the principal and the third person.

As a result of such interaction, the principal will become contractually bound towards the third party to execute the obligations derived from those acts concluded by the agent on his behalf, as long as they are done within the limits of authority conferred to the agent. In a typical agency relationship, an agent will enforce a contract between his principal and a third party, after which the agent will withdraw from the transaction.

Normally, an agent is not personally liable in contracts of agency. However, where the agent is personally liable, the third party who was dealing with him has the option

244 Velasco, Julian, 'Fiduciary Principles in Corporate Law', in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), The Oxford Handbook of Fiduciary Law, Oxford Handbooks (2019), [visited 2024-12-14] https://doi.org/10.1093/oxfordhb/9780190634100.013.4 .

of holding either the agent or principal liable or even both of them liable.

An absolute prerequisite of non-liability of the agent within both the civil law and common law systems is informing the third party that the agent is acting on the principal's behalf. Therefore, all consequences of these actions, whether active or passive, affect the principal directly, making them the creditor or debtor to the third-party contractor. Additionally, the connection between the principal and a third party remains valid irrespective of the nature of these effects, personal or real, and whether they involve establishing, transferring, or extinction of rights[245].

Within a commercial agency agreement, any participant in business relations with whom the commercial agent concludes contracts (performs legal actions) on behalf, in the interests of, under control and at the expense of the principal, could be defined as a third party. The main aim of the representation is that the agent performs actions and concludes contracts on behalf of the principal with the third party.

To add more confusion to the agency concept, currently, the scholars and legal instruments also discuss the existence of the fourth parties (i.e., parties other than the principal, the agent, and the third party who participate in business relations and conclude secondary transaction with the principal or the agent regarding the object of agency relationship) [246]. It is considered that the interests of such parties, though being placed outside the immediate tripartite relationship, deserve protection since such persons rely on validating contracts concluded between the principal and the third parties. These may include the vendors and other representatives of the third parties and contractors of the principal who concluded contracts regarding the same object.

Development of the concept varies across jurisdictions and is often being questioned by scholars as to the relevance of coverage of the fourth parties under the Agency doctrine. The need to extend the protection to the fourth parties is denied due to the lack of the real right of such persons towards the agency relationships as well as the lack of the causal link between the agent's or principal's misconduct and the violated rights of the fourth persons[247]. A certain answer may be provided after assessing the level of violation of the right. If the goods have not been transferred, priority should be given to the transaction concluded earlier. If the transfer has occurred, the property cannot be requested from the bona fide acquirer, so the other aggrieved party shall be granted the right to defend violated rights through the institute of compensation for losses[248].

The necessity mainly occurs in the case of an unauthorised agency when the agent enters into the transaction without the proper authority in the event of alleged representation or necessity to ratify the transaction. The issue arises as to balancing the

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245 Tulai, Dana-Lucia. 'The Principal's Relations with Third Party Contractors'. AGORA International Journal of Juridical Sciences 14 (2020): 80.

246 See Busch, D. Unauthorised Agency in Dutch Law. In Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16; Art. 3:69(5) DCC *supra note* 52; Art. 3:207(2) PECL *supra note* 40.

247 Busch, D.; Macgregor, L. (2009), *supra note* 16, p. 369.

248 Jurkevičius, V. (2014), *supra note* 43 at 40.

interests of all these parties acting in good faith and protecting them.

Fourth parties may rely on the doctrine of apparent authority if they have a reasonable belief that the contract concluded between the principal and a third person is valid, or that real legal consequences are caused by other actions performed by the representative on behalf of the principal; such belief must be defended. Moreover, it is also advised to deny the right of third party to refuse ratification where it would unfairly affect fourth parties' position[249].

1.3. Creation of commercial agency relationship

1.3.1. Grounds of occurrence of international commercial agency relationship

Contractual agency relationships are usually regulated by the rules of contract law in each specific jurisdiction (offer and acceptance, mistake, illegality, misrepresentation, consideration, etc.).

Therefore, the current thesis will discuss the creation of contractual agency. Once all the prerequisites are met, a commercial agency relationship may arise by:

- Appointment - is one of the simplest ways the agency arises, which requires an express agreement between the principal and agent.
- Estoppel or implied appointment - usually arises by an agreement between parties where one party has conducted himself towards another in such a way that it is reasonable for that other to imply the assent to an agency relationship[250].

In legal terms, estoppel prevents the first party from later denying the existence of this relationship if the second party has relied on it to their detriment and denying it would cause damage (usually financial loss) to that third party[251].

- Ratification - occurs when the agent acts without actual authority, and the principal becomes liable to a third party if the agent acts on the principal's behalf and the principal either expressly consents to the agent's act (express ratification) or behaves in a way that implies consent (implied ratification) [252].
- Necessity - arises when an agent, faced with an emergency where the property or interests of another person are in imminent jeopardy, must take action to preserve those interests. This type of agency is often debated as to whether it constitutes a distinct form of agency creation, as it typically involves an existing agent being granted expanded powers in response to an emergency.

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249 Jurkevičius, V. (2014). *supra note* 43, p.111.

250 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, para -2-030.

251 Pokhodun, Yuliia. 'Agency in Common Law System'. Master's thesis. Mykolas Romeris University, 2018.

252 § 82-83, 85, 100, 143 American Law Institute. (1958) *supra note* 193; § 4.01-4.03, American Law Institute. (2006) *supra note* 63. Under the Second Restatement, ratification can occur only if the agent purports to act on the principal's behalf, but under the Third Restatement, ratification can occur if the agent acts or purports to act on the principal's behalf.

Nonetheless, it is included in discussions of agency creation because it involves modifying existing agency relationships in response to unforeseen circumstances[253].

Although agency by necessity nowadays is considered a historical concept deriving from the Roman law doctrine of *negotiorum gestio*, which dealt with the rights and liabilities arising out of the unrequested actions done by the agent due to the impossibility of communicating the transaction with the principal, which is relatively difficult to imagine in nowadays world.

Considering that commercial agency is mainly a contractual relationship, this type will be further analysed.

1.3.2. Agreement as the main contract creating commercial agency relationships

Despite the general definition of the agreement by which the commercial agency relationships are being created, there are differences in terminology used by civil law and common law countries. Thus, the agency agreement is mainly the creation of the common law which is recognised by the European and international community after the adoption of the Convention on the law applicable to Agency 1978, CISG Convention 1983, Europe Directive no. 86/653 of 1986 together with the number of soft law instruments.

Under Ukrainian law, agency is carried out by concluding of an agency contract. There is no explicit definition of a commercial agency agreement; however, it is considered to be based on the model of a mandate agreement and a contract of commission. Hence, the legislative norms regulating the mandate agreement are usually applied while regulating the agency contract[254].

Despite certain differences (which will be discussed below) between the mandate agreement and the commercial agency contract, it should be agreed that the commercial agency agreement took over the model of the mandate agreement.

The mandate contract was originally a civil law agreement that was later applied to commercial representation relations. According to which one party (commercial representative) undertakes to professionally and independently, on an ongoing basis, make transactions in the field of entrepreneurial activity on behalf of and at the expense of the entrepreneur. The second party (the entrepreneur whom they represent) obliges to pay for services of a commercial representative and assist him in the implementation of the contract[255].

The development of the mandate agreement started in the Roman Empire, when the concept of mandatum was introduced into the relationship of one person

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253 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34.

254 Дрішлюк А. І. Агентський договір: цивільно-правовий аспект [Текст]: дис. канд. юрид. наук: 12.00.03. Одес. нац. юрид. акад. – О., 2003. – 215 at 50.

255 Art. 297 Commercial code of Ukraine (2003) *supra note* 55.

(mandans) authorising another (prokurator) to undertake any actions of legal or any other nature[256]. This was the first application of voluntary representation, which later had a significant impact on the development of representation in European law.

The first Civil Code in Europe appeared in France in 1804, where the mandate agreement served as the basis for creating representation relationship[257]. Later, the Commercial Code appeared in 1807, which did not cover the commercial representation[258]. The institution of commercial representation in France was formed at the end of the 20th century with the introduction of the Decree No. 58-1345 of 23rd December 1958 supplemented and amended by Decree No 68-765 of 22nd August 1968[259]. By the way of implementation of commercial representation agreements, agency agreements were considered as types of mandate agreements. Implementation of specialised legislation greatly altered the position of commercial agents by granting them a legal right to receive compensation for any loss they suffered because of the termination of their agency or breach of the contract.

In German law the separation of commission from the mandate contract started in the second half of the 19th century and was later included in the Code of Commerce[260], which outlines three forms of commercial representation: prokura, commercial representation, and power of attorney. Prokura is the most general type of representation that covers all complex legal actions and results from the separation theory between the mandate and authority.

Ukrainian legislator has also adopted the German model of commercial representation with regards to commercial representation. Commercial representation in Ukraine is regulated by Chapter 31 of the Commercial code of Ukraine regulating agency relationships and Article 243 of the Civil code[261]. The issue is also covered by a variety of legal acts such as Law on Joint-Stock Companies of 2008, Law on Limited Liability Companies of 2018, Law on Foreign Economic Activity of 1991, etc.[262].

The concept of mandate agreement originated in civil law; later it served as the basis for the creation of commercial mandate. Both concepts have striking similarities; however, there are differences as well. Thus, as discussed, agency is a fiduciary relationship based on trust between the principal and agent, while in commercial agency,

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256 Харитонов, Євген, Олена Харитонова, Тетяна Ківаклова, and Наталя Голубєва. Цивільне Право України (Традиції Та Новації). 'Право' видавництво, 2010. 700 c at p.371.

257 The Civil Code of France, *supra note* 53.

258 At that time the commercial representation was associated with the commission.

259 Décret n°58-1345 (1958), *supra note* 228.

260 German Commercial Code (HGB), *supra note* 51.

261 Commercial Code of Ukraine *supra note* 54; Civil Code of Ukraine, *supra note* 55.

262 Про Акціонерні Товариства, *Офіційний вебпортал парламенту України*, 2023. [visited 2024-03-10] https://zakon.rada.gov.ua/go/2465-20 ; Про Зовнішньоекономічну Діяльність. *Офіційний вебпортал парламенту України*, 1991 [visited 2023-05-15] https://zakon.rada.gov.ua/go/959-12. Про Товариства з Обмеженою та Додатковою Відповідальністю' *Офіційний вебпортал парламенту України*, 2018 [visited 2023-06-18] https://zakon.rada.gov.ua/go/2275-19.

the object is commercial activity aimed at income increase, which switches the focus mostly to payment. However, the presence of the element of trust cannot be denied.

Also, commercial mandate is limited to the specific set of participants, which was discussed above, as well as a specific set of actions to be performed. While the actions of commercial agents are limited to "negotiating the sale or purchase of goods on behalf of another person, or to negotiate and conclude such transactions on behalf of and in the name of that principal"[263], agents in general can perform any actions on behalf of another person within the scope of his authority. In civil law, the principal's right to terminate at any time can be detrimental and lead to the loss of profits originating from the business relationship. For balancing purposes, a commercial agent is also granted the right to withdraw from the agency relationship by notifying the principal in advance. In such case, the agent would be deemed to compensate the principal for the loss unless otherwise specified in the contract[264].

Therefore, commercial agency agreements possess a number of distinguishing characteristics peculiar to this type of relationship. Therefore, they shall be considered independently of the mandate agreement, which is inherent to the representational relations.

As regards to the creation of the legal relationships of commercial representation, there are discussions as to whether the sole agency agreement can create the agent's powers to act on behalf of the principal or the power of attorney must support it. While some support the position where only the agreement is required, others believe that representation can arise simultaneously based on a contract between the person represented and the representative and based on a power of attorney issued to the representative[265].

By concluding the contract, the principal and agent agree on the powers to be granted. If the scope of authority was not discussed in the contract, the principal can also issue a power of attorney to support the agreement. It is considered that while the agency agreement is an internal document between the principal and the agent, power of attorney is being issued to prove the agent's authority towards the third parties[266]. Thus, the limits of the granted powers are prescribed in the contract, and for relations with third parties, the principal issues a power of attorney to the agent based on the contract.

If the third party requests the proof of the agent's authority, the principal may issue the power of attorney to be presented by the agent in front of the third parties. However, if the third parties do not request the proof of the agent's powers, the sole agreement is sufficient for creating internal and external agency relationships.

Also, it is considered that the power of attorney cannot serve as the basis for the emergence of powers but only records their existence. As a unilateral act, the power of

263 Council Directive 86/653/EEC, *supra note* 59.

264 Saintier S., (2021), *supra note* 44.

265 Цюра В. *supra note* 7 at 237.

266 Грабовий О. *supra note* 10 at 54.

attorney confirms to the third party of the existence of legal relationships between the agent and the principal; however, it cannot create them[267].

As a result, we can conclude that the agency agreement can be considered as the sole basis for the emergence of both internal and external legal relationships of a commercial representation. Power of attorney cannot act as an independent legal fact of the emergence of representation relations since it is intended for the confirmation in front of third parties, who can learn from its content what powers the representative has. For the agent himself, the power of attorney does not give rise to any independent rights to the property received for the execution of the deed. In this case, the power of attorney is a legal document but not a legal fact. The power of attorney is always based on a contract between the principal and the representative due to mutual expression of will.

Therefore, a contract concluded either expressly or impliedly without the PoA is generally the basis for creating both internal and external legal relationships of commercial representation, while the PoA does not create commercial agency relationships but serves as a confirmation of the agent's authority.

1.4. Law applicable to disputes arising from commercial agency agreements

1.4.1. Express choice of law in disputes arising from commercial agency agreements

Due to its complex international nature, contracts of international commercial agency require parties to include clauses on applicable law while concluding them. The law applicable in each specific case may vary due to several interrelated factors, including the contract terms, the choice of law clause, and the jurisdiction in which the dispute is being solved. Parties may insert the choice-of-law clause into their agreement to determine the state's law which will apply and where the dispute will be handled.

Contract law principles are fundamental in any dispute related to an agency agreement. If specified, the choice of law clause will determine which jurisdiction's contract law applies.

Concerning private international law, the law governing the internal relationship may be determined by the parties using an express or implied agreement. Parties to international contracts may choose to apply either the law of the principal or of the agent or choose a neutral law or the law they consider most appropriate for the specific contract. Nevertheless, the normally applicable national law operation may be excluded by the public policy of the forum country and may also be subject to application of overriding mandatory provisions. Moreover, national laws may grant different protection levels, making it almost impossible to reach the proper solution.

Parties may choose to incorporate international treaties and conventions into their contracts. For instance, the United Nations Convention on Contracts for the

267 Доманова І. Ю. *supra note* 67 at 127.

International Sale of Goods (CISG) provides uniform rules applicable to sales agreements involving goods. Such conventions are often fragmented and may lead to various interpretations across countries due to ambiguous provisions, which could give a freedom to parties to interpret contract terms differently. Therefore, courts are trying to provide aligned interpretations to reduce ambiguity in a long run.

Specific laws governing rights, obligations, and termination can apply to agency relationships in the jurisdictions where it operates. Council Directive No. 86/653/EEC[268] may apply within the EU, but it sets a low harmonisation threshold, allowing Member States to extend protection. Therefore, it does not preclude Member states from extending its scope and providing more protection to the participants to the international commercial agency. However, there are overriding mandatory clauses (Articles 17,18) that must be applied when the non-EU Principal contracts with the agent working within the EU. Regulations 1993 may also apply to agency relationships where commercial agents operate in Great Britain[269].

Agency involves internal and external relationships. Some state that the choice of law applicable to the initial agency contract depends on the objective connection to the internal relationship. Meaning that the connection should exist between the relevant law and the internal relationship, or a cause justifying the choice should be raised[270]. However, international legal instruments like Art. 5 of the Hague Agency Convention do not require a direct connection between the internal relationship and the choice of law. Parties should not be limited in their choice irrespective of the degree of the connection between that law and their relationship and the parties' motives in making the choice[271].

The EU Regulation Rome, I n°593/2008 of 17 June 2008 establishes uniform rules for determining the law applicable to contractual obligations[272]. According to Article 3(1), the parties may freely choose the applicable law for the contract signed between them. A requirement of a connection between the law and the contract would contradict the freedom of choice and could preclude them from achieving a mutually beneficial solution. Generally, the parties often choose the law from the practical perspective according to the specific market where they operate.

At first, the European Court of Justice followed the criteria of actual performance of services to decide the applicable law, meaning that a dispute between the commercial agent and the principal needs to be resolved by the law of the Member State where the agent carried out the majority of their activities[273].

Exceptions to the freedom-of-choice principle exist when the national law offers

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268 Council Directive 86/653/EEC *supra note* 59.

269 Article 1(2), The Commercial Agents (Council Directive) Regulations (1993), *supra note* 139.

270 Hay, P., & Müller-Freienfels, W. (1979). *supra note* 119 at p. 9.

271 Karsten, I.G.F. (1978) *supra note* 103.

272 Regulation (EC) No 593/2008 *supra note* 59.

273 Wood Floor Solutions Andreas Domberger GmbH v Silva Trade SA, No. Case C-19/09 (CJEU 11 March 2010).

better protection. In Unamar Judgement, the Court extended the rule by stating that national laws that provide better protection than the Directive may be considered overriding mandatory national law. This principle shall also be relevant vis-à-vis Member States of the European Union which decided to transpose the minimum protection requirements laid down by the Directive. In this case, where Bulgarian law was disregarded in favour of Belgian law, Belgian law prevailed due to its greater protection for commercial agents, indicating it as a public order provision. For this to apply, the forum state's legislature must deem enhanced protection crucial[274].

Outside the EU, the applicable legal framework is to be determined on a case-by-case basis. If the agent is based in the USA while the principal is based in France, the Directive does not apply; in the opposite scenario (the agent is based in France with the principal - in the USA), the Directive applies to the agent's benefit[275].

There is also no specific timeframe for the parties to choose the applicable law. The law may be determined either on the stage of concluding the contract or at any other time acceptable for the parties. Furthermore, the parties may change the applicable law to replace the one used previously if the choice does not jeopardise the contract's form validity or negatively affect the rights of third parties[276].

In recent decades, many international instruments have been adopted to eliminate the uncertainties that come out of the application of national law. Yet there is no unified source that would contain all instruments of uniform law, especially from the cost/benefit perspective[277].

When the agency agreement involves the cross-border sale of goods, international trade laws and regulations can apply. These laws may include export, customs regulations or trade sanctions laws. If these goods are protected by intellectual property rights, intellectual property laws that govern use, protection, and enforcement of intellectual property rights internationally can be relevant.

Often, international commercial agency disputes could provoke allegations of anticompetitive behaviour or violations of competition laws. Therefore, antitrust and competition laws would become applicable, aiming to promote fair competition and prevent antitrust practices.

Many international commercial agency agreements include arbitration clauses that specify the method of dispute resolution. In such cases, the applicable arbitration law and the chosen arbitration institution's rules apply. Parties could consider alternative dispute resolution mechanisms to address disputes more efficiently, for instance international arbitration.

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274 United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, No. Case C-184/12 2013, para. 52.

275 Article 2, Council Directive 86/653/EEC *supra note* 59.

276 Stone, Peter. Stone on Private International Law in the European Union. Fourth edition. Elgar European Law and Practice. Cheltenham, UK Northampton, MA, USA: Edward Elgar Publishing, 2018. See also Art. 3(2) Regulation (EC) No 593/2008 *supra note* 59.

277 Bonell, M. J., *supra note* 3, at p.19.

1.4.2. Implied Choice of law in disputes arising from commercial agency agreements

When the principal and the agent have not expressly chosen the applicable law, the Court must consider whether the implied choice have been made. The Hague Agency Convention accepts this approach, the Rome I Regulation and national law.

The Rome I Regulation maintains the principle of party autonomy in choosing the governing law (*lex voluntatis*), but with changes to default rules. According to Article 3, parties have broad autonomy: they can choose expressly or tacitly, demonstrated by circumstances like the choice of court clause, reference to specific national laws, or use of typical legal forms/terms[278]. The chosen law can apply to the entire contract or part of it and can be established or changed at any time.

Article 4 of the Rome I Regulation outlines default rules for cases where parties haven't agreed on the governing law. Despite the fact that legal certainty if the general objective of the Regulation, the default provisions may differ due to the specific characteristics of the object of the contract, or the parties involved. A contract for the sale of goods is governed by the law of the country where the seller has habitual residence (lex *firmae habitationis*). The Regulation defines habitual residence for individuals conducting business as their principal place of business and for legal entities as the place of central administration.

The Court may presume an implied choice of law if the agreement reasonable demonstrated the parties' intention to choose a specific country's law[279]. Article 3(1) of the Rome I Regulation requires a 'clearly demonstrated" choice instead of "demonstrated with reasonable certainty"[280]. However, the Lawlor v. Sandvik mining case[281] established that the change in wording did not alter the intended meaning but aimed to align with the Convention's French wording. While this ruling does not have the force of binding precedent on the European Court, it appears probable that the European Court will embrace this approach as well.

In the common law approach, in the event of evident choice of law, the parties must show the connection between the parties and/or the transaction and the state whose law the parties choose to apply[282]. The well-established principle states that the contract concluded between the principal and the agent must be governed by the "proper law" of the contract, which is usually the law of the state where the contract was formed.

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278 Regulation (EC) No 593/2008 *supra note* 59.

279 Art. 3(1) Regulation (EC) No 593/2008 *supra note* 59 provides that "a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case…".

280 Regulation (EC) No 593/2008 *supra note* 59.

281 Timothy Joseph Lawlor v Sandvik Mining and Construction Mobile Crushers and Screens Ltd [2013] EWCA Civ 365.

282 Zaphiriou, George. 'Choice of Forum and Choice of Law Clauses in International Commercial Agreements'. International Trade Law Journal 3, no. 2 (1978): 311–334, p.313.

Whether a connection is necessary between the parties, the transaction, and the selected law essentially a matter of academic debate. Consequently, a question emerges regarding the extent of the connection required for parties to be able to designate the law of a specific jurisdiction.

According to the US approach, a "reasonable connection" would be adequate for the Court to uphold the choice-of-law clause. In contrast, English law follows a more limited direction by applying the principle of the "most substantial connection." Consequently, even if the choice-of-law clause suggests otherwise, parties cannot evade the application of mandatory rules associated with the jurisdiction to which the contract is most substantially connected[283].

On the international level rules on applicable law can also be found in the Hague Agency Convention, 1978[284]. The Convention provides that in the absence of a choice by the parties, the state's law where the agent has their business establishment or habitual residence at the time of forming the agency relationship applies. For instance, in the US law, the agent is not entitled to indemnity, except if contract termination is based on "fair ground".

When deciding, the Court must establish whether there was an implied choice of law in the international commercial agency contract several factors must be analysed:

1. Whether previous contracts had an explicit choice of law clause[285].
2. Whether the contract contains a jurisdiction clause, the substantive law of this country may be applied based on an implied choice[286].
3. If the parties interpret certain terms according to the specific law, it could be inferred that they intended to apply that specific law[287].
4. In English case law, an implied choice may be inferred when the contract and all its provisions comply with the laws of a specific jurisdiction, and applying the laws of another country would result in partial or complete invalidation of the contract[288].

Courts should consider multiple factors rather than relying on a single one to identify an implied choice. For instance, in a case involving a French principal and a German agent operating in Germany, the French Court of Cassation found an implied choice by considering factors like the contract's execution and drafting in France and a jurisdiction clause favouring the French court. Consequently, French law was applied[289].

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283 Collier, J. G. Review of Review of Dicey and Morris on the Conflict of Laws, by Lawrence Collins. The Cambridge Law Journal 53, no. 1 (1994): 183–85; Graveson, R. H. 'Conflict of Laws. Cases, Notes and Materials. By J.-G. Castel. Second Edition. [Toronto: Butterworths. 1968. Xxvi and 1104.' International & Comparative Law Quarterly 18, no. 3 (July 1969): 793–94. https://doi.org/10.1093/iclqaj/18.3.793

284 Art.1(1), Convention on the Law Applicable to Agency, *supra note* 57.

285 Karsten, I.G.F. (1978) *supra note* 103, p. 20et seq.

286 Stone P. (2018), *supra note* 276 at 306.

287 Verhagen, H. L. E. *supra note* 41, p. 205.

288 Coastlines v Huding & Veder [1972] 2 QB 34 Court of Appeal (Civil Division).

289 Stone P. (2018), *supra note* 276, at 299.

According to Rome I Regulation, the applicable law may be determined by the standard factors such as the locations where negotiations occurred or the place of contract formation, as well as the country where contractual obligations were carried out. Since these factors are inherent in every contract, they can serve as indicators of the closest connection, as stipulated in Article 4[290].

1.4.3. Partial Choice of law in disputes arising from commercial agency agreements

Partial choice of law in international commercial agency contracts refers to the situation when the parties choose the law of different legal systems to govern specific aspects or provisions within the same contract. Earlier quoted Article 3(1) of the Rome I Regulation defines the possibility for the parties to "select the law applicable to the whole or part only of the contract"[291]. Even though this approach allows parties to tailor the applicable law to suit the needs and circumstances of different parts of the agreement, applying different laws to various segments of a contract is acceptable unless it does not undermine the contract's logical consistency or create contradictions[292]. Additionally, the Giuliano and Lagarde Report guides on limiting the selection of different laws to contract elements that can coexist without causing conflicts[293].

While the Hague Agency Convention does not explicitly address partial choice of law, some argue that the phrase "in so far as" in Article 6 allows parties to select multiple laws for different aspects of the internal relationship[294]. As it was stated in Karsten report, the words 'in so far as' are designed to cover a variety of possible situations in which the law specified by Article 5 is not applicable. This may include cases where the parties have made no choice of law, or where the partial choice was made, or where their choice is ineffective"[295]. However, relying solely on this phrase may lack a justification for permitting partial choice of law.

Nonetheless, the partial choice of the applicable law enjoys a broad recognition in

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290 Wasa International Insurance v Lexington Insurance [2008] 1 All ER (Comm) 286 (Simon J), affirmed sub nom. Lexington Insurance v AGF Insurance [2009] UKHL 40.

291 Regulation (EC) No 593/2008 *supra note* 59.

292 Kaye, Peter. The New Private International Law of Contract of the European Community: Implementation of the EEC's Contractual Obligations Convention in England and Wales under the Contracts (Application Law) Act 1990. Aldershot [GB] Brookfield (Vt.) Hong Kong [etc.]: Dartmouth, 1993 at p. 145.

293 Art. 3, Com, 4, Giuliano, Mario, and Paul Lagarde. 'Report on the Convention on the Law Applicable to Contractual Obligations.' Official Journal of the European Communities C 282, 1980. [visited 2023-07-18] http://aei.pitt.edu/1891/1/Obligations_report__Guiliano_OJ_C_282.pdf

294 Art.6 states: "In so far as it has not been chosen in accordance with Article 5, the applicable law shall be the internal law of the State where, at the time of formation of the agency relationship, the agent has his business establishment or, if he has none, his habitual residence" See Convention on the Law Applicable to Agency, *supra note* 57.

295 Karsten, I.G.F. (1978) *supra note* 103 at p. 47 et seq.

various legislative acts and conventions, including the Hague Convention of 1986 on the International Sale of Goods. Nevertheless, it is essential to note that the utilisation of partial choice should not disrupt the internal coherence of the contract.

1.4.4. Public Policy and Overriding Mandatory Provision

The parties' freedom of choice of applicable law may be limited by the application of the "mandatory provisions", i.e., provisions of the law of the forum which "are mandatory irrespective of the law otherwise applicable to the contract"[296]. Thus, where the judgment is sought to be recognised or enforced under the law chosen by the parties, the Court may refuse to acknowledge or enforce it at the request of the defendant where the conflict of law is found that would require the application of the national law with which the contract is most substantially connected.

In the Unamar Judgment, the CJEU emphasised that the assessment of whether a national law qualifies as "mandatory" should consider the specific language of that law and its structure and the surrounding circumstances. This evaluation determines whether the legislature intended to safeguard an interest deemed vital by the respective Member State. Moreover, the Court stressed that since the Directive 86/653/EEC provides the minimum level of protection, a national law may be applied where it provides enhanced protection to commercial agents[297].

In Ingmar GB Ltd v Eaton Leonard Technologies Inc, where the principal was in the USA and the agent in the UK, they chose US law to avoid indemnity after termination. However, the CJEU ruled that Directive applies if the agent works in an EU Member State, even if the principal is outside the EU and the contract applies non-EU law, to ensure "certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country and a clause of the contract stipulates that the contract is to be governed by the law of that country"[298]. It establishes international overriding mandatory applicability of Articles 17 and 18, protecting agents upon termination.

The clause aims to protect the agent, the weaker party, against the economically superior principal in the agency relationship. It prevents non-EU principals from choosing indemnity arrangements less favourable to the agent than those in Articles 17 and 18 of the Directive. Mandatory rules like these allow no exceptions and explicitly forbid parties from exempting themselves. Article 19 also falls under imperative provisions, prohibiting deviation from Articles 17 and 18[299].

The CJEU stated that the application of the principle defined in the Ingmar case

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296 Art. 9, Regulation (EC) No 593/2008 *supra note* 59.

297 United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, *supra note* 274.

298 Ingmar BG Ltd v Eaton Leonard Technologies Inc, (2000) *supra note* 134.

299 Article 2, Council Directive 86/653/EEC *supra note* 59.

may vary depending on individual member states' interpretation of equity[300]. However, Unamar case clarified that national law provisions exceeding the Directive's scope may be considered overriding mandatory national law if the court finds it crucial to grant the extra protection[301]. This principle is relevant for the EU States while implementing the Directive's minimum protection requirements.

In 2017, the Austrian Supreme Court tackled whether claims under the Austrian Commercial Agents Act could be heard in an Austrian Court despite an arbitration clause specifying New York law and arbitration. After the principal wrongfully terminated the agreement, the agent sought compensation under Section 24 of the Act, rooted in Directive Articles 17 and 18[302].

When transporting the Directive into the national law, many Member States extended the scope of the applicability of the compensation provisions. Thus, the Austrian Court decided that their definition was broader than the one described in the Directive and applied to anyone who is commissioned and authorised to conclude business transactions on behalf of another person.

As per Article II, para. 3 of the New York Convention[303] and Section 584, para. 1 of the Austrian Code of Civil Procedure[304], an Austrian court cannot dismiss a lawsuit when it determines that the arbitration agreement is non-existent or unenforceable. An arbitration clause becomes unenforceable if it aims to evade mandatory procedural or substantive legal provisions applicable to the contract.

Since the agent was primarily operating in Austria, the rule set out in Ingmar case applies. The procurement of business is not covered by the relevant definition in the Directive, which only refers to the sale or purchase of goods. Therefore, the Austrian Supreme Court concluded that the only way to safeguard the international mandatory application of Art. 17 and 18 of the Directive in favour of the agent was to reject the arbitration clause's validity. Consequently, the arbitration clause in the agency agreement is considered invalid and cannot prevent the agent's lawsuit.

The judgment, however, didn't thoroughly explain why agents involved in business procurement needed to have a compensatory claim based on a national overriding mandatory provision that significantly weakens the argument that this compensatory claim was rooted in Articles 17 and 18 of the Directive. Nevertheless, the case clearly

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300 Honyvem Informazioni Commerciali Srl v Mariella De Zotti, No. Case C-465/04 (CJEU 23 March 2006), para.16.

301 United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare, *supra note* 274.

302 Oberster Gerichtshof (OGH), case 5Ob72/16y, 2017. [visited 2023-10-19] https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=Justiz&Dokumentnummer=JJT_20170301_OGH0002_0050OB00072_16Y0000_000&Suchworte=RS0046941

303 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 330 UNTS 3, 1958 [visited 2023-10-19]: https://cil.nus.edu.sg/databasecil/1958-convention-on-the-recognition-and-enforcement-of-foreign-arbitral-awards/

304 Code of Civil Procedure, RGBl. No. 113/1895, Sixth Part, Fourth Chapter, as inserted by the Arbitration Law Reform Act 2006, BGBl. I No. 7/2006, with subsequent amendments. [visited 2023-10-19]: https://www.ris.bka.gv.at/Dokumente/Erv/ERV_2006_1_7/ERV_2006_1_7.html

illustrates the influence of overriding mandatory laws and the authority of national courts in interpreting such provisions within the context of international arbitration. Thus, it is essential to know whether international or national overriding mandatory laws might apply even if the contract contains an express choice of law.

Interim conclusions to Chapter 1

The study of the state of legal and scientific development, the legal nature, the concept of a commercial representation, its features, and its place in the system of civil law and common law achieved theoretical and practical results, which are the basis for further research on analysing the internal commercial agency relationships and reconciliation of interests between its participants.

Among the main conclusions made within Chapter 1, the following should be highlighted:

1. The profound analysis of the concept of commercial agency in countries with a continental legal system led to the conclusion that the separation theory has been deeply rooted in the continental law governing representational activity. This theory differentiates between the mandate and authority, stating that the former establishes the internal relationships of representation, while the authority is essential for the agent's ability to bind the principal with the third party externally

2. Common law grounds the agency doctrine on the theory of identity of the principal and the representative without distinguishing between the external and internal relationships, which allows the principal to remain undisclosed at all stages. The common law approach of identification of two different subjects (the principal and the agent) is more practical, brings certain legal flexibility to the law of agency, and is more justified from the standpoint of the needs of commercial relations than the doctrinal and abstract method of separation. Nevertheless, the separation theory offers a wide variety of forms of mediation in practice and provides an opportunity to regulate relations and the grounds for their occurrence in more detail.

3. The following characteristics can define commercial agency as the type of activity - as agent's actions are carried out exclusively in entrepreneurial (commercial) activity; purpose of activity– aimed at establishment, modification, termination of contractual relations between entrepreneurs; and the nature of the activity which shall be systematic, paid and carried out on a professional basis.

4. Despite the existence of the international legal instruments that greatly contributed to unification of agency rules, most of them choose a selective approach which harmonises only separate issues, omitting the problems of defining capacity of the principal and the agent, defects in consent, the abuse of power in general, as well as failing to align the approaches of both legal systems by regulating both internal and external relationships and leaving the regulation of a vast number of issues for the disposition of national law.

5. According to the continental law, agency is explained through the doctrine of separation, based on the two-contract construction distinguishing between the

internal and external relationships, and including either internal or external relationship to the concept of representation. On the contrary, the common law study fails to make a distinction between the internal and external relationships identifying the agent and principal, thus only external relationships are included into the concept of agency. Limiting the concept of agency to including only internal would not reveal the purpose of the concept of representation where the agent performs actions toward the external parties on behalf and in the name of the principal.

6. Agent's authority to negotiate is one of the loopholes of the definition of commercial agent prescribed by the EC Directive 86/653, which is interpreted differently by the national courts. Considering the number of cases where different interpretations were used by the local courts, it could be a solution to provide a more extensive definition into the Directive to avoid a 'loophole' situation. The ECJ has confirmed the way of interpretation of the agent's power to negotiate multiple times and seems to be consistent in it. Therefore, in order to avoid misguidance, the definition could be extended and specified as follows:

"a commercial agent can be defined as a self-employed natural or legal person who, is not bound by an employment contract nor having the power to change the prices of such goods or services, has the continuing authority to negotiate and to possibly conclude contracts relating to sale or purchase of goods in the name of and on behalf of principals".

7. A commercial agent is a professional legal or natural person engaged in intermediary activities as a primary course of business to deliver effective achievement of legal and physical actions in the field of trade based on professional competence.

8. While describing the representation of legal entity by its organs, it is undeniable that some features of representation are present, which is why within the common law system, directors are considered as representatives of the company whose actions are considered to be the company's actions. However, in countries with the continental legal system, the actions of the organs are considered as manifestations of the legal entity's own decision-making and operational activities conducted by authorised individuals within the scope of their official roles and do not require additional delegation. Given the nature of actions performed and causal link, such type of representation is deemed to be a quasi-representation, which lacks fundamental features of representation but is similar to voluntary representation as such.

9. Classic model of representation involves only three parties in representational relationships (the principal, the agent and the third party), while currently the inclusion of the fourth parties is being discussed in case of agent performing unauthorised actions. Fourth parties can be defined as external stakeholders who although not directly connected to the initial agency relationship, are closely related to it under the second transaction regarding the same object and rely on its validation. Though the interests of the fourth parties could be breached as a consequence of violation of third party's interests, fourth parties may not be strictly considered as the further layer in the chain of agency participants as they could be tied to agency relationships through the link with the principal.

2. MAINTAINING A BALANCE BETWEEN THE INTERESTS OF AGENTS AND PRINCIPALS IN INTERNATIONAL COMMERCIAL AGENCY RELATIONSHIPS

2.1. Internal relationships in international commercial agency

2.1.1. Fiduciary duties as default rules in principal-agent relationship

Agency law distinguishes between internal and external relationships formed depending on the parties involved.

The internal relations of representation are interpreted as those between the agent and the person being represented, causing the latter to be bound by the contract concluded as a result of the agent's actions. In other words, the internal legal relationship of representation is a legal relationship by which one person (the agent) has the right to perform specific legal actions on behalf of and in the interests of another person (the principal) about third parties. The principal is obliged to assume all legal consequences of these actions[305].

The internal agency relations are often characterised by the fact that they are: 1) aimed at streamlining the legal relationships between the person they represent and a third party, meaning that they have the nature of the organisational, legal relations (by which the agent obtains the right to represent another person); 2) have an auxiliary character in relation to the relationship between the principal and the third party; 3) are established and implemented not in the interests of the representative, but in order to protect the interests of the principal[306].

An agency relationship is a status-based fiduciary relationship where the application of fiduciary duties is presumed by the nature of the relationship. Internal relations represent the fiduciary side of the agency relationship as they are based on trust between the participants[307]. Fiduciary character that signifies relationships of representation are personal, presuming that the agent must act loyally in the principal's interest and on the principal's behalf.

Fiduciary elements are present not only in agency relationships. Trust law, corporate law, and guardianship may also be recognised as fiduciary relationships. Moreover, fiduciary principles can be applied on an ad hoc basis to other types of relationships if the court recognises the party as a fiduciary based on specific circumstances if the beneficiary relied on the knowledge and experience by placing confidence and

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305 Цюра В. *supra note* 7 at 236.

306 Харитонов Євген, Харитонова Олена. Цивільні правовідносини: монографія. [2-ге вид., перероб. і допов.]. Одеса: Фенікс, 2011. 456 с, at p 318.

307 Kelly, Daniel B., 'Fiduciary Principles in Fact-Based Fiduciary Relationships', in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), The Oxford Handbook of Fiduciary Law, Oxford Handbooks (2019) [visited 2024-12-14] https://doi.org/10.1093/oxfordhb/9780190634100.013.1.

trust in another party.

Different types of fiduciary relationships pursue different goals that affect the content of the duty of loyalty. For instance, trust law is focused on wealth preservation, corporate law is concerned with shareholder wealth maximisation, guardianship requires decision-making, while agency emphasises following the principal's instructions[308]. These contextual differences determine different legal approaches to defining conflict of interest in each specific type of relationship, which requires the law to be flexible in treating these conflicts.

Fiduciary duties are an essential part of all relationships of representation and arise when one person acts in the interests of and on behalf of another person. They constitute a mechanism of legal protection to ensure that a representative (fiduciary) complies with the principal's (beneficiary's) instructions and preserves his interests[309]. Fiduciary duties stand for the highest standard of loyalty that is "imposed by law, irrespective of agreement" that presumes complete unselfishness of the agent who must not profit from the fiduciary position unless the principal expresses his knowledge and consent. They include the duty of care and loyalty, obliging the agent to act in the interests of his principal.

According to fiduciary law, the following duties shall be included:

- duty of loyalty (i.e., duty not to acquire a material benefit from a third party in connection with transactions or other actions taken on behalf of the principal or otherwise through the agent's use of position (no profit rule), duty not to act in conflict with the principal's interests (no conflict rule); Rather interesting, but within the agency relationships the principal is not bound by the duty of loyalty to the agent. Thus, the principal can engage two or more agents to conclude and/or negotiate on the same transaction. Some principals engage multiple agents to receive insider information regarding the negotiation[310].
- duty of care;
- duty of confidentiality;
- duty to disclose all the material information.

Since agency relationships are fiduciary, there are two categories of duties that the agent owes to his principal: the fiduciary duty and a set of general duties imposed by agency law. At the same time, a general set of duties is determined by the general principles of contract and tort law. The list, however, may differ as per each country's national law applied.

There are different approaches to including the duty of care into the category of

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308 Gold, Andrew S., 'The Fiduciary Duty of Loyalty', in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), The Oxford Handbook of Fiduciary Law, Oxford Handbooks (2019), at p. 389. [visited 2024-12-15] https://doi.org/10.1093/oxfordhb/9780190634100.013.20

309 Mussell, Helen J. "Theorising the fiduciary: Ontology and ethics." Journal of Business Ethics 186, no. 2 (2023): 293-307 at p.294.

310 Singleton, S. (2015) *supra note* 3. See also § 8.02, American Law Institute. (2006) *supra note* 63; Art. 1993 of the Civil Code of France, *supra note* 53.

fiduciary duties, seeing it as a tort law duty. The duty of care can also be a general professional duty rather than a fiduciary duty, although it can exist within a fiduciary context. Others consider the duty of care an agent's duty as a professional and do not regard it as a fiduciary duty. Nevertheless, even legal authorities still consider the duty of care to be a fiduciary duty[311]. Others simply mention that duty of care is required to avoid negligent and opportunistic behaviour[312].

Indeed, suppose we consider relationships where the representative is a professional (e.g. commercial agent, lawyer) who is already covered by the duty of care. In that case, it will not change once they start representing someone. Thus, the duty of care is present, notwithstanding whether the agent represents anyone at this moment in time. For the person who is not usually covered by the duty of care (family member in legal representation or manager representing the company), the duty of care will arise only after the relationship is created as part of fiduciary duties[313].

While the duty of care may be included in the fiduciary duties concept, they serve different purposes. The duty of care is a positive obligation that ensures a person acts with a reasonable level of caution and competence. In contrast, fiduciary duties prescribe a prohibition on what a person cannot do while acting as fiduciary. Fiduciary duties are more limited and apply in specific circumstances, however, they may still include the duty of care when the representative is not covered by the duty of care as part of their professional activities.

According to the author, it is important to distinguish between cases when the duty of care is exercised within a relationship of representation and when the professional is covered by the duty of care in general.

As it was earlier concluded, a commercial agent is a self-employed natural or legal person who is professionally engaged in the intermediary activities. The duty of care is linked to one of the duties as a professional. A similar conclusion can be reached about the commercial agent's duty to act in good faith.

As fiduciaries, commercial agents must act loyally, prioritising their principals' interests over their own. Over enforcing the duty of care in some cases might undermine the duty of loyalty. For example, agents deemed to act to maximise the principal's wealth must be allowed to take some risks, including financial. Over imposing of the duty of care could make agents overly cautious, which would interfere with their performance as regards acting in the principal's best interests. Thus, commercial agents should also be able to rely on business judgment rule while performing a risky

311 Nappier, D. R. (2014). Blurred lines: Analyzing an attorney's duties to a fiduciary client's beneficiaries. *Washington and Lee Law Review*, 71(4), 2609–2658.

312 Easterbrook, F. H., & Fischel, D. R. (1993). Contract and fiduciary duty. *The Journal of Law and Economics*, 36(1, Part 2), 425–446. https://doi.org/10.1086/467282 .

313 The Supreme Court of Lithuania. (2021d). Judgment of the Supreme Court of Lithuania of 6 September 2021 (civil case no. e3K-3-215-378/2021). Vilnius cited in Jurkevičius, Vaidas, Raimonda Bublienė, and Dominyka Šeputaitė. "Impact of agent's fiduciary duties for the sustainable agency relationships." *In 12th International scientific conference "Business and management 2022", May 12–13, 2022,* Vilnius, Lithuania. Vilnius: Vilnius Gediminas Technical University, 2022, 772. ISBN 9786094762888.

transaction in the principal's best interests[314].

Commercial agency relationships typically arise from an agreement concluded between the parties. The main principle of contract law is the freedom to agree on the terms of the contract, which allows the parties to choose what clauses should be included, amended, or excluded from their agreement. The understanding of the default rule presumes that, although a rule may be considered important, the parties can still negotiate around it; it can be modified or even overridden by the contract. Therefore, the question arises whether all fiduciary duties are default rules that can be disregarded while concluding the agency agreement.

The question is now a subject of heated and long-standing discussions between the two schools of contractarians and anti-contractarians. While the first argues that fiduciary rules constitute default rules around which the parties can negotiate[315], and anti-contractarians argue that at least some rules are mandatory and cannot be waived[316].

It is worth mentioning that fiduciary and contract law address different problems. Where fiduciary law aims to protect fiduciaries from misappropriation and lack of care, contract law focuses more on formalising and enforcing mutual promises of parties[317].

Nevertheless, some fiduciary duties cannot be waived and are considered mandatory, namely loyalty and reliability. Negotiating with the agents on the issue of waiver of such duties will eliminate the principal's right to rely on their agents, which will necessarily entail the termination of the whole relationship as such.

Under Article 1.7 para. 2 of UNIDROIT Principles, parties may not contractually limit or exclude the mandatory principles of good faith or fair dealing. However, the parties may specify the mandatory nature by agreeing in the contract to observe stringent standards of behaviour. Thus, they may agree that the stipulated amount becomes due or payable, which would otherwise be enforceable by the court. The more precisely general principles are described, the more unlikely any interference with the contract provisions to happen[318].

The obligation to 'act dutifully and in good faith' is incorporated into several legal documents, including Directive 86/653/EEC. This obligation generally covers the agent's duties to make proper efforts to negotiate and conclude transactions according to the principal's instructions and disclose all information related to the transactions.

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314 Goldberg, John C. P., 'The Fiduciary Duty of Care', in Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff (eds), The Oxford Handbook of Fiduciary Law, Oxford Handbooks (2019), at p. 412. [visited 2024-12-15] https://doi.org/10.1093/oxfordhb/9780190634100.013.21 (noting that in other domains such as guardianship or doctor-patient relationship lowering the level of the duty of care could not be justified and would lead to liability).

315 Butler, Henry N., and Larry E. Ribstein. 'Opting out of Fiduciary Duties: A Response to the Anti-Contractarians'. *Washington Law Review* 65 (1990): 1.

316 Coffee Jr, J. C. (1989) *supra note* 17, 1618- 1650.

317 Frankel, Tamar 'Fiduciary Duties as Default Rules'. *Oregon Law Review* 74 (1995): 1209, p.1276.

318 UNIDROIT (2016), *supra note* 46.

These mandatory duties cannot be waived[319].

The Directive does not contain provisions that address the consequences of the breach of the prescribed duty, which may indicate that Member States can apply their domestic procedural and remedial norms if they meet the requirements of equivalence and effectiveness required by the CJEU. This is valid only for civil law countries since common law tradition follows a different approach, presuming that commercial agents owe their principals both fiduciary obligations and duties of performance[320].

The duty to 'act dutifully and in good faith' as prescribed in the Directive overlaps with the fiduciary duties that agents have in common law. In particular, there are strong etymological connections between the duty of loyalty and the duty to act in good faith.

The duty to act in good faith is an autonomous concept of EU contract law that runs consistently throughout the EU legal framework. It can even be considered a matter of public policy that forbids the parties to act outside of it. Although neither the EU Treaties nor CJEU identifies its context, the DCFR, being a soft law instrument, includes a definition of 'good faith and fair dealing," describing it as a "standard of conduct characterised by honesty, openness, and consideration for the interests of the other party to the transaction or relationship in question"[321].

The duty to act in a good faith is also present in the common law doctrine representing an objective standard by reference to the way of acting in particular relationship, requiring the parties to exercise of reasonable care skill in all the relevant circumstances. It could be traced that an agent who is a member of a profession will be obliges to exercise the degree of skill and care reasonably expected of a reasonably competent member of that profession[322]. Therefore, the duty to act in good faith is an independent duty applied in various kinds of relationships, while the duty of loyalty appears only in a relationship that requires a party to act in someone else's interests.

The duty of loyalty is a fundamental concept of fiduciary law that precludes a fiduciary from engaging in self-dealing, conflict of interest, or any other behaviour that undermines the principal's interests[323]. It does not extend to pre-contractual negotiations, while the parties must act dutifully and in a good faith at all stages of relationships. The Duty also covers the performance of the agency contract. Therefore, according to Articles 3(2)-4(2) of the Directive, agents must comply with the specific standard of conduct throughout the performance of the commercial agency and provide examples

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319 Art. 3, of the Council Directive 86/653/EEC*, supra note* 59.

320 Tosato, Andrea. 'Commercial Agency and the Duty to Act in Good Faith'. Oxford Journal of Legal Studies, Oxford Academic 36, no. 3 (2016): 661–95 p. 675. https://doi.org/10.1093/ojls/gqv040 .

321 Art I.-1:103 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

322 Ross Harper & Murphy v Banks 2000 SLT 699 cited in Commission, Great Britain Law, and Scottish Law Commission. Partnership Law: A Joint Consultation Paper. Stationery Office, 2000.

323 Barker, William T., Paul EB Glad, and Steven M. Levy. "Is an Insurer a Fiduciary to its Insureds?" *Tort & Insurance Law Journal* (1989): 1-14.

of the required behaviour[324].

While acting as fiduciaries, agents are entrusted with property, and rights, and everyone -except the principal – will see the agent as the real owner while performing actions on the principal's behalf. Therefore, it is important to ensure that agents do not engage in self-dealing and act according to the agreed terms. Opportunistic behaviour by the agents can lead to multiple agency conflicts, resulting in high agency costs and undermining the agency's value in general. Naturally, the principal's primary incentive is to minimise the risks and increase the control over the agent's performance. While increasing control may lead to the higher agency costs, a more favourable solution is to enhance the trust in internal relationships by implementing fiduciary duties. Duty of loyalty, full disclosure, avoidance of conflict of interests, and acting in good faith can be regarded as a fundamental value of agency relationships and their default rules[325].

Fiduciary duties are seen as the essential part of agency relationships, which are prescribed solely for fiduciaries to comply with. Some fiduciary duties can be waived or modified except, however some of them such as duty to act loyalty, dutifully and in a good faith cannot be changed. Fiduciary duties ensure the balance of interests between the participants in the legal relationship of representation and preclude agents from acting unlawfully. Fiduciary duties may overlap with other duties that are applied to professionals or obligation to act "dutifully and in good faith" under the Directive.

2.1.2. Limitations of the fiduciary duty regime

A common-law invention, the fiduciary duty regime is considered an efficient and effective legal technique for reducing legal costs and increasing trust within relationships. Nevertheless, every legal regime should be subject to limitations and boundaries; otherwise, it will become inefficient.

To gain a better understanding of the fiduciary relationships, the basic features can be distinguished:

1. Delegation of power – a fiduciary duty arises only where the owner delegates a certain amount of power to the agent. In agency relationships, this is particularly important to determine whether the principal can be held bound by the agent's acts;
2. The subject of the relationship – usually, this refers to the property entrusted to the agent from which the agent receives a profit;
3. Ownership of property – this feature entirely depends on the legal system in which it is applied. For instance, in the common law system, which is based on the theory of identity, the agent is considered the principal's alter ego and holds the title to the latter's property. By receiving the title to the principal's property, the agent is empowered to transfer it to the third party, sometimes even without

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324 Council Directive 86/653/EEC, *supra note* 59.

325 Tosato, A. (2016) *supra note* 320, at p. 679.

the principal's knowledge or consent (i.e., in the case of an undisclosed agency) [326].

Even though, due to the subdivision of property rights in common law systems, principals remain property owners and not merely holders of contractual rights, thus being able to claim their interests and obtain proprietary remedies against everyone. Nonetheless, the agent can exchange the property and bind the principals with proprietary rights to a new property. In this case, the principal is always protected against the unfaithful agent[327].

At the same time, continental law follows a different approach, where the ownership is never entirely transferred to the agent. Instead, two agreements are concluded: one between the principal and the agent, and another between the agent and a third party. This scheme leads to a less flexibility, but it protects the third party against the agent who was acting in bad faith. Also, the principal will not be bound by any agreements concluded without his knowledge and/or in bad faith.

4. The role of contract – it is worth mentioning that although fiduciary duties are fundamentally contractual, they may not be easy to waive entirely. A complete waiver would be inconsistent with the purpose of establishing a fiduciary relationship[328].

Fiduciary law does not, however, extend to the pre-contractual phase of negotiations. Even though some scientists claim that the parties are also subject to acting in good faith during pre-contractual negotiations - relying on the insurance relationship, which deviated from the *caveat emptor* principle and obliged the insured party to disclose all information material to the insurer's judgment during negotiations – this position has limitations[329].

Nevertheless, the departure from the main rule cannot be analogically applied to commercial agency relationships where the agent cannot be compared to a consumer. Otherwise, they are self-employed professionals dealing with other professionals, and their relative bargaining power will vary depending on the circumstances[330]. There are no inherent informational asymmetries between principals and commercial agents that would justify the departure from the caveat emptor principle in the agency. Thus, no fiduciary duties apply to the parties during the pre-contractual negotiations.

Requirement to 'act dutifully and in good faith' prescribed by Directive 86/653/EEC does not directly indicate that it extends to pre-contractual negotiations. Neither legislative acts, nor the court practice mention obligations for the parties to adhere to certain standards during the negotiation phase or recognise *culpa in contrahendo* as

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326 Ribstein, Larry E. 'The Structure of the Fiduciary Relationship', 2003. [visited 2024-01-28] http://dx.doi.org/10.2139/ssrn.397641.

327 Hansmann, Henry, and Ugo Mattei. 'The Functions of Trust Law: A Comparative Legal and Economic Analysis'. *New York University Law Review* 73 (1998): 434.

328 Frankel, T. (1995). *supra note* 317, 1209-1278.

329 Saintier, S., & Scholes, J. (2017*), supra note* 44.

330 Tosato, A. (2016), *supra note* 320, p. 679.

general principle of EU law[331]. Nevertheless, some legislative acts that require the parties to negotiate in good faith while regulating the pre-contractual negotiations within their scope[332]. Thus, while the doctrine is not foreign to EU law, it is only found in acts that specifically aim to regulate pre-contractual negotiations.

Unlike the continental law, which regulates the issue indirectly, the common law system foresees a liability for parties if they act negligently or fraudulently during the negotiations to provide a remedy for wrongful conduct during the pre-contractual phase. They may be required to perform the agreement or to compensate the other party for their losses[333].

According to the common law approach to pre-contractual liability, a basic agreement simply to negotiate does not bind the parties engaged in the negotiation procedure[334]. Therefore, there are no special remedies available for the parties to seek if unfair dealing occurs during the negotiations. This was confirmed in the case Hedley Byrne v. Heller, where the court ruled that the mere withdrawal of an offer, which causes loss to the offeree, would not give rise to a claim for damages in tort for misrepresentation[335].

Speaking of soft law instruments, the duty to conduct negotiations in good faith is prescribed in Article II.- 3:301 of the DCFR, stating that: "A person who is engaged in negotiations has a duty to negotiate in accordance with good faith and fair dealing. This duty may not be excluded or limited by contract". However, it should be noted that the requirement under the DCFR is framed as a duty, not an obligation. Thus, the remedies for non-performance of an obligation are not all available; however, paragraph (3) allows for the suffered party to seek compensation for "any loss caused to the other party to the negotiations" [336].

Within the agency law, only specific fiduciary duties, such as duty of loyalty and good faith, can be considered mandatory and, therefore, cannot be subjected to any limitations. Apart from the duty of loyalty and good faith, the rest of the fiduciary duties are seen as default rules and can be bargained around to satisfy the specific conditions unique to this area of the law and the interests of the parties while concluding the agency agreement.

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331 Tridimas, Takis. *The General Principles of EU Law*. 2. ed., 1. publ. in paperback. Oxford European Community Law Library. Oxford: Oxford Univ. Press, 2007 at 1-56; specifically on *culpa in contrahendo*.

332 Art. 4(2) Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L144/19; Art 3(2) Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC [2002] L271/16.

333 Quagliato, P. B. (2008). The duty to negotiate in good faith. *International Journal of Law and Management*, Vol. 50 No. 5, pp. 213-225, p. 216.

334 Hoffman v. Red Owl Stores Inc. 133 N.W. 2d. 267 (1965).

335 Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) AC 465 (HL).

336 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

The waiver would be possible, however, following the special two-step procedure that involves clear notice from the principal regarding which duties are being waived and full disclosure of the information from the agents about what was acquired. This enables principals to make an informed, independent decision regarding the waiver[337]. The procedure should be mandatory, as agency relationships expose principals to risk by entrusting the agents with the power to act on their behalf concerning their property and to bind them to legal consequences.

The possibility to bargain around the certain fiduciary duties allows the parties to reach the consensus about what will be the best for both. The classic example could be the passage stated in Hospital Products Ltd v United States Surgical Corporation:

"[I]t is the contractual foundation, which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction"[338].

Fiduciary duties are prescribe what the fiduciary must not do and what he ought to do. Thus, commercial agents, as fiduciaries, must act with single-minded loyalty, prioritising the principals' interests over their own[339].

The concept of fiduciary duties also penetrated the civil law system; however, the application of the former is limited by the legal acts and international legal instruments. The duties enshrined in the international legal acts usually describe the standard behaviour of parties based on honesty, openness, and regard for the interests of the other party to the transaction. Therefore, the application of fiduciary duties should be limited when it overlaps or conflicts with the former ones. Thus, the agent's fiduciary duty to act according to the principal's instructions should be limited if the instructions given by the principal are illegal, unethical, or lead to the agent's liability.

Over imposing of a strict fiduciary duty regime in the light of modern commercial relations may lead to the increase of agency costs and negatively affect the general efficiency of agency. To avoid these rather controversial results, fiduciary duties require certain limitations to become more cost-efficient and favourable solutions to agency problems in jurisdictions outside of the common-law world. For instance, a function equal to the fiduciary duty regime can be performed by other legal arrangements, such as an increase of the agent's personal liability for the actions done outside of the scope of his authority or aligning the interests of the principal and agent within the agency relationship[340].

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337 Frankel, T. (1995). *supra note* 317, p.1212.

338 Hospital Products Ltd v United States Surgical Corporation [1984) 156 CLR 41 (HCA) 97.

339 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, para. 6-032-6-108.

340 Zhang, Chi. 'The Limits of Fiduciary Duties in Business Organizations: The Evidence from Limited Partnerships in the US and UK'. *European Company Law* 15 (2018): 83.

2.1.3. Agent's duty to disclose as a way of balancing the interests between the agent and the principal

Apart from the duty of loyalty, agent is bearing a duty to disclose all the information available to him regarding the relationship with the principal. The duty to disclose includes a few aspects:

1. Duty to disclose the conflict of interests;
2. Duty to disclose all material information related to the transaction;
3. Duty not to disclose all the confidential information;
4. Duty to disclose the breach[341].

Failure to comply with any of these duties would lead to the breach of agent's duty to disclose, however, it is not necessarily limited to a breach of the agent's duty of loyalty. Therefore, it may not result into the termination of the agency agreement but rather in the application of other damages as defined in the contract. However, it would trigger other consequential duties, such as a duty to disclose the breach to the principal. An agent who has acted outside the scope of his authority or in any other way breached the contract terms is obliged to communicate that to the principal and disclose all the relevant information[342].

A principal is not required to detect unauthorised action taken by the agent, which may also be undetectable by the principal for some time. At the same time, the agent is usually in a better position than the court to determine the breach of a duty[343]. Having the agent obligated to disclose the breach would facilitate the earlier disclosure and better chances to minimise the losses in case the principal is not interested in the transaction. This could also balance the agent's interests to avoid further claims to indemnify the losses, to which the principal is entitled under the common law rules[344].

Since any contractual duty of disclosure includes a relevant fiduciary obligation[345], in cases where the agent fails to disclose prior to entering into new competing relationships should be treated as a breach of contract terms and thus, a fiduciary duty.

2.1.4. The impact of breaches of fiduciary duty on contractual provisions

When concluding the agency contract, the parties agree on certain terms and obligations that are crucial for such relations, such as duty of loyalty, duty of care, acting in the best interests of the principal, etc. Even though the duties mentioned are originally fiduciary in nature, they are incorporated into the body of the contract and, therefore, become contractually adopted.

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341 DeMott, D. (2007) *supra note* 229.

342 Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng 697 F. Supp. 1224 (D.D.C. 1988).

343 Armour, John, and Matthew Conaglen. 'Directorial Disclosure'. *The Cambridge Law Journal* 64, no. 1 (2005): 48–51. https://doi.org/10.1017/S0008197305366761.

344 § 8.09 cmt. b American Law Institute. (2006) *supra note* 63.

345 Hilton v. Barker Booth and Eastwood [2005] 1 WLR 567.

While the concept is relatively straightforward for common law courts where the fiduciary law is not so well-developed, continental law fails to define the nature of liability for the breach of fiduciary duties, simply stating that the agent will become personally liable. The Directive 86/653/EEC does not provide a straightforward solution; however, scholars prefer to see the Duty as a condition of fundamental importance to the commercial agency relationship, implying application of general doctrines of contract law while determining the consequences. Moreover, if the principal is aggrieved party, the rules of contract law apply; if the third party is involved, tortious liability may arise[346].

Within the common law system, liability is strict and arises under the fiduciary law provisions. The test should be applied by courts to decide whether the duty is of contractual or fiduciary nature: "when a duty arises from the language of a contract, that duty is a contractual duty, but if a duty arises as a matter of common law because the structure of the relationship comports with the description of fiduciary relationships, that duty is a fiduciary duty"[347].

Beneficiaries in fiduciary relationships are always vulnerable to opportunism, as fiduciary contracts are incomplete, allowing agents to abuse the power or exercise significant discretion[348]. Therefore, when the parties invoke fiduciary duties in their agreement, it is reasonable to interpret such contract terms in the light of contract law principles applying respective remedies for the breach.

Under the contract law, a material failure by one party to perform the contract terms constitutes the non-occurrence of a constructive condition affecting the other party's remaining duties of performance under the contract. This justifies the suspension of performance under the contract or complete contract termination[349]. Termination occurs when the principal may no longer trust the agent, such as non-performance or breach of the contract terms in any other way.

Nevertheless, termination should be considered a remedy of last resort and applied only when other "self-help" remedies fail or do not serve their purpose. Thus, prior to termination, the parties may first choose to apply:

1. Damages;
2. Cure of performance;
3. Withholding of performance;
4. Reduction of price;
5. Specific performance.

While the internal contract between the agent and the principal may contain an

346 Saintier, S., & Scholes, J. (2017), *supra note* 44; Gelter, Martin, and Genevieve Helleringer. 'Fiduciary Principles in European Civil Law Systems'. SSRN Scholarly Paper. Rochester, NY, 2018. [visited 2024-01-28] https://papers.ssrn.com/abstract=3142202.

347 Smith, D. Gordon. 'Contractually Adopted Fiduciary Duty'. *University of Illinois Law Review* 2014 (2014): 1783.

348 Smith, D. Gordon, and Jordan C. Lee. 'Fiduciary Discretion'. *Ohio State Law Journal* 75 (2014): 609.

349 Smith, D. Gordon, and Jordan C. Lee. (2014) *supra note* 347.

explicit provision indicating any of the remedies mentioned above to address breaches, the breach of the overriding fiduciary duty of loyalty is incurable, as it contravenes the principal's expectation of diligent and honest service by the agent. It would be unreasonable to require the principal to continue working with a disloyal agent and to apply remedies other than termination.

The agent's duty of loyalty appears to have functions beyond ensuring the due performance of the agent's other duties. Fiduciary norms thus appear to dominate.

For example, in Larken, Inc. v. Larken Iowa City Limited Partnership, the court held that the provision did not restrict the owner's right to terminate the contract with the manager when the manager engaged in a series of self-dealing transactions "so serious that they frustrated one of the principal purposes of the management agreement, which was to manage the hotel in the best interests of the owner and to be honest and forthright in its dealings"[350]. Thus, the breach of the fiduciary duty of loyalty is likely to be incurable and results in the termination of the agency contract.

The regulation of fiduciary duties under continental law is rather abstract, with the dubious concept and undefined legal consequences for the breach. Remedies for the breach of fiduciary duties by the commercial agents are not regulated neither in the international legal instrument, nor in court practice. From the perspective of EU legislation, the responsibility to define appropriate defence instruments are put on the Member States, that regard the obligation to act dutifully and in good faith as a principle of contract law rather than the primary duty of agency law.

2.1.5. Remedies for the breach of an the agent's fiduciary duties

When the agent has acted disloyally, the principal is usually entitled to receive remedies. Since a mixture of clauses applies to agency relationships, it is evident that a mixture of remedies for the breach of agency contact applies. These could be contractual, fiduciary, or tort law remedies.

All remedies have different points of emphasis: in contract law, they are focused on what the plaintiff has expected to receive under the contract; in tort-on the loss suffered by the plaintiff; in restitution (or quasi-contract), remedies are focused on reversing the defendant's unjust enrichment, typically either by asserting the plaintiff's property rights or by approximating what the parties might hypothetically have agreed to if there had been a contract[351]. However, what unites all of them is that the agent is always liable for the loss of the principal[352].

Thus, in case the agent has been accused of a breach of fiduciary duty, the principal

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350 Larken, Inc. v. Larken Iowa City Limited Partnership 589 N.W.2d 700, 700 (1998).

351 Webb, Charlie. *Reason and Restitution: A Theory of Unjust Enrichment*. First edition. Oxford Legal Philosophy. Oxford, United Kingdom: Oxford University Press, 2016, cited in Bray, Samuel L. 'Fiduciary Remedies'. SSRN Scholarly Paper. Rochester, NY, 28 May 2018 [visited on https://papers.ssrn.com/abstract=3185158.

352 § 8.01 cmt. d (1), American Law Institute. (2006) *supra note* 63.

is entitled to any of the following:

- Invalidity of transactions entered by the agent who infringed fiduciary duties;
- compensatory damages;
- denying the agent of any profit accrued from the breach or compensation paid or
- punitive damages (generally not available in equity)[353].

Fiduciary duties have a significant influence on fiduciary remedies, more specifically, they shape their content. As a creation of equity (a division of common law rules requiring specific performance or abstaining from the performance from an individual who breached contractual obligations), fiduciary duties and fiduciary law, in general, are viewed separately from contractual duties. Such a division is absent in civil law countries, which incorporate fiduciary duties into other institutions, particularly contract law[354].

Some fiduciary remedies stand for only requiring fiduciaries to perform their duties; however, the common feature of all fiduciary remedies is that all of them are equitable, meaning that they require the person to be accountable as a constructive trustee and aim at restoring the exact position of parties they would have been in if no breach occurred (e.g., specific performance, restitution for unjust enrichment, rescission under the common law). Fiduciary duties under the common law are seen as significantly important, thus, the remedies are built to ensure that the duty is not breached, and not to make the breach harmless. The application of the equitable remedies is discretionary, though, in some jurisdictions their application is denied[355].

One example of an equitable remedy is a constructive trust, which is imposed in cases of misappropriation of property, similar to unjust enrichment. It can be understood as a gain-based remedy that evolves from the agent's fiduciary position to acquire benefits on behalf of the principal. Thus, the agent's duty is to deliver what was agreed upon and to pay compensation for any excess obtained while acting on the principal's behalf. The idea is that the principal is entitled to everything the agent obtained during the agency[356]. A similar example of a gain-based remedy that can also be found within civil law systems is restitution for unjust enrichment[357].

The law of restitution and unjust enrichment also establishes a basis for the agent's liability to the principal. If the agent has received a material benefit from the use of the principal's property or has breached the fiduciary duty in any other way, the agent shall compensate the benefit received, its value, or its proceeds[358].

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353 Sitkoff, Robert H. 'The Fiduciary Obligations of Financial Advisors Under the Law of Agency'. SSRN Scholarly Paper. Rochester, NY, 2013. [visited 2024-09-28] https://doi.org/10.2139/ssrn.2234830.

354 Gelter, M., Helleringer G. (2018) *supra note* 346.

355 Australian law denies their applicability for the breach of fiduciary duty. See 'Harris v Digital Pulse Pty Ltd [2003] 56 N.S.W.L.R. 298.

356 FHR European Ventures LLP v Cedar Capital Partners LLC [2014] UKSC 45, para 33.

357 Art. 812(1) Burgerliches Gesetzbuch (BGB), *supra note* 50.

358 DeMott, Deborah A. 'Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences'. *Arizona Law Review* 48 (2006): 925 at 927-34.

One possible legal consequence of a breach of fiduciary duties is the recognition of the transaction concluded by the agent in breach as invalid. The validity of the transaction depends on two elements: subjective (will) and objective (expression of will). Both are equally essential. In the absence of either of these elements or if they are inconsistent with each other, the deed may be declared invalid or remain contested. When the agent commits a breach of fiduciary duty, he infringes upon the will of the principal by binding them to unwanted transactions against their will and interests.

Moreover, a transaction can be considered invalid when the agent's will is corrupted. Thus, whenever the agent commits an act under the influence of deception, violence, threats, or malicious agreement, such a transaction can be deemed invalid[359]. If the agent engages in self-dealing behaviour and concludes a transaction to personally benefit from it, this results in a conflict of interest. The principal's interests in such cases are protected by the possibility of recognising the transaction concluded by the agent as invalid. Defects in the principal's will can lead to the impossibility of a contract between the person whose interests are represented and a third party.

Another legal consequence that may arise for an agent who has breached their fiduciary duties is compensation for damages or losses incurred by the principal due to the breach. This remedy is limited to situations where restitution in kind is not possible or sufficient to protect the violated rights, thereby constituting a subsidiary remedy[360].

This type of remedy will be discussed further in the thesis along with the denial of the agent's right to compensation. However, it is important to note that awareness of the parties plays an important role in determining whether compensation for damages shall be awarded[361].

About subject matter, Directive 86/653/EEC does not provide a list of remedies **available in the event of a breach of the duty to 'act dutifully and in good faith'. The only** provision that touches on these issues is Article 16, which states that the Directive does not affect national rules governing the immediate termination of agency contracts because of the failure of one party to carry out all or part of his obligations[362]. Therefore, it seems that there are no remedies to be awarded to the parties who suffered from the breach, leaving it to the discretion of the Member states.

At the same time, fiduciary remedies are not intended to punish but rather to

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359 Art. 230-232 Civil Code of Ukraine (2003) *supra note* 54; Article 2.135(1) Lietuvos Respublikos Seimas. (2000). Lietuvos Respublikos civilinio kodekso patvirtinimo, įsigaliojimo ir įgyvendinimo įstatymas (2000 m. liepos 18 d. Nr. VIII-1864) [Civil Code of the Republic of Lithuania]. Vilnius. [visited on 2024-08-22] https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.107687 Chapter 7 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

360 Jurkevičius, V., Bublienė R., Šeputaitė D. (2022) *supra note* 313.

361 Art 232 Civil Code of Ukraine (2003) *supra note* 54. If the third party knew or should have known about the absence or excess of authority, the question arises about his participation in compensation for damages caused by actions. Similarly, if the third party was aware of the breach, however, the agent was not, third party alone shall be liable for the damage caused.

362 Council Directive 86/653/EEC, *supra note* 59.

maximise social welfare by wisely setting incentives[363]. While the equitable and compensatory damages discussed above are the most appropriate for this purpose, punitive damages may be awarded in cases of severe misconduct if the breach of fiduciary duty was particularly malicious. This type of damages is aimed at punishing the fiduciary in case of deliberate misconduct. The Restatement (Third) on Agency mentions the possibility of awarding punitive damages for the breach of fiduciary duty, thereby opening the door for applying national remedies available in tort law[364].

While the idea of awarding a remedy that combines elements of criminal and tort law, which carries also an economic function, seems to be an efficient way to promote disclosure, punitive damages have not been adopted in many jurisdictions[365]. Under the EU law, imposing punitive damages would face several obstacles, such as inconsistency with the compensatory function of tort law in civil law jurisdictions, as well as the division between private and public law[366].

Despite the theoretical obstacles to the introduction of punitive damages in European civil law jurisdictions, the potential adoption of this remedy cannot be excluded. In fact, particularly in business settings, this remedy has already attracted the attention of the European Commission in the public law field with a view toward future legislation[367]. Since public law issues are excluded from current work, further discussion on this topic will not be pursued.

Nevertheless, the analysis of some recent private international law cases in EU Member States has shown that there is room for changes toward the recognition of US-style punitive damages in the EU. For instance, in 2010, the Supreme Court of France overruled a US court decision and denied the imposition of punitive damages amounting to $1,460,000.00 on the grounds that it was disproportionate and conflicted with public policy[368]. This decision sparked numerous debates about whether punitive damages would find a place in the French tort system, coinciding with the

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363 Cooter, Robert D., and Ariel Porat. *Getting Incentives Right: Improving Torts, Contracts, and Restitution*. Princeton University Press, 2014. https://doi.org/10.1515/9781400850396 cited in Bray, S. L., Fiduciary Remedies (2018) *supra note* 351.

364 § 8.01 American Law Institute. (2006) *supra note* 63. See § 874 Restatement (Second) of Torts (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

365 Some cases can be found in the US but not under Delaware law. See Corradi, Marco Claudio. "Securing corporate opportunities in Europe–comparative notes on monetary remedies and on the potential evolution of the remedial system." *Journal of Corporate Law Studies* 18, no. 2 (2018): 439-473.

366 Meurkens, Renée Charlotte. "The status quo of punitive damages rejection in Europe: toward more liberalness?" In *Kritiek op recht. Liber amicorum Gerrit van Maanen*, pp. 267-310. Kluwer, 2014.

367 Commission staff working paper accompanying the White paper on damages actions for breach of the EC antitrust rules, 2008. [visited on 2024-08-22] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008SC0404.

368 Cour de cassation, Chambre civile (Cass Civ) 1, 10 December 2010, no 09-13303, Bulletindes arrêts des chambres civiles (Bull) 2010, no 248.

Avant-Projet that included a proposal to award punitive damages in tort cases[369].

As part of the Civil Code reform, the proposal aims to introduce the Article 1371, allowing the courts to award punitive damages under specific circumstances[370]. However, the proposal has faced severe criticism for not providing any criteria on how the damages would operate in practice and for potential conflicts with fundamental principles of tort law (e.g., proportionality and full reparation). For example, in the US, factors such as the character of the tortfeasor's act, the nature, and extent of harm to the victim, the wealth of the tortfeasor, whether criminal penalties have been imposed, the extent of any profit made by the tortfeasor, and the relationship between compensatory and punitive damages are considered. These factors could guide French lawmakers[371].

From the European legal perspective, the application of punitive damages to cases of commercial agency could potentially conflict with the CJEU approach towards the "equitable" indemnity[372]. Although not directly connected with the allocation of damages, indemnity is also seen as a type of contractual remedy for loss compensation. Therefore, it is questionable if the court will extend the "equitable" approach to other types of remedies.

Although the reform has not yet been introduced, noticeable changes are occurring in various Member States that indicate a shift in attitude toward introducing punitive damages in national law, noting that some overlap between criminal law and civil law is permissible[373].

Punitive damages, despite their undeniable shortcomings—such as the risk of overcompensation and the potential to undermine moral balance—have the potential to provide full reparation, restore the status quo ante, and offer fair compensation for the victim. From this point of view, such approach should be viewed as consistent with national law principles.

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369 Avant-Projet de réforme du droit des obligations (Articles 1101 à 1386 du Code civil) et du droit de la prescription (Articles 2234 à 2281 du Code civil), art. 1371 (Sept. 22, 2005) [visited on 2024-10-15] https://www.justice.gouv.fr/sites/default/files/migrations/portail/art_pix/RAPPORTCATALASEPTEMBRE2005.pdf

370 A person who commits a manifestly deliberate fault, and notably a fault with a view to gain, can be condemned in addition to compensatory damages to pay punitive damages, part of which the judge may in his or her discretion allocate to the Public Treasury. A judge's decision to order payment of damages of this kind must be supported with specific reasons and their amount distinguished from any other damages awarded to the victim. Punitive damages may not be the object of insurance. See Parker, Matthew. "Changing tides: the introduction of punitive damages into the French legal system." *Ga. J. Int'l & Comp. L.* 41 (2012): 389.

371 Green Oil Co. v. Hornsby, 539 So. 2d 218, 223–25 (Ala. 1989)

372 Volvo Car Germany GmbH v Autohof Weidensdorf GmbH, No. Case C-203/09 (CJEU 28 October 2010); NY v Herios SARL, No. Case C-593/21 (CJEU 13 October 2022).

373 Behr, Volker. "Punitive damages in America and German Law-Tendencies towards approximation of apparently irreconcilable concepts." *Chi.-Kent L. Rev.* 78 (2003): 105. noting that German courts have awarded damages of a punitive nature. Jablonski, Scott R. "Translation and Comment: Enforcing US Punitive Damages Awards in Foreign Courts-A Recent Case in the Supreme Court of Spain." *JL & Com.* 24 (2004): 225.

2.2. The concept of authority in international commercial agency relationships

2.2.1. Real authority of a commercial agent

We have already concluded that agency should be distinguished from other "false agency" relationships. Commercial agency is a fiduciary relationship in which the agent has the continuing authority to negotiate and possibly conclude contracts with third parties relating to the sale or purchase of goods in the name of and on behalf of principals following their instructions.

The essence of agency concept derived from the definition mentioned above, is the ability of the "agent to affect the principal's legal position in relations with third parties, by concluding the contract or performing some other acts on his behalf". Such "ability" is usually defined through the terms of authority.

Authority in general constitutes the agent's power to affect the principal's legal relations with third parties in such a way as if he had done the act himself. However, we should distinguish between authority and power[374]. "Authority" carries the image of justifying a legal result, whereas "power" is neutral and simply states the result regardless of the justification for it (in the case with agency, it is the ability to bind the principal with the acts the agent has performed)[375].

The agent may have the authority to perform an act, but he also has to have the power to do it. Thus, the power may be broader than the authority[376]. In most jurisdictions, this is likely to be the case because of the need for proper protection of bona fide third parties as well as commercial convenience. Sometimes, an agent's power may be less extensive than his authority[377].

The question of the distinction between power and authority has always concerned scientists, therefore there are many opinions regarding it, one of which is:

"Authority differs from Power: authority is a fact, while power is a legal relation. Authority is the conduct of the principal, including either oral or written communication to the agent. Power is neither conduct nor a document. Authority may create Power, but not always; Power may be created by Authority but also by other operative facts. Authority denotes merely the factual transaction between the Principal and Agent, while Power expresses the concept of possible future changes in the legal relation of the principal with the third persons. Authority merely describes a historical event; however, Power predicts possible events in the future"[378].

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374 Powell R. (1951) *supra note* 65, at 6.

375 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, para- 1-012.

376 Seavey, Warren A. 'The Rationale of Agency'. *Yale Law Journal* 29 (1920 1919): 859.

377 Wright, Peter, Terence Sheard, Leon J. Ladner, and John Willis. 'Case and Comment'. *The Canadian Bar Review* 28, no. 10 (1950). [visited on 2024-10-02] https://cbr.cba.org/index.php/cbr/article/download/1677/1677, at 19.

378 Fabunmi, J. O. 'The Scope of Agents Authority and Power'. *Journal of the Indian Law Institute* 22, no. 3 (1980): 414–30 at 415.

Nevertheless, the issue of determining the essence of authority remains problematic, as there is still no unified approach regarding the legal nature of the agent's authority. Usually, authority is considered a non-material subjective right, as no actual property right or obligation of either party in the relationship corresponds to it. Such an approach, however, does not indicate the absence of a property element in the legal relations of representation in general. The agent's right to remuneration and the corresponding principal's obligation to pay it are elements of the relationship, along with the authority, but not a part of the authority itself[379].

In agency theory, two types of authority are usually distinguished: "real" or "actual" and "apparent" or "ostensible" authority. The latter refers to cases where the principal may be bound even when the agent has exceeded the authority conferred on them by the principal[380].

The principal and the agent are settling the existence and the scope of the actual authority in the agreement between them. In other words, the principal and the agent must "agree about the creation of the relationship" and grant to the agent certain "powers to act on the principal's behalf in relations with third parties"[381]. After the delimitation of authority by the principal's manifestation of assent, the agent incurs no personal liability either to the principal or the third party as long as he is acting by his express or implied authority[382].

Thus, if the agent's actions are duly authorised by the principal, authority issues shall arise from the agent's actions with the third parties. In the case of real authority, possibility to use the power are coextensive as against the principal.

At the same time, the existence of apparent authority is being recognised based on the third party's reasonable belief in the agent's appearance of authority. The agent possesses only the external legal power to act without the corresponding internal justification vis-à-vis the principal.

There is no dispute regarding the nature of actual authority. It is widely recognised that the existence and the scope of the agent's actual authority (express or implied) is governed by the law regulating the internal contract between the principal and agent[383].

In civil law tradition, such a division is rejected since the authority empowers the agent to perform actions in front of third parties. Thus, the Article 11 of the Hague Convention insists on including all forms of authority, including actual authority, within the scope of external relationships. In this regard, the applicable law may also differ from that governing the internal relationship[384].

As concluded in Chapter 1, such an approach is also taken by the French Civil

379 Цюра В. *supra note* 7.

380 Powell R. (1951) *supra note* 65 at 35.

381 Fridman, G. H. L. (1996) *supra note* 85 at 11.

382 Fabunmi, J. O. (1980). *supra note* 378.

383 Collier, J. G. (1994) *supra note* 283.

384 Art.11 Convention on the Law Applicable to Agency *supra note* 57.

Code, by which the agency is regarded not as a separate institution but as an outcome of a mandate, where the power to act as an agent is considered a component of mandate without a distinct concept of authorisation. In contrast, modern codifications like Germany and Ukraine distinguish between the unilateral act of authorisation issued by the principal (PoA) and the internal contractual relations between the principal and the agent[385].

Thus, the internal contract between the agent and the principal is considered to be a sufficient basis for the emergence of an agency relationship outlining the agent's authority to act on the principal's behalf. The issuance of a document confirming the agent's powers that can be presented to third parties, besides being not compulsory, is only external evidence of authority.

The present thesis sees the agent's actual authority as a component of the internal agency relationship. We will differentiate this from apparent authority, which will be examined within external agency relationships.

2.2.1.1. The difference between express and implied authority

Agency doctrine distinguishes between two types of authority: actual (or real) and apparent (or ostensible). As mentioned in section 2.2.1, the difference between them lies in the principal's justification of the agent's actions. Thus, the authority the principal has granted to the agent - whether through express conferral by using words or in writing – is considered an express actual authority, while the authority conferred upon the agent by implication is referred to as implied actual authority.

One of the most famous definitions of actual authority was given by Diplock LJ in the case Freeman & Lockyer v. Buchhurst Park Properties (Mangal) Ltd:

"An "actual" authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement, the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. If the agent enters into a contract pursuant to the "actual" authority, it does create contractual rights and liabilities between the principal and the contractor[386]".

It is common to distinguish express actual authority from the implied, depending on the mode of agency creation.

Express authority arises where the principal expressly, by words, consents to authorise the agent to act on his behalf, and the agent, in his turn, agrees to act. Such agreements may be performed both in written and oral form. The main requirement is

385 Rigaux, F. (1963) *supra note* 68; Art. 297 Commercial code of Ukraine (2003) *supra note* 55; German Commercial Code (HGB), *supra note* 51.

386 Freeman & Lockyer v. Buchhurst Park Properties (Mangal) Ltd 2 Q.B. 480 (1964).

that the conferral must be done "by express words[387]".

In addition, it should be stressed that even though authority was granted through the express words or in writing if the case goes to court, the judge will first pay attention to the parties' words and conduct at the time of the agency creation, as well as the historical background. Later, words and conduct may have some bearing; however, will be less important[388].

As authority is an inherent element of the agency relationship, it seems logical that the grounds for its occurrence are the same as those for the relationship itself. Thus, an agreement concluded between the parties serves simultaneously as the basis for establishing both agency relationships and defining the scope of authority[389].

The most obvious example of express authority is the power of attorney (PoA). The PoA presents a formal conferral of authority that defines the limits of the agent's powers to perform legal actions on behalf of the principal and informs third parties of this authority.

While the modes of agency creation differ and there is no defined rule, *Section 1 of the Powers of Attorney Act 1971* requires the powers of attorney to be executed under seal. Therefore, the powers are conferred to the agent in conformity with strict rules applicable to the construction of deeds. Only the power of attorney concluded in this manner can specify the extent of the authority granted; otherwise, the authority must be determined 'by inference from the whole circumstances"[390] known to both parties, such as the normal course of business, trade customs, etc.

Additionally, the agency contract can be concluded in electronic form and may be regarded as written by some legislators. For instance, art. 207(1) of the Civil Code of Ukraine considers contracts signed by using electronic or other technical communication as those concluded in a written form[391]. It is believed that agency contracts may also be concluded in electronic form, which will be equated to a written form of agency agreements.

2.2.1.2. Scope and limitations of implied powers granted to a commercial agent

When faced with incomplete or ambiguous instructions from the principal, the agent is typically obligated to seek clarification through verbal or other forms of communication. With modern means of communication, it is possible to obtain instant

387 Hely-Hutchinson v. Brayhead Ltd 1 Q.B. 549 (1968).

388 Garnac Grain Co Ltd v Faure & Fairclough Ltd 1 Lloyd´s Rep 495 (1967); Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd *supra note* 348.

389 Гранін, Віталій. 'Повноваження представника та його реалізація за цивільним законодавством України'. Одес. Нац. Юрид. Акад. О, 2005. [visited 2024-03-22] https://core.ac.uk/download/pdf/50594080.pdf .

390 Ashford Shire Council v. Dependable Motors Pty Ltd AC 336, by Reid LJ (1961).

391 Art. 207 (1) Civil Code of Ukraine *supra note* 55.

clarification, and the agent may not be considered to have acted reasonably if he has not done so[392]. However, if communication with the principal is impossible and the circumstances are urgent, the agency doctrine protects the agent and the third party. In such situations, where the agent acts reasonably given the changed circumstances, the agent and the third party may be shielded from liability[393].

Nevertheless, even in cases where the agent's authority is not expressly conferred, agency is real but has to be inferred from the parties' conduct and the circumstances of the case[394].

The most obvious cases of implied authority arise in the forms of:

1. *Incidental authority* - authority to do everything what is normal to the expressly authorised usual activity and is necessary to accomplish the task[395].

This type of authority can overlap with the notion of apparent authority causes the impossibility of deciding whether parties rely on apparent or implied authority. Even though not everything can be spelled out in the contract, the agent should be entitled to do whatever is needed within his activity, regardless of whether his principal is a natural person or a company. Thus, the agent should be considered acting within the scope of authority while performing actions that are ordinarily incidental to the line of **business, even if they exceed the granted authority**[396].

Indeed, the position of the agent, as well as his duties; may significantly vary depending on the sise of the business or the field of its activity. It is difficult to predict and define all the powers that would be needed to carry on the activities within the agency and some powers should be simply inferred from the general scope of business the agent is currently performing. However, where the principal defines the agent's rights in great detail, it could mean that the agent does not have any implied authority and is supposed to act within the limited scope of authority[397].

2. *Usual authority* is the authority the principal has impliedly agreed to do for the effective execution of the agent's express authority in the usual way[398].

Professional agents may have implied (usual) authority that arises from the nature of their natural occupation. For example, an agent was employed to sell goods. However, he was not granted powers to warrant their quality[399]. Nevertheless, he may be authorised impliedly to do so being part of his professional activity.

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392 European Asian Bank AG v. Punjab and Sind Bank (No. 2) 1 W.L.R. 642 (1983) at 655, saying that the principle is "only available in very limited circumstances".

393 DeMott, D.A. (2013) *supra note* 35.

394 Munday, R. (2010), *supra note* 33, para. 3.15.

395 § 8.10 American Law Institute. (2006) *supra note* 63.

396 Watteau v Fenwick [1893] 1 QB 346.

397 Seavey, W. A. (1964), *supra note* 376.

398 Bowstead, William. *A Digest of the Law of Agency*. Clark, N.J.: Lawbook Exchange, 2007, see also Articles 38-40 cited in Hornby, J. A. 'The Usual Authority of an Agent'. *The Cambridge Law Journal* 19, no. 2 (1961): 239–48. https://doi.org/10.1017/S0008197300082453.

399 Benmag, Ltd v. Barda. [1955] 2 Lloyd's Rep. 354

Usual authority emerged in common law as a justification for holding an undisclosed principal accountable for the actions of an agent who operates with apparent authority. Both disclosed and undisclosed principals are accountable for all actions their agent performs on their behalf, as long as these actions are typical for the agent's role. This responsibility stands regardless of any breach of the internal limits set within the agency relationship. For this reason, civil law countries do not recognise the concept of usual authority. Instead, the doctrine of apparent authority can be invoked even in cases involving the legal relationship of indirect agency[400].

Professor Powell, however, has constituted that: "a principal is liable for acts of an agent within his usual authority. If they are within the agent's actual authority because the principal has expressly or impliedly consented to the agent doing them, then the principal is liable"[401].

At the same time, the principal cannot be held liable when he has withdrawn or restricted the usual authority and notified third parties about such withdrawal or restriction until the third party is notified or has notice of these facts[402].

3. *Customary authority* states that the agent has an implied authority to act in accordance with applicable business customs and usages that apply in the market within which he operates[403].

The burden of proving the existence of a custom usually lies on the person alleging that the custom was present. To prove the custom is notoriously difficult with certain conditions to be satisfied, so this rule has limited application. The party must be able to show that such customs or usages are (i) reasonable; (ii) universally accepted by the particular trade or profession or at the particular place; (iii) certain. This was explained in *Cunliffe-Owen v. Teather & Greenwood:*

"Usage' as a practice which the court will recognise is a mixed question of fact and law. To become recognised as usage, it must be *certain*, in the sense that the practice is clearly established; it must be *notorious*, in the sense that it is so well-known in the market where it exists that those who conduct business in that market contract with the usage as an implied term; and it must be *reasonable*[404]".

The custom or usage must be lawful and consistent with the contract's express and implied terms. Even if a custom is proven, the court may ignore it if it is expressly or

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400 See section 1.1.2 regarding the division between direct and indirect representation in continental law. Also, see Jurkevičius, Vaidas, and Raimonda Bublienė. 'Interaction between Apparent and Implied Authority in the Implementation of Sustainable Business Relationship'. In International Scientific Conference Contemporary Issues in Business, Management and Economics Engineering 2021, 13–14 May 2021, Vilnius, Lithuania. Vilnius: Vilnius Gediminas Technical University, 2021, Art. No. Cibmee. 2021.609. ISBN 9786094762604., 2021. [visited 2024-07-22] https://cris.mruni.eu/cris/bitstream/007/17550/1/609-1332-2-PB.pdf?sequence=1

401 Powell R. (1951) *supra note* 65 at p. 73.

402 Hornby, J. A. (1961) *supra note* 398, at 248.

403 § 8.11 American Law Institute. (2006) *supra note* 63

404 Cunliffe-Owen v. Teather & Greenwood 1 W.L.R. 1421 (1967) at 1439 per. Ungoed-Tomas L.J.

impliedly excluded. The only exception is when the custom forms a part of the written agreement[405]. The reasonableness of the custom usually means that it is consistent with the nature of the agency contract, as well as norms of justice and public utility.

4. The last general category of implied authority is the *authority arising from dealing between the parties and the circumstances of the case*. This type is particularly connected to the implied appointment of an agent and results from the general rules of interpretation and construction of contracts.

The implied authority is also defined in international legal instruments[406], and is viewed as a legal basis for the agent's actions in the legal acts of many countries, such as France, Germany and others[407]. Although there are many precedents that address various problems, the difference between the express or implied is not always clear. In addition, problems arise when distinguishing actual implied and apparent authority, as they tend to overlap and leave room for debate. This problem is closely connected with the liability issue. It raises the question whether a principal can be held liable for a contract concluded by an agent where the agent has no actual or apparent authority. However, the contract was concluded within the implied authority. The question is quite controversial, which may not have the same solution in common law and civil law countries.

2.3. Identifying the conflicts between subjects to international commercial agency

2.3.1. Grounds for conflicts between the agent and the principal

The main goal of agency relationships is profit maximisation and achieving economic and other benefits for the parties involved. Agency involves a tripartite relationship that consists of internal and external. Various conflicts may arise between the agent and a third party; however, for the purposes of preserving agency's value, internal relationships are deemed to be decisive. Thus, the alignment of interests between the agent and the principal shall be dominant in evaluating the efficiency of agency relationships. A misalignment of interests between the principal and the agent may lead to situations where the parties do not reach the equally beneficial outcome or where one of them will be put in a detrimental position.

Opportunistic behaviour may consist of self-dealing, information asymmetry, shirking, acting with a conflict of interests, misrepresentation, or breach of fiduciary duties. Agents may engage in self-dealing that would benefit them personally, financially, or professionally, even though such actions may conflict with the principal's

405 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, para-3-032.

406 Article 3:201(1) Lando, O., & Beale, H. G. *supra note* 47; Article II. – 6:103(2) Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48, Article 2.2.2(1) of the UNIDROIT Principles (2016), *supra note* 46; Article 9(1) of the Convention on Agency in the International Sale of Goods *supra note* 11.

407 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

interests. Such actions could include diverting possibilities and material benefits meant for the principal to their own interests. Additionally, it can manifest as neglecting tasks, failing to exert full effort, or not achieving agreed performance targets[408]. Inadequate compensation of the agent may be the reason for such behaviour, making them reluctant to perform and achieve good results.

Agents may provide false or incomplete information to the principal to manipulate the decision-making process in their favour. Such misrepresentation may also result in a conflict of interests or non-compete violations that would be in favour of the agent's financial interests.

Conflicting objectives and information asymmetry are two basic ingredients of the agency problem that are discussed under the incentive theory. The principal's main objective while hiring an agent is to fulfil his lack of knowledge in a certain market, thus presuming that the agent has more knowledge about the market conditions or has more opportunities in handling tasks. Information asymmetry has been present since the beginning of international commercial agency and is one of the reasons why the principal is interested in working with the agent. Thus, only once the interests and goals of the parties are aligned, the existing information asymmetry will be beneficial for them. Moreover, this imbalance can lead agents using their knowledge for the personal gain. It creates the situation of the principal's uncertainty in the delivered result and the impossibility of figuring out the adequate compensation that would reflect the level of effort[409].

Delegating a task to an agent with conflicting objectives can be problematic, mainly when the principal has limited information. This situation gives rise to incentive-related challenges. If the agent had different objectives but no access to information, the principal could design a contract that effectively manages the agent's behaviour, aligning it with what the principal would want in a scenario where delegation did not exist[410].

Another problem associated with agency conflicts is risk aversion. Within the classic agency model, the principal is presumed to be risk neutral. Whenever the agent is averse to risk, he/she will require a more compensation, which will result in agency costs for the principal[411]. Risk aversion in international commercial agency refers to the situation where the agent or the principal seeks to minimise potential risks associated with their involvement in cross-border business activities that can influence decision-making within the agency relationship.

Agent's risk aversion is mainly related to the revenue obtained from the agency

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408 Burgelman, Robert A. 'A Process Model of Internal Corporate Venturing in the Diversified Major Firm. *Administrative Science Quarterly*, 1983, 223–44.

409 Lisciandra, Maurizio. 'Agency Theory and Work Incentives'. *Studi Economici*, no. 2007/91 (2008). [visited on 2024-09-12] https://www.francoangeli.it/riviste/articolo@Model.IDArticolo, at 119.

410 Sappington, D. E. M. (1991), *supra note* 234 at 48.

411 Laffont, Jean-Jacques, and David Martimort. *The Theory of Incentives: The Principal-Agent Model*. Princeton University Press, 2009. https://doi.org/10.1515/9781400829453 at 167.

relationship, as it mostly depends on the delivered result. Therefore, to preserve the revenue, agents would become both effort-averse and risk-averse, which may negatively affect the principal's main goal of profit maximisation. In other words, the agent may be reluctant to engage in risky, even though potentially profitable, transactions in order to preserve stable compensation. As a result, agents lose the potential for profit maximisation and create additional costs for risk-neutral principals[412]. Such situation can be remedied by ensuring the agent by making their compensation less sensitive to performance (e.g., through a contingency fee contract).

Principals often implement various strategies to mitigate the risk of opportunistic behaviour, such as monitoring, clarified contractual terms, and other legal safeguards. However, all these strategies contribute to increasing agency costs.

2.3.2. Ways of minimising the conflict within internal commercial agency relationship

The conflict between the principal and the agent emerges when the agency involves personal gains for the agent while carrying out actions aimed at maximising the principal's welfare. Simply put, when the agency becomes asymmetrical or proves unprofitable for one of its participants, it gives rise to an agency problem.

Delegating a task to an agent with different objectives than the principal's, can become problematic. Self-interest drives the agent to deviate from the principal's instructions, act outside the scope of their authority, or conceal important information about the transaction. If the principal decides to involve the agent in contracting with a third party on their behalf, they should also exercise a necessary amount of care toward the third party. Thus, aligning incentives—rather than expecting agents to act selflessly—would be beneficial in eliminating uncertainty and preventing liability[413].

To prevent and resolve conflicts in international commercial agency relationships, full disclosure and a shared understanding of objectives are essential for successful collaboration and conflict resolution. To minimise the agency problem, implementation of a legal framework that would include a specific set of regulations and standards for the parties to comply with. At the moment, no internationally adopted standard legislation exists at the European level. The general principles of national tort and contract law govern agency contracts. Although these principles provide a basis for establishing liability, they fail to comprehensively explain the doctrine[414]. Furthermore, there is no universal set of conflicts between agents and principals that can be resolved in the same manner. Thus, the efficiency of these mechanisms depends on the specific legal environment they are being applied in[415].

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412 Sappington, D. E. M. (1991), *supra note* 234 at 49.

413 Heath, Joseph. 'The Uses and Abuses of Agency Theory'. *Business Ethics Quarterly* 19, no. 4 (2009): 497–528 at 505. https://doi.org/10.5840/beq200919430.

414 Dalley P. J., (2010) *supra note* 84.

415 Pokhodun, Y. (2021), *supra note* 20.

Moreover, different mechanisms show different level of effectiveness across different jurisdictions. For example, the United Kingdom relies more on the judicial precedent that the law instruments to control agency problems. Thus, English law requires the courts to introduce constraint mechanisms. In practice, courts are reluctant to interfere in commercial decision-making, either because they lack sufficient experience or knowledge to decide commercial matters or because such interference might slow up the pace of commerce[416].

One of the main reasons for creating the international commercial agency relationship is to use the agent's knowledge of the market and national procedures, allowing the principal to avoid complexities in the internal market. Thus, the principal expects the agent to share all the relevant information about the contract negotiation process, the third parties with whom the agent is negotiating future contracts, and the market conditions in which the agent operates.

DCFR in the Article IV.E.–3:203 imposes and obligation on the agent to provide information during the performance, requiring the commercial agent to disclose to the principal all the information available to him regarding the contract performance. Under the DCFR, the agent must inform the principal about the contracts he enters into, market conditions, and the solvency of the third parties he is negotiating with. Disclosure of all relevant information is essential, as the principal is the party bound by the ultimate sales or service contract. This transparency is important to verify that the agent acts according to the principal's instructions and interests[417]. Obligation to disclose is incorporated into all main international and European legal acts on agency, and proper awareness of the process is relevant for the principal to perform obligations under the contract[418].

Confidentiality clauses reinforce the obligation to disclose by forbidding the parties from disseminating information obtained during negotiations[419]. Conflicts may arise whenever there is a misunderstanding regarding the scope of non-compete and confidentiality clauses or their longevity, especially if agents believe these clauses unduly restrict their future business activities.

Additionally, conflicts between the agent and the principal may arise due to miscommunication regarding the scope of authority granted. Principals may assert that agents have exceeded their authority, while agents may claim they acted within the agreed scope. As a result, the principal may assert that the agent's actions were unauthorised and that they are not liable for them unless such actions are ratified. On the other hand, the principal's actions should be assessed to determine whether the agent and a third party had reasonable grounds to believe that the principal intended

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416 Lesini v Westrip Holdings Ltd EWHC 2526 (Ch) (2010) BCC 420 (2009), para 85.

417 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48.

418 Art. 3 Council Directive 86/653/EEC *supra note* 59; UNIDROIT Principles (2016), *supra note* 46 although no general duty of disclosure is mentioned, however, it is implied from various provisions.

419 Article 2.1.16 UNIDROIT Principles (2016), *supra note* 46. See also Sections 1.2.3.1 and 2.1.1 for further clarification.

to conclude the contract with the third party. In this case, the principal shall be considered bound under the contract, even though the agent was not duly authorised. Therefore, for the parties to rely on the doctrine of apparent authority, all conditions must be met, and the interests of all parties should be aligned[420].

The application of fiduciary duties and the control and monitoring executed by the principal are the most popular strategies for resolving agency problems. However, their application might result in the increased agency costs for the principals. Therefore, it is important to implement proactive prevention strategies or risk-sharing arrangements rather than merely defensive measures.

The application of the tort law least-cost avoider principle encourages all parties to take precautions ex ante to avoid liability and high costs. The principle assumes that liability should be borne by the party who can avoid the harm at the lower cost but has not taken the necessary steps to prevent the breach. The least-cost avoider principle simplifies the determination of liability by identifying who bears a lower cost of avoiding harm and assigns liability to that party. This principle has a shortcoming in that parties may not know each other's costs; however, it helps judges define the liable party based on the principles of fairness and proportionality[421].

The principal can choose the agent based on their skills and knowledge, instruct them on necessary actions, and exercise control over them. This authority empowers the principal with the means to avoid mistakes related to authority. The principal considers the type of authority present in the relationship when the harm occurred to determine the liable party. For instance, if the agent had actual express authority, the principal typically assumes all liability. In contrast, with implied actual authority, more factors must be assessed to determine who shall bear the consequences of the mistake[422].

Nevertheless, the principle should be distinguished from the concept of authority, as it also relies on the level of precautions the parties take to avoid harm. Thus, in cases where it is difficult to define an agent's powers, it may be easier to determine who is the least-cost avoider[423].

The principle is primarily applied in the US[424]; however, it could serve as guidance for civil law judges when deciding which party shall bear the agency costs, thereby reducing the complexity of assigning liability.

Agency conflicts create uncertainties in relationships and result in increased agency costs and additional liabilities and risks for all parties involved. The principal can

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420 Jurkevičius, V. & Pokhodun, Y. (2018) *supra note* 19.

421 Rasmusen, E. (2004), *supra note* 32, at 376.

422 § 3 American Law Institute (1958) *supra note* 193. [visited 2024-12-16]: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf The distinction is similar to the one between general and special agents where the general agents have continuing authority to perform series of transactions, while the special agent is authorised to a single transaction.

423 Rasmusen, E. (2004), *supra note* 32, at 384.

424 Ryan Stevedoring Co., Inc. v. Pan-Atlantic Corp., 350 U.S. 124 (1956).

also exercise care by choosing agents carefully and monitoring them to enhance the agents' incentives to avoid errors and to identify erroneous contracts before any reliance costs are incurred. Without effective communication and alignment of incentives, agents may act outside the scope of their powers, leading to the risk of liability for themselves and the risk of binding the principals to unwanted contracts.

2.3.2.1. Compensation schemes as a way of aligning the interests of parties to commercial agency

Mechanisms for minimising agency problems vary according to whether they are being applied at the internal or external level. Internal mechanisms come from contract terms, compensation systems, and the general aim of agency relationships. To keep agents motivated, it is important to develop a working compensation system. Agents, being sensitive to profits, are always trying to choose the most beneficial compensation package. Adoption of a reasonable compensation package can help aligning the parties' incentives and motivate them to produce better results[425].

Remunerations are inherent outcomes of all commercial relationships, and when they are not satisfactory, they can generate pathological incentives. Disputes arise over the rates, payment schedules, and methods of compensation are common. Termination clauses can also be a reason for conflicts between the agent and the principal when either of them decides to terminate the agency agreement. Issues may include the grounds for termination, notice periods, and post-termination obligations.

In addition to being legally entitled to a commission for transactions concluded during the agency agreement and after its termination[426]—provided the transaction was finalised due to the agent's efforts during the term of the agency agreement and entered into within a reasonable period after termination—agents may also be compensated for any losses and damages incurred as a result of the termination of the agency.

Compensation and indemnification are usually contractually enforced. Thus, there is no strict legal regime that would force the principal to pay compensation to the agent. Nevertheless, a number of legal acts provide a mandatory regime of compensation and indemnification in case of the absence of an express or implied contract provision. International and European legal instruments that apply to agency mostly enforce the minimum regime of protection, leaving to contracting parties and Member states the room for discretion in applying the same. The Directive 86/653/EEC in Articles 17, 18, and 19 sets up a mandatory regime that requires principals to indemnify or compensate commercial agents upon termination. No strict rules are defined by the Directive, stating that any derogation from this regime to the detriment of the commercial agent before the expiration of agency contract is inadmissible[427].

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425 Core, John E., Robert W. Holthausen, and David F. Larcker. 'Corporate Governance, Chief Executive Officer Compensation, and Firm Performance1'. *Journal of Financial Economics* 51, no. 3 (1999): 371–406. https://doi.org/10.1016/S0304-405X(98)00058-0.

426 Regulation 8. The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139.

427 Art. 17, 18, 19 Council Directive 86/653/EEC *supra note* 59.

Respective provisions are enshrined in Regulation 6 of the Commercial Agents Regulations[428]. According to this regulation, in the absence of any agreement between the parties regarding remuneration, a commercial agent will still be entitled to such remuneration to the extent that it is customary for a commercial agent dealing with this type of goods in that area or, if there is no such customary practice, to "reasonable" remuneration[429].

There is no agency-based measurement to define fair compensation because every measure of compensation is based on the bargain between the principal and the agent[430]. Moreover, some national laws also tend to omit this by letting the parties to decide upon the compensation internally or referring to the customs in case of the absence of an express agreement[431].

Therefore, aligning the interests and objectives regarding commission, compensation, and indemnification at the stage of contract conclusion is essential to avoid conflicts in the future since no legal act will provide detailed instructions and the dispute will have to be resolved in court.

2.3.2.2. Agent's right to compensation

One of the central rights of the commercial agent is the right to receive compensation. Agents receive compensation either for the agreed amount of work performed under the agreement or in case the principal terminates agency relationships.

When the agency relationship is contractual, the parties usually decide on the amount and form of compensation in the agreement; however, when there is no agreement concluded or the agreement does not regulate it, then this issue should be governed by the relevant legal instruments. For instance, under Sec. 87, 87a, 87b of HGB, the commission of an agent is calculated according to the usual customer compensation, which is revealed in the percentage of the sales of goods received from the transactions concluded or negotiated by the agent[432].

In the absence of any agreement between the parties, the matter should be solved by the application of compulsory legal provisions. As per Article 6 of the of Council Directive 86/653, if the compensation issue cannot be solved internally by the parties to the commercial agency agreement, Member States should be able to apply their national laws to decide on the level of agent's remuneration, as per customary practice[433].

The moment when the agent has "earned" his commission may differ across the

428 Regulation 6. The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139.

429 Ellington, Paul, and Bill Carr. 'The UK Commercial Agents Regulations 1993 (Council Directive 86/653/EC)'. *Int'l Bus. LJ*, 1995, 51, at 55.

430 Dalley, P. J. (2010) *supra note* 84 at 442.

431 Art L 134–5 al 3 Commercial code of France (Code de commerce), (2000), *supra note* 95.

432 German Commercial Code (HGB), *supra note* 51 cited in Campbell, D., Lidgard, H. H., and Rohwer, C. D. (Eds.). (1984). *supra note* 42.

433 Bogaert, G., Lohmann, U. (2000) *supra note* 136, at 26.

jurisdictions. As per the EU legislation, the agent is entitled to receive compensation if:

a) The principal has executed the transaction;
b) The principal should have executed the transaction as per agreement with the third party;
c) The third party has executed the transaction[434].

The agent's right to commission lapses when the third party fails to complete the transaction. This is supported by the case law in Martin v. Perry and Daw, where the court held that the agent is entitled to commission when he has fulfilled his obligation to "bring the purchaser ready, willing and be able to complete [the purchase]"[435].

The right to commission is dismissed when the agent concludes an agreement that is later recognised as void, rejected by the principal, or concluded outside the scope of the agent's authority[436].

In some instances, the agent may also request a reasonable advance payment. The "reasonableness" of the payment depends on the risk that the principal may incur while working with the agent and the agent's reliability. Based on these considerations, the advance payment amount that minimises harm to the principal should be negotiated[437].

The agent has a right to receive compensation upon termination of the commercial agency relationship[438]. The contract that does not stipulate a clause regarding the term of the agreement or where the term changed to an indefinite after some time, the agency relationship may be terminated only when certain conditions with regard to the notice period are met.

Under the English law, the reasonable notice period for the contract with the indefinite term of validity is considered to be the term of 3-6 months[439]. At the same time the Regulations of 1993 incorporated into the UK law by way of adoption of Council Directive 86/653 on the coordination of the Member States relating to self-employed commercial agents in the Regulation 15(1) defines that the notice period must be not less than:

- 1 month for the first year of the contract;
- 2 months for the second year commenced; and
- 3 months for the third year commenced and for the subsequent years[440].

These periods are considered the minimum requirements set with regard to termination, which means that they cannot be shortened. However, they could be prolonged

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434 Art. 10 Council Directive 86/653/EEC *supra note* 59.

435 Martin v. Perry and Daw 2 K.B.D (1931).

436 German Commercial Code (HGB), *supra note* 51, Sec. 87 par. 1.

437 *Ibid*., Sec. 87a par. 1.

438 Contractual agency relationship may be definite, with the specific length of time agreed by parties in the agreement or indefinite – as long as the parties do not terminate is within a certain period of time the contract becomes valid for an indefinite period of time.

439 Campbell, D., Lidgard, H. H., and Rohwer, C. D. (Eds.). (1984), *supra note* 42 at 137.

440 The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139.

by other legislation or courts.

Thus, the German Commercial Code defines shorter notice of 6 weeks for a contract that lasted up to three years and at least three months' notice for contracts that lasted longer than three years. Additionally, HGB adds one more 6-months' notice period for contracts concluded more than 5 years ago (art. 89 HGB). Moreover, HGB introduces an additional requirement that the notice period counts with the end of the calendar year[441].

The obligation to provide notice prior to termination can be waived when there are substantial reasons for termination, such as when the agent continuously violates the duty to disclose, disregards the principal's instructions, or is disloyal or dishonest[442] . In such cases, the principal may terminate the agency relationship without the notice period, and the agent loses the right to receive compensation.

The minimum notice periods do not apply to the agency agreements that expressly define the contract termination date, which can be terminated upon reasonable notice. The concept of 'reasonableness' depends on where it should be applied in each case. Courts usually apply the requirement of "reasonable time" in its common sense: "time during which the authority continues is determined by the nature of the act specifically authorised, the formality of the authorisation, the likelihood of changes in the purposes of the principal and other factors"[443].

DCFR provides guidance on estimating the reasonable period of notice provision. An important factor is whether the agent has been granted exclusive rights to act solely for the principal. In such cases, the reasonable period for the notice should be longer[444]. The burden of proving the termination or revocation of agency rests on the party asserting it.

At the same time, the Civil Code of Ukraine imposes only one general term of one month in order to notify the other party about the termination of the agency relationship, unless the longer term is not specified in the contract[445]. One exception is provided in Article 1008 of CCU for commercial agency, where the principal may terminate the relationship without any prior notice in case the entity acting as an agent was liquidated.

No notice period is required in case the parties have extraordinary and serious reasons to terminate the agency relationship, such as death, incapacity, or substantial changes to the contract[446].

In case the termination was lawful, and the appropriate notice period was observed,

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441 Art. 89 German Commercial Code (HGB), *supra note* 51 adds one more 6-months' notice period for contracts that were concluded more than 5 years ago.

442 Klaus Guenther 'Germany' cited in Campbell, D., Lidgard, H. H., and Rohwer, C. D. (1984), *supra note* 42, at 79.

443 Hotchkiss v. Nelson R. Thomas Agency, Inc., 96 Cal. App. 2d 154, 158 (1950).

444 IV.E. – 2:302, Von Bar, C., Clive, E., and Schulte-Nölke, H. (2009). *supra note* 48.

445 Civil Code of Ukraine, *supra note* 55.

446 *Ibid*, art IV.D.–6:105.

the principal may owe 'clientele indemnity' or 'goodwill indemnity' to the commercial agent for the losses and expenses incurred by the agent during the course of the agency relationship as well as future loss. The clauses on indemnity are included in Article 17(2) of the Council Directive 86/653 ECC, Regulation 17 of the Commercial Agents Regulations 1993, Article 74 CISG, and national legal norms[447]. Article 17 of Directive 86/653 prohibits the parties from excluding the right to indemnity from the contract, as it is mandatory provision that applies regardless of its implementation into national law. This provision applies to parties conducting their activities within the EU/EEA or both within and outside the EU/EEA[448]. However, parties that are registered or conduct their activities entirely outside the EU are not covered by the scope of the Directive.

CJEU in the case Ingmar v Eaton Leonard Technologies Inc., specifically stated that, although the applicable law was the law of California, which does not provide the indemnity entitlement, the agent was registered and provided activities in the EU[449]. Thus, the parties could not circumvent the mandatory provision of Article 17, and the commercial agent was entitled to the indemnification and compensation notwithstanding the choice of law clause. Article 17 is defined rather broadly by the CJEU, including cases where the termination occurred during the trial period[450].

Article L.134-12 French Commercial Code allows the agent to claim the right to indemnity if the breach has occurred due to the principal's non-performance or when the contract has expired. This is supported by Article 1999 of the French Civil Code. The only limitation arises in cases of breach of contract due to the agent's negligence. The burden of proof lies on principal[451].

The amount of indemnification relates to one amount commission for the agent over the five years of agency[452]. In French law, however, the termination payment is often assessed to two years' commissions, which can be a substantial amount. Under the Sec. 89b (2) HGB, the calculation of the remedy is based on the actual contract duration if the contract lasted less than five years[453]. However, there is no rule absolute rule, since the indemnity reflects the amount of damages suffered, including the loss of clientele linked to the products supplied by the principal, which can fluctuate significantly.

The principal also owes an obligation to indemnify and protect the agent against claims, liabilities, and expenses incurred in discharging the duties assigned by the

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447 Council Directive 86/653/EEC *supra note* 59; The Commercial Agents (Council Directive) Regulations 1993, *supra note* 139; Art. 7:406 DCC *supra note* 52.

448 Agro Foreign Trade & Agency (Judgment) Case C-507/15 (16 February 2017)

449 Ingmar BG Ltd v Eaton Leonard Technologies Inc. (2000) *supra note* 134.

450 Conseils et mise en relations (CMR) SARL v Demeures terre et tradition SARL, No. Case C-645/16 (CJEU 19 April 2018).

451 Art. L.134-12 Commercial code of France *supra note* 95; Art. 1999 Civil Code of France, *supra note* 53.

452 Art. 17(2) Council Directive 86/653/EEC *supra note* 59.

453 Pokhodun Yuliia 'Termination of contractual agency by the act of parties from the comparative perspective. *Юридична Україна'* Vol. 5-6, p. 242-248 (2018).

principal[454]. According to the Art. 7 of the Royal Decree No/2033 of 1981 of the Ministry of Labor, Health and Social Security of Spain, the company will be obliged to compensate for the expenses suffered by the agent due to his activities within the scope his performance as an agent[455].

Along with indemnification, the agent is also entitled to compensation. Both compensation and indemnity are alternative forms of payment to the agent following the contract termination; however, there are certain distinctions between them. According to Article 17(3) of Directive 86/653/EEC, a commercial agent is entitled to compensation for the damage suffered as a result of the termination of his relations with the principal[456].

While indemnity payment is subject to specific calculations, the amount of compensation is not limited. The Directive does not provide any methods for calculating compensation either. Also, indemnity payments include the 'substantial benefit' the principal has gained and continues to receive from the agent's work after the contract's termination. In contrast, compensation focuses on the loss suffered by the agent as a result of the termination. According to the CJEU in the case NY v Herios, the court interpreted that a goodwill indemnity must be significant and connected to the services provided by the agent. Being rather broad in its interpretation, the Court also reminded the Parties that the purpose of Directive 86/653/EEC is to protect the agent's interests, while restricted interpretation would deprive the agent of compensation for the added value brought to the principal[457].

According to the CJEU, cases in which the agent can be denied compensation or indemnity are strictly limited. Thus, the principal can exercise his right to deny indemnity where the contract was terminated because of the agent's default that would justify immediate termination or where the agent was the one who terminated the contract[458].

The EU Member States have been given a choice between the German system of indemnity and the French system of damages, or a combination of both[459]. The European Commission's Report of 23 July 1996 shows that the majority of EU countries have opted for the German system[460].

For the UK, this was one of the biggest concerns during the implementation of the

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454 Western Smelting & Refining Co. v. First Nat'l Bank, 35 N.W.2d 116 (1948).

455 Royal Decree 2033 / 1981, Of 4 September, which Regulates the Employment Relationship of the Special Character of the People Involved in Commercial Operations on behalf of One or More Employers, without Assuming the Risk and Ventura of Those. cited in Campbell, D., Lidgard, H. H., and Rohwer, C. D. (Eds.). (1984), *supra note* 42.

456 Council Directive 86/653/EEC *supra note* 59.

457 NY v Herios SARL, No. Case C-593/21 (CJEU 13 October 2022).

458 Volvo Car Germany GmbH v Autohof Weidensdorf GmbH, No. Case C-203/09 (ECJ 28 October 2010).

459 Ingmar BG Ltd v Eaton Leonard Technologies Inc (C-381/98) [2000] ECR I-9305.

460 Report on the Application of Article 17 of Council Directive on the Co-Ordination of the Laws of the Member States Relating to Self-Employed Commercial Agents (86/653/EEC), COM (1996) 364 final (July 23, 1996).

Directive, as it had previously employed a different method for calculating compensation based on loss mitigation, which the Directive did not provide[461]. Thus, while implementing Article 17 of the Directive, the UK chose both types of compensation: German indemnity system for substantial expansion of business relations with clients, which brings significant benefits to the principal, and the French system of compensation for losses incurred due to the contract termination[462].

When calculating the indemnity, German courts consider the net present value of the agent's customer list, presumable losses of commission, and the benefits the agent could have earned in the years following the termination of the agreement. Loss of income can only include income from the sale of goods to repeat customers but not from services or other activities provided by the agent[463].

The right to receive proper remuneration for the work performed is the central right of the agent within agency relationships. The extent and scope of this right may differ depending on whether the contract was concluded and whether the parties expressly agreed on the form and amount of compensation. Article 17 of the Directive is considered a mandatory provision that applies even if the parties choose the law of a country outside the EU/EEA. Although the measures adopted by the Directive aimed at harmonising the regulation of agency agreements within the EU and increasing the security of transactions, uniformity is precluded by allowing Member States to choose between a system of compensation, indemnity, or a combination of both. This choice has effectively extinguished the idea of uniformity.

2.3.2.3. Aligning the interests between the agent and the principal by introducing the contingent fee system

From the above analysis, it is evident that the Directive provides the mandatory regime of agent's compensation that is applied in all cases. Thus, the agreement, which does not include the terms, and the amount of agent's compensation, shall be considered illegal. Commercial agent's compensation does not usually depend on performance or the number of concluded transactions, securing the payment in case of any outcome. Nevertheless, situations are common when the principal does not perform an agreement either because of his own fault or due to the actions of the third party who, for example, does not pay the amounts due. In this case, the question arises, of whether the agent is still entitled to full commission anyway or only to the extent where the principal is responsible for non-performance[464].

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461 Williamson, M., & Milligan, J. (1997). United Kingdom. In A. Jausas (Ed.), International encyclopedia of agency and distribution agreements (Vol. 2, Updated and enl. ed., p. 1). Alphen aan den Rijn., p. 9.

462 Eftestol-Wilhelmsson, E. (2014) *supra note* 30.

463 § 89 b (1) German Commercial Code (HGB), *supra note* 51.

464 Mykolska Natalya, Slipachuk Tatyana. "Ukraine: Commercial Agency: a Thousand and One Questions - Parts I, II and III", 2010. [visited 2020-07-28] https://www.mondaq.com/international-trade-investment/104610/commercial-agency-a-thousand-and-one-questions--parts-i-ii-and-iii..

The above may not apply in cases where the transaction has failed to be executed; however, no fault of an agent may be traced. In this case, the principal still owes the remuneration to the agent[465].

The law and court practices regarding this matter are often ambiguous. However, to ensure that the agency serves the interests of both parties, it may be stipulated that the agent is not entitled to commission that the principal (or the third party) fails to execute the agreement unless otherwise specified in the agency agreement[466]. The degree of seriousness of the grounds that lead to non-performance must be assessed on case-by-case basis, however, no guidance exists, leaving the agent with a significant risk that no commission may follow.

While this approach benefits the principal, it could bring misalignment into the agency relationship. Therefore, it is essential for such terms and conditions to be clarified in the agency contract to avoid any misunderstandings.

To maximise professional self-interest and to ensure equality and impartiality under the agency agreement, it is suggested to introduce an incentive contract. This contract would offer compensation for damages incurred and would effectively restrict the personal interests of agents, compelling them to treat all clients with impartiality, loyalty, and due care[467]. Moreover, it would increase the agency's value and would motivate the parties to share valuable information, thus increasing the net income of the parties involved[468].

The contingency fee contract is usually referred to as a method of agent remuneration calculated as a percentage of money "won" for the principal in addition to a fixed amount agreed upon in the contract. This arrangement allows the agent to settle the amount of damage compensation ex post based on the time spent and resources involved while preserving all obligations of loyalty and due care. Such a method provides the agent with a stronger economic incentive to deliver better services in the principal's interests[469].

Under the EU law the contingent payment is covered by the concept "*pactum de quota litis*", which presumes that the principal pays the agent a share of the benefit

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465 Art.1999 (2) of the Civil Code of France, *supra note* 53.

466 Sec. 87 (a) III 2 German Commercial Code (HGB), *supra note* 51, stating that "no right to commission shall exist in the event of non-performance where that is due to reasons beyond the control of the principal, i.e. because of force majeure or when the law has been changed"; See also Fergus R, Davey J. (2003) *supra note* 239 noting that principal is absolved from having to pay commission as soon as "serious grounds for non-performance" exist even though the third party later defies expectations and performs after all.

467 Cenini, Marta, Barbara Luppi, and Francesco Parisi. 'Incentive Effects of Class Actions and Punitive Damages under Alternative Procedural Regimes'. *European Journal of Law and Economics* 32, no. 2 (2011): 229–40 at 234. https://doi.org/10.1007/s10657-011-9241-z.

468 Lubatkin, Michael. 'One More Time: What Is a Realistic Theory of Corporate Governance?' *Journal of Organizational Behavior* 28, no. 1 (2007): 59–67 at p. 59.

469 Emons, Winand. 'Playing It Safe with Low Conditional Fees versus Being Insured by High Contingent Fees'. *American Law and Economics Review* 8, no. 1 (2006): 20–32.

received due to the agent's actions[470]. The concept is used to settle the fees of lawyers. In the US, the conditional fee agreement is known as a "no win-no fee" or success arrangement, according to which the lawyer is getting paid the percentage of the case won in case of a successful outcome. In the UK, the lawyer receives the upscale from what was won in addition to the fixed amount agreed[471].

Despite the benefits it may bring into agency relationships, there is still a limited amount of literature that justifies it. Due to legal and ethical considerations, Germany has completely banned the conclusion of "no win-no fee" arrangements between lawyers and their clients, citing their unconstitutionality[472]. The law of EU Member states also prohibits contingency fee agreements in cross-border activities; however, no specific directives have been issued for the national law[473]. The prohibition on pacta de quota litis does not apply to national law, where parties can still engage in such agreements. For instance, Sweden allows contingent fees in contracts only in specific cases, such as when the lawyer represents interests in collective actions or when handling cross-border representation[474].

Although the thesis does not aim to compare lawyers to commercial agents due to the essential differences in the nature of their activities, implementing a contingent fee system as a commercial agent's remuneration scheme could indeed promote fairness and equality. Moreover, EU law does not impose any prohibitions on defining the compensation of commercial agents (unlike in the case of lawyers). Article 6 of Directive 86/653/EEC states that the level of remuneration can be determined by parties, subject to compulsory provisions of national law.

According to German law, parties can agree on extra remuneration if the agent successfully negotiates a better price than the initially set amount (known as "Überpreis"). Under Article 87b, paragraph 1 of the German Civil Code, the customary rate applies when the commission amount is not specified. Thus, it can be presumed that nothing precludes the parties from agreeing on a different form of compensation, which can include a fixed amount, a minimal guaranteed commission, a percentage of profits, etc.

There are concerns about whether permitting the agent to negotiate compensation

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470 Code of conduct for lawyers in the European Union, 2006 [visited 2024-10-19] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEONTO_2021_Model_Code.pdf

471 Emons, Winand, and Nuno Garoupa. "US-style contingent fees and UK-style conditional fees: agency problems and the supply of legal services." *Managerial and Decision Economics* 27, no. 5 (2006): 379-385. p.379-380.

472 Gaižutytė, Silvija. "Do contingency fee agreements violate the principles governing lawyers' practise?" (2011): 39.

473 Art. 3.3.1 Charter of core principles of the European legal profession and code of conduct for European lawyers, 2008, CCBE [visited 2024-10-19] https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

474 Code of Professional conduct for members of the Swedish Bar association, 2008, [visited 2024-05-13]: https://www.advokatsamfundet.com/globalassets/advokatsamfundet_eng/code-of-professional-conduct-with-commentary-2016.pdf

ex post would align with the fiduciary duties inherent in agency contracts. Contingent fee agreements may pose the risk of agents overcharging clients, particularly wealthier ones, by setting excessive or unreasonable fee amounts. This could encourage self-serving behaviour on the part of the agent[475].

The commercial agent is obligated to act dutifully and in good faith. Thus, an unreasonable fee increase would indeed amount to a breach of this duty. Moreover, the private law principle *pacta sunt servanda* requires the parties to perform the agreements as they were concluded. Nevertheless, agency agreements are usually concluded for a long term, and it would be unreasonable to expect that the original compensation will remain reasonable over the years. Moreover, if the agent spends more time, effort, or resources to conclude the necessary agreement with a third party, it may become detrimental for them to continue the agency relationship.

Including a contingency fee clause in the contract, could motivate the agent to deliver better performance considering that they will receive larger commission in that case. However, the fee increase cannot be unreasonable, and the limitations shall be introduced to the amount of uplift. As conditional fee clauses are absent in most EU member states, an increase in the agent's commission in such cases could be compared to the 'disturbance of the basis of the contract" and subsequently be subject to revision. Section 313 of German civil code allows fee adjustments due to the significant change in the circumstances[476]. The clause is applicable in case the "adherence to the unchanged contract is unreasonable for the disadvantaged party".

Such solution might partially resolve the problem of the agent's self-serving behaviour and risk aversion by motivating them to take risks to achieve a higher gain. This is also aligned with the principal's main goal of profit maximisation, optimising the agency's utility.

2.3.3. Abuse of the rights granted to the agent as a ground for agency conflict

Under the normal circumstances, agency relations arise when a duly authorised agent concludes or negotiates a contract with a third party on behalf and in the interests of his principal. Such a relationship is constituted on mutual consent between the agent and the principal. Where such consent is present, the agent has actual authority to bind the principal with his actions.

There can also be situations when the agent acts outside the scope of the authority granted by the principal. Agents may be tempted to act without authority due to many reasons, including self-interest or other fraudulent intentions. Thus, the agent seeking to receive the agreed payment may intentionally exceed the limits of authority granted to him[477].

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475 Maurer, Virginia G., Robert E. Thomas, and Pamela A. DeBooth. 'Attorney Fee Arrangements: The US and Western European Perspectives'. *Nw. J. Int'l L. & Bus.* 19 (1998): 272, at 283.

476 German Civil Code (BGB) *supra note* 50.

477 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 186.

Unauthorised actions are frequent phenomena in present-day commercial relations, as agents often need to act fast in certain cases. Communicating every act with the principal could delay the conclusion of a contract or negotiations, especially in large and complex business undertakings[478]. In such cases, agents may abuse their powers and act without authority, hoping that the principal will later ratify the act. However, it may be that the principal would never have agreed to enter into a contract on those terms. Thus, conflicts may arise, along with questions of liability.

The abuse of rights granted to an agent can be a significant source of agency conflict, particularly when the principal's interests do not align with the terms of the contract. In such cases, the principal may choose to reject the contract concluded with the third party, which jeopardises the interest of the third party and makes the agent liable under the concluded agreement. To invoke the concept of ratification, parties' interests must be aligned. The principal should be willing to be bound by the contract concluded due to the unauthorised act, and the agent must prove that he acted honestly and in the best interests of the principal, and the third party should show that they entered into the contract in good faith. The agent's liability for performing an unauthorised act will be discussed further in Chapter 3.

Interim conclusions after Chapter 2

As a result of the research of the internal agency relationship, nature of commercial agency agreement, authority, involvement of fiduciary duties and problems arising out of the breach of fiduciary duties and ways of minimising the agency problem, theoretical and practical results were achieved that are essential for further analysis of external agency relationship.

Among the main conclusions made within the Chapter 2, the following should be highlighted:

Agency, including the commercial one, is a fiduciary relationship. While the agency doctrine within Common law is based on the fiduciary law, presuming that commercial agents owe their principals both fiduciary obligations and duties of performance, the Continental legal approach is more contractual, seeing fiduciary duties more as general principles of contract law to 'act dutifully and in a good faith'. Although overlapping, fiduciary duties impost strict obligations on parties, the breach of which leads to legal consequences and liability. The civilian approach does not contain provisions that address the consequences of the breach of the Duty and allows application of the national procedural and remedial norms.

Having penetrated both civil and common law jurisdictions, application of fiduciary duties is limited by international legal instruments when the principal's instructions are illegal, unethical or lead to the agent's liability. The imposition of a strict fiduciary duty regime in the context of modern commercial relations may lead to increased agency costs and negatively affect the overall efficiency of agency operations.

478 Munday, Roderick. 'The Unauthorised Agent: Perspectives from European and Comparative Law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16 at 186.

While duty of loyalty and good faith cannot be limited, other fiduciary duties can be negotiated upon to become cost-efficient and foster favourable solutions in jurisdictions outside of the common-law world, such as increasing the agent's personal liability for unauthorised actions or adopting a favourable compensation package.

The fiduciary nature of agency relationship presumes the absence of conflicts between the agent and the principal. Although conflicted transactions are not being banned, they are subjected to equitable review. Not to compromise the duty of loyalty, the agent acting in the principal's best interests must disclose the potential conflict and receive the principal's approval for that.

The scope of the actual authority is being settled by the principal and the agent in the agreement between them, while apparent authority is based on the third party's reasonable belief in the agent's appearance of authority. The agent possesses only the external legal power to act without the corresponding internal justification to the principal. While the distinction is applied in common law, some civil law jurisdictions reject it, since the authority empowers the agent to perform actions in front of third parties, including all forms of authority within the scope of external relationships.

The agent shall be held liable for the breach of fiduciary duties when he fails to comply with the principal's will or instructions. Breach of fiduciary duties gives rise to a number of remedies that vary according to the jurisdiction. An agent in breach of his fiduciary duties may be liable for damages, denied compensation or declared invalidity of transactions he entered into.

Agency conflicts bring uncertainties to the relationships and result into raise of agency costs as well as additional liabilities and risks for all the parties involved. Mitigation of the risk of the agent's opportunistic behaviour, by implementing various proactive prevention strategies shall be considered the most effective.

There is no measurement of the reasonable agent's compensation provided by the Directive 86/653/EEC due to the bargaining power between the principal and the agent. Therefore, aligning the interests and objectives regarding commission, compensation, and indemnification at the stage of contract conclusion is essential to avoid conflicts in future since no legal act will provide detailed instructions and the dispute will have to be resolved in court.

Agent's right to receive compensation is the central one within agency relationships. Although Directive 86/653/EEC generally sets the minimum protection requirements, Article 17 is recognised as mandatory, being applicable regardless of the choice of applicable law if the parties operate within the EU or registered there. The Article provides the possibility to choose between a system of compensation, indemnity, or a combination of both, which affects the idea of uniformity.

The use of contingency fee contracts varies significantly and is subject to controversy across jurisdictions. While they are widely applied in the US, their adoption in Europe requires careful consideration. The UK stands out as one of the few countries in Europe where such agreements are used and regulated more extensively. The application of contingent fees is possible in the case of commercial agents; however, it is subject to certain restrictions to prevent violations of general principles of contract law and fiduciary duties.

Table 1

Key concepts related to reconciling of interests among the principal and the agent	Civil law	Common law
Conflict of Interests in Case of Performing for Multiple Principals	Under the EU perspective, the duty to avoid conflicts of interest is governed by Article 3 of Directive 86/653/EEC, where agents can be charged with material breach for acting on behalf of competitors unless the agreement forbids it. From the perspective of EU legislation, the responsibility to define appropriate defence instruments are put on the Member States, that regard the obligation to act dutifully and in good faith as a principle of contract law rather than the primary duty of agency law.	The agent is under a fiduciary duty to avoid conflicts of interest. An agent's failure to disclose may not necessarily lead to a breach of duty of loyalty, meaning that the agreement may not be terminated, however, the principal will be entitled to an indemnity claim to compensation for losses. Moreover, the duty of loyalty should not be considered compromised if the agent fully informed the principal about engaging in a relationship with another principal and the former approved it.
Fiduciary Duty	The civil law duty to act in good faith is outlined in the Directive 86/653/EEC, however, it does not extend to pre-contractual obligations. The nature of liability for breaches is vague and requires member states to define it.	Common law establishes liability is strict and arises under the fiduciary law provisions for negligent or fraudulent conduct during negotiations. Courts distinguish between contractual duties and fiduciary duties, which provide a robust legal framework for enforcing obligations.
Remedies for Breach of Fiduciary Duty	Fails to define the nature of liability for the breach of fiduciary duties, simply stating that the agent will become personally liable. Contract law remedies, tort law remedies are applied for the breach.	Specific fiduciary law remedies are applied that include equitable and compensatory damages. Courts may award punitive damages for severe misconduct as outlined in The Restatement (Third) on Agency.
Compensation	Article 17 of the Directive is considered a mandatory provision that applies even if the parties choose the law of a country outside the EU/EEA. Although the measures adopted by the Directive aimed at harmonising the regulation of agency agreements within the EU and increasing the security of transactions, uniformity is precluded by allowing Member States to choose between a system of compensation, indemnity, or a combination of both. This choice has effectively extinguished the idea of uniformity.	To maximise professional self-interest and to ensure equality and impartiality under the agency agreement, the use of an incentive contract effectively restricts the personal interests of agents, compelling them to treat all clients with impartiality, loyalty, and due care. Moreover, it increases the agency's value and would motivate the parties to share valuable information, thus increasing the net income of the parties involved.

3. ALIGNING THE INTERESTS BETWEEN THE PARTICIPANTS TO EXTERNAL COMMERCIAL AGENCY RELATIONSHIPS

3.1. External relationships in international commercial agency

3.1.1. Position of the third party in agency relationship

As described in the current thesis, scholars outline two general types of legal relationships formed as a result of creation of commercial agency: internal (between the principal and the agent) and external (emerge in relations with third parties).

External agency relationship includes two subdivisions: 1) relations that hold informational character, meaning that the agent represents the principal and informs third parties that he is authorised to act on behalf of the principal; 2) relations between the principal and the third parties that arise out of the agent's acts[479].

The above division of external agency relations is, however, disputable, as it would be difficult to apply it in the common law system, especially when the principal is undisclosed. In the civil law system, it is correctly outlined that the agent must inform a third party about his position and, in some cases, present the proof of powers granted by the principal. An objective aspect mainly characterises informational legal relations of representation, as they are important for third parties who enter direct legal relations with the person the agent represents.

Under civil law, the principal can be unnamed at the negotiation stage, however, the name must be disclosed during the contract conclusion; otherwise, the agent fails to create a valid relationship between the principal and the third party and himself becomes a party to the contract.

Therefore, considering different circumstances and stages of agency, the external agency relationship which arise out of authorised legal relationships can be classified into1) factual relations between the agent and third parties; 2) legal relations between the principal and third parties, the establishment of which is a consequence of the activity of the representative.

Thus, the agency has a complex legal structure and consists of three levels:

1) legal relationship between the principal and the agent;
2) legal relationship between the agent and a third party;
3) legal relationship between the principal and a third party.

The traditional structure can now be extended to add one more level, which is:

4) legal relationship between the participants in legal relations of representation (representative, principal, third parties) and other related (fourth) parties.

Adding the fourth level, however, may raise questions, especially among scholars who consider only the internal relationship between the principal and agent to be

479 Харитонов Євген. 'Добровільне представництво у цивільному праві України': навч. посіб. Київ: Істина, 2007. 176 с, at 52-53.

covered by the concept of representation. Nevertheless, it is reasonable to consider the interests of bona fide persons indirectly related to the legal relationship of representation and whose interests are affected in the case of unauthorised agency or when the agent has acted with apparent authority. Therefore, in the current thesis, the related (fourth) parties will be considered when discussing alleged and unauthorised representation cases.

3.1.1.1. Peculiarities of external agency relationships within the disclosed agency

The primary purpose of a commercial agency is to create a valid contractual relationship between the principal and a third party with the participation of a duly authorised agent who acts on behalf of the principal. Therefore, the principal will become contractually bound towards a third party to execute the obligations resulting from the acts concluded by the agent on his behalf as long as they are within the limits of the mandate. In a typical agency relationship, the agent will enforce a contract between his principal and a third party, after which he will withdraw from the transaction.

An absolute prerequisite of non-liability of the agent within both the civil law and common law systems is informing the third party that the agent is acting on the principal's behalf. Therefore, all consequences of these actions, whether active or passive, affect the principal directly[480].

The level of the principal's disclosure to third parties directly affects the legal consequences concerning the rights, duties, and liabilities of the principal, agent, and third parties engaged in international commercial agency arrangements. The concept of *disclosed principal* is defined by the inclusion of the phrase "in the name and on behalf of the principal" and presumes that the third party is entirely aware of the existence of agency relationships between the principal and the agent from the start of the business dealings, and the principal's identity is fully disclosed[481].

Thus, when representing the disclosed principal, the agent owes an informational duty to the third party, meaning the agent must reveal the existence of an agency relationship. This part of the fiduciary duties like the duty of loyalty and fair dealing. The agent acts on behalf of the principal with full disclosure, and the principal is directly liable to the third party unless agreed otherwise.

Mandate agreement concluded between the agent and the principal creates an internal relationship; however, it may not be a sufficient source of information for the third party due to confidentiality or other reasons. For balancing purposes, third parties have the right to demand a confirmation that he is acting precisely as a representative and not as, for example, a contractual counterparty. Additionally, a representative must provide proof of authority and its content.

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480 Tulai, D. L. (2020) *supra note* 245.

481 Art.1(1) Convention on the Law Applicable to Agency *supra note* 57; § 1.01 American Law Institute. (2006) *supra note* 63; Art. 1 Council Directive 86/653/EEC, *supra note* 59.

A power of attorney is usually an appropriate document that can be presented to the third party to inform about the agency relationship and the limits of authority conferred to the agent to present the principal[482]. However, the presence of the power of attorney may not always be requested by the third parties. At the same time, within the disclosed agency, the agent is always bound to make it clear that he is not aiming to become the contracting party.

The existence of the agent's authority and its limits greatly affect the future liability and its extent under the contract with the third party. Therefore, it is necessary to limit the rule of principal's liability to these two conditions. Once the third party is fully aware of the fact that they are dealing with the agent who acts within the limit of actual authority (either express or implied) or where the principal retroactively ratifies the agent's unauthorised act, only the principal can be held accountable for any legal action done by the agent.

If the agent steps outside the scope of his authority, the third party may be entitled to rely on the doctrine of apparent authority, based on the agent's manifestations of authority. In such case, the principal is contractually liable to the third party, though, agent's liability for damages or breach of warranty of authority can still be reserved[483].

Dealing with a disclosed principal is the usual and the most stable form of agency, where the parties can achieve their primary objectives. While direct (disclosed) agency is recognised both in civil law and common law countries, the latter has introduced other concepts that are also covered by the agency relationship.

One such concept known to the common law is dealing with the *partially disclosed (unidentified)* where the existence of a principal is revealed to the third party but not his identity. Instead, the agent may represent the principal under a generic or ambiguous designation, such as "a principal to be named later" or "acting on behalf of an undisclosed principal." Thus, the third party is aware of the existence of agency relationship but not the principal's identity[484].

3.1.1.2. Peculiarities of external agency relationships in an undisclosed agency and indirect representation

Depending on the legal system, the consequences of an agent acting on behalf of the undisclosed principal would either result in the establishment of a direct relationship between the agent and the third party (even if the agent was acting within the scope of the granted authority) or create a valid relationship between the principal and the third party with certain requirements to be met[485].

For common law and some mixed legal systems, the difference between direct and

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482 Цюра В. *supra note* 7 at 237; Грабовий О. *supra note* 10 at 54.

483 Art. 3:202, Lando, O., & Beale, H. G. *supra note* 47. Art. 2.2.5(2). UNIDROIT (2016). *supra note* 46; Art. 14(2) Convention on the Law Applicable to Agency *supra note* 57.

484 § 6.02 American Law Institute. (2006) *supra note* 63.

485 Busch, D., (2005) *supra note* 45.

indirect agency is not known. The law recognises the agent who acts either in the name and on behalf of the principal or in his own name and on behalf. In case of *undisclosed principal*, the agent conducts business with third parties without disclosing the existence or identity of the principal. The third party has never been notified that the agent is acting on behalf of another party. Thus, the former intends to deal with the agent contracting party.

As a result of the agent's actions on behalf of undisclosed principals, the agent creates a valid relation between the principal and the third party, where the principal assumes all duties and liabilities. Thus, the undisclosed principal remains bound by the agent's contracts, and the agent acts as a mere intermediary. Regarding the liability, the responsible parties may differ depending on whether the agent acted within the scope of authority or not[486].

In civilian legal systems, such a situation is considered as an indirect agency where an agent acting in his own name, although on behalf of the principal, fails to create a valid contractual relationship between the principal and a third party[487]. The law considers such principals as "strangers" and protects the third party from having the stranger enforce the contract. Therefore, the "indirect agent" would be the contract party empowered to enforce it[488]. The third party can also enforce the contract only against the agent and not against the undisclosed principal.

Therefore, the indirect agency exists in case the following requirements are preserved:

- The agent has sufficient authority to represent the principal and acts within the scope of such authority;
- At the time of contract conclusion, the third party is aware of the existence of agency relationships but does not know the name of the principal. Thus, the agent still acts on behalf of the principal[489].

The legal effect of the indirect agency is that the contract concluded with the third party makes the agent a counterparty to this contract, as he acted in his name and not in the principal's. However, as the transaction is concluded on behalf of and at the risk of the principal, the indirect agency secondarily also engages the principal in the contract. Therefore, in some instances like bankruptcy or the agent's default, the third party and the principal may sue each other directly[490]. Also, a third party who fails to perform the contract is responsible for compensating the damages both to the agent

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486 Kortmann Sebastian, Kortmann Jeroen 'Undisclosed Indirect Representation. Protecting the Principal, the Third Party or Both?' in Busch, D., Macgregor, L., & Watts, P. Agency Law in Commercial Practice. First edition. Oxford, United Kingdom: Oxford University Press, 2016 at p. 86.

487 Verhagen, H. L. E. *supra note* 41, p. 32.

488 Soergel, Hans Theodor, et al. *Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen*. 14. Auflage, Stand: Frühjahr 2022. Stuttgart: Verlag W. Kohlhammer, 2023.

489 Busch, D., (2005) *supra note* 45.

490 Arts 7:420-421 DCC *supra note* 52. For a brief comparative overview see also Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

for his own damage and to reimburse the losses that the principal has suffered[491].

As the doctrine of indirect representation does not imply the creation of a relationship between the principal and the third party, the question of the agent's authority is not raised. Thus, both cases where the principal has authorised the intermediary to bring him into contractual privity with the third party and those where he has not been covered by the doctrine of indirect representation[492].

The doctrine of the undisclosed principal is narrower and applies only to cases where the agent acts within the scope of the granted authority to create a valid relationship between the principal and the third party, therefore, it could be stated that cases of 'undisclosed agency' fall within the civil law doctrine of indirect representation. Both doctrines allow the principal to participate in commercial transactions without disclosing his name. It is especially evident from the cases of intermediary's insolvency when the principal is allowed to sue under a contract that was not concluded in his name.

Therefore, while the mechanisms of application differ, the practical consequences of two doctrines share common ground. The civil law doctrine of indirect representation can be compared to the common law concept of partially undisclosed principal. The requirements are compatible: the third party is aware of the existence of the agency relationship; however, does not know the identity of the principal.

Situations where the principal is partially disclosed is a grey area of common law agency since the agent may bear potential liability to a third party who is not aware of the principal's identity. If the principal's identity is revealed, he assumes liability towards the third party. However, contractual constraints may prevent the agent from disclosing the principal's identity, placing the agent in a potential liability situation with limited avenues for mitigation.

For instance, in Narravula v. Perosphere Tech., Inc.[493], it was determined that agents acting for a partially disclosed principal are bound by the agreement's arbitration provision. The court stated that "*An agent for an undisclosed or partially disclosed principal will be liable even if the third party is aware that an agency relationship exists, so long as the agent fails to disclose the principal's identity. And where the agent of an undisclosed or partially disclosed principal is sued on a contract that includes an arbitration clause, the agent will be compelled to arbitrate*".

The concept of unidentified principal is also defined in the Restatement (Third) on Agency §6-02, which suggests two options for the agent acting with actual or apparent authority: 1) the principal is a party to the contract, or 2) the agent is a party to the contract unless agreed otherwise[494]. Thus, the Court in the Narravula case based the decision on the Restatement (Third) on Agency.

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491 Art. 7:419 DCC *supra note* 52; Art. 3:303 PECL *supra note* 40; Art. III- 5:401 Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009) *supra note* 48.

492 Busch, D., (2005) *supra note* 43; Kortmann S., Kortmann J. (2016) *supra note* 486, at p. 86.

493 Narravula v. Perosphere Tech., Inc. NY Slip Op. 50510(U) (2021).

494 § 6.02, American Law Institute. (2006) *supra note* 63.

The above scenario depends on the construction of the contract concluded with the third party. If the third party knew about the principal's existence and is willing to conclude the agreement with the unknown principal, there should not be an issue with the principal stepping into the contract later.

Although the introduction of the concept of unidentified principal seems to be well-accommodated to the needs of modern commerce, it burdens the parties with proof of intention and presents difficulties when the agent acts on behalf of multiple principals. Doubts arise within the English case law, since courts are usually guided by the view that the agent acting on behalf of an unidentified principal does not become the party to the contract[495] and that the willingness of the third party to contract with the principal shall be presumed[496].

Moreover, if the agent is acting on behalf of an undisclosed principal, it is not sufficient to merely add a vague reference to the existence of the principal or to indicate that the agent is acting on behalf of the principal. The identification of the parties must be clear to ensure that the third party is aware that the agent is concluding the contract on the principal's behalf. A similar rule was defined in the case Teheran- Europe Ltd v S. T. Belton (Tractors) Ltd, where the agent included the ambiguous term "our clients" in the contract, which could imply the "customers" of the agent, not necessarily those participating in the contract. Thus, the fact that the principal is "known" is insufficient to create a proper relationship with third parties. Instead, the intentions shall be proven.

3.1.2. Peculiarities of undisclosed agency from the perspectives of international and soft law instruments

A cross-border commercial agency involves appointing a commercial agent in one country to represent and promote the business interests of a principal internationally. In a commercial agency, all parties are usually businesses that operate internationally and require local contacts to navigate the market. Regardless of jurisdictional regulations, within the duly authorised agency, a direct contractual relationship is formed between the principal and the third party[497].

From the external agency relationship perspective, the agent cannot be considered an individual acting in his own legal capacity like other subjects of legal relations. The agent does not possess basic contractual rights like freedom of contract. Agent's actions are constrained by the limits of their authority and the principal's instructions. Once the contract is concluded, the agent "falls out" of the agreement, having fulfilled their function.

The agent in the disclosed agency relationship is acting on behalf and in the name of the principal; otherwise, following the specific organisation of the agency within

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495 N.J. Vlassopoulos Ltd. v. Ney Shipping Ltd., The Santa Carina (1977).

496 Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd. (1968).

497 Грабовий О. *supra note* 10 at 50.

jurisdictions following the continental law legal tradition, the agent acting in his own name on behalf of the undisclosed principal fails to create valid relationship between the principal and the third party and becomes contractually liable to the third party. In this case, the third party is not aware of the agency arrangement between the agent and principal and considers the agent a contracting party. Certain exceptions exist in case when the agent is claiming bankruptcy.

The application of insolvency laws under the civilian legal systems does not preclude the possibility of substituting parties in respect of the whole contract, provided the third party agrees to it. In such cases, courts may grant the principal a right of direct actions against the third party in two situations: where the agent goes bankrupt or fails to perform his obligations to his principal or to the third party[498]. The rule, however, is not applicable when the unauthorised agent acts on behalf of an undisclosed principal. Thus, the contract is deemed to be concluded between the agent and the third party, and the agent fails to make the principal bound.

The right of an undisclosed principal to intervene and establish a contract with a third party is recognised in civil law and common law systems. During the drafting of the UNIDROIT Principles of International Commercial Contracts 2004, there was a proposal to allow an exception whereby an undisclosed principal and an unaware third party could overcome the agent who stepped outside the scope of the granted authority and contract directly with each other. However, this clause was later removed, limiting the possibility of the undisclosed principal to contract directly with the third party. Conversely, the DCFR provides the third party with the right to bypass the agent, depending on the undisclosed principal's decision to intervene[499].

Although this rule appears fair and balanced, it still benefits principals by protecting them against the insolvency of their agents. Thus, to introduce a proper balance, the same right shall be granted to the third parties against the undisclosed principal, regardless of whether the principal reveals their identity.

Article 13 of the CISG provides some degree of reconciliation, stating that in case the agent fails to fulfil or is unable to fulfil his obligations to the third party, the third party may exercise against the principal the same rights they have against the agent, subject to any defences which the agent may raise against the third party and that the principal may raise against the agent[500]. The same right is granted to the principal to exercise the rights against the third party.

Thus, in case the agent becomes insolvent or fails to perform his duties in any other way, the undisclosed principal can both sue and be sued despite not being a party to a contract that was concluded on his behalf. A similar right is defined under the PECL, where both the principal and the third party can address each other, bypassing the

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498 Kortmann S., Kortmann J. (2016) *supra note* 486, at p. 86.

499 Art. III - 5:401 and III. - 5:402, Von Bar, C.; Clive, E. (2009), *supra note* 48.

500 Art. 13 (2)(b) 1983 Geneva Convention on Agency in the International Sale of Goods. See Evans, Malcolm. 'Explanatory Report on the Convention on Agency in the International Sale of Goods'. *Os-12 Unif. L. Rev.*, 1984, 72.

agent in case the latter has gone insolvent[501]. Thus, aligning the approaches and introducing the same in UNIDROIT Principles can be recommended.

There are exceptions when the undisclosed principal may not sue or be sued by the third party under the contract entered by the agent in his name. As relational contracts, agency agreements may consider the identity of the contracting party a material clause. For example, the third party may be willing to contract with the agent due to their trustworthiness or reputation, and changing the counterparty would undermine that trust. Also, the third party may never have contracted with the principal had they been disclosed; thus, the agent would be the one sued under such a contract.

If the principal wishes to stay unnamed for various reasons, international legal acts vary as to how they regulate the agent's actions on behalf of unidentified principals. The UNIDROIT Principles distinguish between only two types of agency: disclosed and undisclosed[502]. The legal instrument is, however, silent on whether the third party shall be aware only about the existence of the principal or his identity as well. Considering that the document generally aligns with common law, it can be assumed that only the existence of the agency relationship is important; thus, the identity of the principal may not need to be revealed. However, it is suggested that this norm be clarified in the next revision to avoid misunderstandings.

A similar rule was incorporated into Article 12 of the CISG: "Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example, by reference to a contract of commission, that the agent undertakes to bind himself only"[503].

PECL, which generally follows the continental law approach, tried to unify certain concepts of both legal families, including the concept of unidentified principal. Accordingly, the document states that an agent who fails to disclose the principal's name within a reasonable time after a request from the third party becomes bound by the contract[504]. From the structure of the clause, the consequences for the agent who fails to disclose the principal's identity within the designated time frame are similar to those in the case of unauthorised agency. Thus, the agent will be liable to pay damages to the third party.

A similar clause is included in Article II. - 6:108 of DCFR with one difference: the latter treats an agent who acted on behalf of the undisclosed principal as having acted 'in a legal capacity', which could be interpreted as permitting the agent to sue[505]. However, this is questionable, as the agent does not become a party to the contract but

501 Kortmann, S. C. J. J., & Kortmann, J. (2016), *supra note* 486, pp. 83-94.

502 Ar. 2.2.3 UNIDROIT (2016). *supra note* 46.

503 Art. 12, Convention on Agency in the International Sale of Goods *supra note* 11.

504 Art. 3:203 Lando, O., & Beale, H. G. *supra note* 47.

505 Reynolds, Francis, 'Unidentified Principals in Common Law', in Busch, D., Macgregor L., Watts P. (2016) *supra note* 486.

only incurs personal liability. Given the generality of the clause, it unfortunately cannot provide a long-term solution to the problem, let alone unify the approach between the different legal families. Although the heading of the article is "unidentified principal", the text of the clause is if changed to the "principal whose identity is to be revealed later", generally omitting the cases where principals do not expect their identity to be revealed at all.

Following the construction of the highlighted provisions, it is obvious that soft law instruments do not permit the principal to remain undisclosed at all stages, assuming that the identification can follow later. At the same time, the third party is allowed to request the agent to identify the principal within a reasonable time. If the third party requests the agent to reveal the principal's identity and the principal objects, this places the agent in a difficult position. On the one hand, there is the possibility of being liable under the contract with the third party; on the other hand, the agent risks infringing the duty of loyalty and confidentiality to the principal. Therefore, if the agent is acting within the limits of their authority, there should not be any obstacles to performing the contract without the principal being identified.

3.2. Peculiarities of apparent authority of a commercial agent

3.2.1. Appearance of authority to the third party

The existence of apparent authority is being recognised by relying on the third party's reasonable belief in the agent's appearance of powers. Within the doctrine of apparent authority, the agent has only the external legal power to perform without the corresponding internal justification. Therefore, it is believed to be included in the external agency relationship.

The doctrine originated in common law under the name of *ostensible authority* and describes the situation when the third party reasonably believes that an agent is legally authorised to bind the principal with his actions[506]. The definitions of apparent authority are not unified; some of them might even be contradictory. However, what is common is that the apparent authority is a manifestation of authority communicated to the third person; thus, it has an external nature and flows from the principal to the third party rather than to the agent.

The court in the AAA Tire opinion gave an excellent description of the concept:

"The concept of apparent authority only comes into play when the agent has acted beyond his actual authority and has no permission whatsoever from his principal to act in such a manner. The principal will be bound for such actions if he has put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has the authority to act for the principal. The facts and circumstances of each case must be examined to determine the reasonableness of the third

506 State Farm Mut. Auto Ins. Co. v. Johnson, No. 14SC890, 2017 WL 2417764 (2017) (Citing § 2.03, American Law Institute. (2006) *supra note* 63.

party's belief. One must look from the viewpoint of the third person to determine whether an apparent agency has been created. In transactions between businessmen, the nature of the business and the customs and the usages within the trade can be important factors to be considered[507]*".*

In commercial agency relationships, cases could go beyond the conferred. Thus, *Denning L.J.* correctly defined it as follows: "Ostensible or apparent authority is the authority of an agent as it *appears* to others[508]".

Apparent authority deals with cases that border on unauthorised actions when the situation is so urgent that the agent does not have time to obtain approval from the principal. Thus, the agent can rely on the manifestation of authority by the principal, while not having actual one. By recognising the presence of apparent authority, the agent acquires justification for his actions and consequently creates legal consequences for the principal and the third party.

By acknowledging the existence of apparent authority, courts, legal doctrine, and certain cases of positive law have developed a means to protect the interests of third parties who rightfully and reasonably believe that the agent's acts were fully authorised at the time of contract conclusion.

Apparent authority can pose risks to businesses and their owners by allowing agents to create obligations and liabilities without sufficient authority. Some even argue that the doctrine of apparent authority confers no authority at all. However, it would be a mistake to disregard it altogether.

Being comparatively new for common and continental law[509], there is no unified approach regarding the doctrine of apparent authority, even within the same legal system. The English law view on apparent authority differs significantly from the American law position, as the former regards the concept of estoppel as the basis[510]. At the same time, the latter sticks to the objective theory of agency, which is directly derived from the objective theory of contract. Moreover, a disparity marks the development of the doctrine within Europe itself, with the French system identifying authority and mandate. The German system distinguishes these two ideas[511]. Thus, the apparent authority is seen as quasi-authority due to the absence of real powers conferred to agent that become real only in case of legal intervention[512].

A good definition of the concept of apparent authority was given by the Restatement (Third) of Agency as "the power held by an agent or other actor to affect a

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507 Holmes, Wendell H., and Symeon C. Symeonides. 'Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law'. *Tulane Law Review* 73 (1999 1998): 1087.

508 Hely-Hutchinson v. Brayhead Ltd *supra note* 371 at 583.

509 First mentioning about the apparent authority appeared in Pothier, Robert Joseph. *Traité des obligations*. Debure l'ainé, 1761; The doctrine was applied for the first time by firstly applied by Lord Ellenborough in Pickering v. Busk 15 East, 38, 13 Rev. Rep. 364 (1812).

510 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, at p.375.

511 Müller-Freienfels, W. (1957), *supra note* 34.

512 Munday, R. (2010), *supra note* 33 at p.82.

principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on the principal's behalf and that belief is traceable to the principal's manifestations[513]".

Restatement, Second of Agency (1958) defines a general rule when all the "acts are to be interpreted in the light of ordinary human experience". If a principal puts an agent into, or knowingly permits him to occupy, a position in which, according to the ordinary habits of persons in the locality, trade, or profession, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise. The content of such apparent authority must be determined from the facts[514].

Therefore, for the apparent authority to arise, three elements are required: 1) an act by the agent or his principal justifying a belief that an agency relationship exists, 2) the principal has knowledge of the general circumstances, and 3) a third party is reasonably relying on his belief in the apparent agency relationship[515].

3.2.1.1. Actions contributing to the creation of the impression of the existence of the agent's authority.

The basis of apparent authority is the actions of the principal and not the agent. Allegations may be made either expressly or inferred from the conduct to show that the agent is duly authorised to act on the principal's behalf. Presenting the proof of such would be sufficient for the third party to invoke the principal's liability. Manifestation can also be made by way of a written document.

A similar approach may be inferred from the definition of alleged representation in PECL, Geneva Convention, and UNIDROIT Principles. UNIDROIT principles use the phrase "the principal causes the third party reasonably to believe," which is interpreted as including both the active and implied actions that lead to the third person's belief in the fact of a power of attorney[516]. However, the linguistic analysis of soft law provisions does not provide a basis for such an expansive interpretation[517].

Manifestation of authority involves appointing the agent to the position, which implies specific actual authority[518]. Therefore, when the agent manifests apparent authority to the third party without having actual authority, the third party cannot reasonably rely on such manifestation.

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513 American Law Institute. (2006) *supra note* 63.

514 American Law Institute. (1958) *supra note* 193.

515 Mich Jr, Robert A. "Actual versus Apparent Authority - It's Easier to Become Liable than You Think" (2012). [visited 2024-05-15] https://www.kayandandersen.com/a46---actual-versus-apparent-authority---itrsquos-easier-to-become-liable-than-you-think.html

516 Ar. 2.2.3 UNIDROIT (2016). *supra note* 46. Art. 10 Convention on Agency in the International Sale of Goods *supra note* 11; Art. 3:201) PECL *supra note* 40.

517 Jurkevičius, V. (2014). *supra note* 43, at p.85.

518 Sec. 54 (3) and 56 German Commercial Code (HGB), *supra note* 51.

Mixed legal systems have a unique requirement that the representation must be of such nature that the principal could reasonably expect it to be acted upon[519]. Common law representatives criticise this approach for being unfair to innocent principals. In countries with civil law order, like France or Belgium, where the liability historically was based on tort, follow the *l'apparence* doctrine - based on the principal's fault[520].

Agent's authority usually comes from the principal's conduct. When the agent is placed in a position where he possesses certain powers to do whatever incidental, usual, or customary within the course of business, it will be reasonable for third parties to infer that the agent does have this authority[521]. Hence, it is sometimes considered that the actual or apparent authorities "generally co-exist and coincide"[522] and that the same evidence, which would justify a court in implying an agency, would often equally justify estopping an alleged principal from denying it. This explains why "implied" authority is often confused with the 'apparent" authority.

Nevertheless, the distinction still exists and is revealed in the principal's actions. Thus, to claim implied authority, it must be shown that the acts performed by the agent were necessarily incidental to the proper performance of his agency or that trade, or profession, or other practice justified it. Whereas, to prove apparent authority, it is necessary to show that the principal's conduct was to mislead the third party and to induce him to rely upon the existence of agency.

Rarely does the principal undertake specific actions to make the third party believe in the existence of authority; more often, this belief is inferred from the principal's inactivity. Limiting apparent authority to the direct actions of the principal would lead to an incomplete assessment of the factual circumstances. In establishing the relationship between the principal and the agent, the court should consider whether the agent received remuneration from the principal, or the time elapsed since the previous transaction[523].

The theory of risk developed by the Dutch legal doctrine presumes that if certain circumstances fall within the risk area of the principal, they may lead to the application of alleged representation. In other words, the idea of the representative's direct action enshrined in the law is supplemented by the principle of risk in court practice[524]. It is still necessary to prove the principal's direct action to recognise the existence of apparent authority. This is related to the fact that indirect behaviour cannot justify disregarding the principle of autonomy of will.

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519 Monzali v. Smith 1929 AD 382.

520 Only the reasonable belief of a third party is sufficient for the principal's liability to arise.

521 Rama Corporation Ltd. v. Proved Tin and General Investment Ltd., 1 All E.R. 554 (1952), cited in Fabunmi, J. O. (1980). *supra note* 378.

522 Freeman & Lockyer v Buckhurst Park Properties Ltd *supra note* 348.

523 Jurkevičius, V. (2014), *supra note* 43 at p.92 analysing the case Lietuvos Aukščiausiojo Teismo 2012 m. kovo 20 d. nutartis civilinėje byloje *uždaroji akcinė bendrovė „Sareme "v. UAB „Wood & Houses* "(bylos Nr. 3K-3-102/2012).

524 Jurkevičius, V. (2014). *supra note* 43, at p.89.

The principal's liability arises from the belief established in the mind of the third party. However, the representation must be made to a particular individual who relies on it or under circumstances that justify the inference that he knew of the representation and acted upon it[525].

The existence of apparent authority usually implies the violation of the principal's autonomy of will. Thus, it is important to establish whether the agent in any way contributed to forming the third party's belief in the presence of authority. If the agent leads the third party to believe in the existence of authority without the principal's surrounding acts, the direct relationship between the agent and the third party is deemed to be established resulting in consequences solely for the agent.

However, if the agent contributed to forming the third party's belief only to a certain extent, the apparent authority can still be proved. Moreover, the principal can also be held responsible for allowing the representative to perform specific actions that caused the third party to have a reasonable belief[526].

Furthermore, the principal's liability under the doctrine of apparent authority may arise when the agent exceeds the scope of the granted authority. This position was formulated in the First Energy (UK) Ltd v. Hungarian International Bank[527], the principal was held responsible for the agent's unauthorised actions since the factual circumstances were sufficient for the formation of the third party's reasonable belief in the existence of sufficient authority.

Under Ukrainian legal doctrine, there is no unified approach regarding "apparent authority." Some scholars connect it with the appointment of the agent to a specific position, which allows him to act *ex officio* without any other documents. This approach implies that the basis for the authority to arise is the conclusion of an employment contract. Others, however, deny the possibility of considering a person acting under the employment contract as an agent, following the requirements of the "separation theory" [528].

Therefore, only the principal's allegations of the existence of the authority shall invoke the application of apparent authority. The impression of authority incurred from the agent's actions shall be discussed under the doctrine of unauthorised agency, and the rules of false procurator liability should be applied. Despite the doctrinal developments, the implied actions of the principal shall not be considered a valid ground for liability. Nevertheless, to provide the comprehensive analysis of the case, the court must consider all the factual circumstances, including the principal's behaviour that led the third party to believe in the representative's powers.

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525 Fabunmi, J. O. (1980), *supra note* 342.

526 Seavey, W. A. (1964), *supra note* 376 cited in Jurkevičius, V. (2014), *supra note* 43, at p.90.

527 First Energy (UK) Ltd v. Hungarian International Bank 2 Lloyd's Rep 9 (1983).

528 Цюра В. *supra note* 7 at 254.

3.2.1.2. A third party's reasonable belief in the authority of the representative

Another condition of apparent authority is that the third party's belief in the fact of the agent's authority is reasonable.

A reliance on the representation means a causal link must be established between the representation and the third party's actions. Thus, a third party must show that they acted reasonably and in good faith and relied on the manifestation of the authority based on the evidence available at the time of the interaction[529].

Lord Lindley in *Farquharson v. King* said: "Holding "out to the world" is a loose expression; the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it"[530].

Therefore, the third party's good faith is important in establishing the apparent authority[531]. This factor is especially important for the courts in countries with the continental legal system. France, Belgium, and the Netherlands base their doctrine on the protection of the third party's *reasonable (legitimate) belief*[532]. Reasonableness is usually associated with the *bonus pater familias* standard of conduct, assessing whether, in similar circumstances, an ordinarily attentive and careful person, without taking measures, would believe in the agent's credentials.

Moreover, the agent's professional status and behaviour shall be assessed to determine whether they create the third party's belief in the presence of authority. Decisive factor is whether or not the agent acted in his own interest while determining the third party's belief. German law does not explicitly require a reasonable belief. However. it seems unlikely that a court would allow a third party to invoke apparent authority where the belief of the third party was unreasonable[533]. For instance, if the agent uses images, email addresses, or business cards that show the validity of his actions, the courts could justify the third party's belief[534]. However, the mere presence of these factors should not be considered a determining factor.

Third parties are generally treated as the weaker parties in the agency relationship; thus, lower standards of care are applied in comparison to those applicable to the principal. While the principal's liability can be established even for unauthorised acts of the agent when a proper level of security has not been established, for the third party, it is sufficient to demonstrate the impression of authority in the agent's acts. Higher

529 Bedford Insurance Co. Ltd. v. Instituto de Resseguros Do Brasil B. No. 4785, 1983. [visited 2-24-03-22] http://www.uniset.ca/other/css/1985QB966.html.

530 Farquharson v. King A. C. 325 (1902) para. 341.

531 Munday, R. (2010), *supra note* 33 at p.82.

532 Cass Ass Plen 12-12-1962, Banque Canadienne Nationale D 1963, J 277.

533 Jurkevičius, V. & Pokhodun, Y. (2018) *supra note* 19.

534 Derbam v Aner Life Insurance Co Ltd 56 FLR 54 (1987).

standards apply when the principal or the third party is a legal entity[535].

While assessing the legitimacy of the third party's belief, the court will assess the circumstances of the case (such as employment and education) that would show whether the third party was more likely to fall victim to the appearance of the agent's authority. Therefore, characteristics such as the level of trust, longevity of cooperation, professionalism of the third party, and ability to verify the agent's actions with the principal shall be considered while determining the reasonableness of the belief[536].

To establish the doctrine of apparent authority, the third party can also rely on the *alteration of its position resulting from the reliance on the agent's authority*. In some cases, to invoke the doctrine of estoppel, courts require evidence that the party's position has been altered to their detriment within the agency relationship[537].

Thus, the Diplock L.J. declares in Freeman & Lockyer that: 'the representation, *when acted upon by the contractor by entering a contract with the agent, operates as an estoppel*, preventing the principal from asserting that the contract does not bind him. It is irrelevant whether the agent had actual authority when entering the contract or not[538]".

All conditions should be met to bind the principal to the acts performed by the agent with apparent authority; otherwise, the principal would be able to resile from a contract for being unauthorised. The third party always bears a risk that the agent acts without authority, regardless of how reasonable it was for the third party to rely on the agent's manifestations of authority. Nevertheless, each situation must be assessed separately. In most cases, the risk is apportioned between the principal and the third party, since an agent acting without authority is not personally responsible[539]. Such a compromise is the subject of the doctrine of apparent authority.

Under the doctrine of apparent authority, the third party can sue the principal, but the principal cannot do the same, as he must understand that his agent did not have the authority to act. The principal cannot claim the estoppel doctrine as well[540].

Considering the differences that historically emerged in common law and continental law, soft law instruments combine their most prominent features of the doctrine of apparent authority. In general, UNIDROIT Principles align with the English law in considering apparent authority as a doctrine based upon estoppel, preventing the principal from denying representation of the existence of authority that does not in truth exist[541].

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535 Busch, D. Unauthorised Agency in Dutch Law. In Busch, D., & Macgregor, L. J. (2009) *supra note* 16, p. 142.

536 Saintier, S. Unauthorised Agency in French Law. In Busch, D., & Macgregor, L. J. (2009) *supra note* 16, p. 11.

537 Lord Robertson in George Whitechurch Ltd v. Cavanagh AC 117, 135 (1902).

538 Freeman & Lockyer v Buckhurst Park Properties Ltd *supra note* 348.

539 Müller-Freienfels, W. (1957), *supra note* 34.

540 Jurkevičius, V.; Pokhodun (2018), *supra note* 18, at 567.

541 Art. 3:201, Lando, O., & Beale, H. G. *supra note* 47.

Under the UNIDROIT Principles, both principal and agent are bound to each other by acts within the agent's apparent authority as much as by acts within its actual authority[542]. Only the third party may invoke apparent authority there[543] in case he had a reasonable belief that the agent possessed sufficient authority to act on the principal's behalf.

When it comes to the power to hold the other party bound by the contract, English law and the UNIDROIT Principles, the principal is bound under the contract even if the agent's act fell outside the scope of actual authority but within the scope of his apparent authority. Under the PECL, an act within the agent's apparent authority automatically binds both the principal and third party, so no question of speculation can arise[544].

Thus, views on apparent authority are quite controversial, with many unregulated issues remaining. However, in general terms, apparent authority shall be applicable where the principal's behaviour or other related circumstances led the third party to reasonably and honestly believe that the agent has the necessary authority, although in reality, the representative acts as a falsus procurator.

3.2.1.3. Balancing the interests of fourth parties in case of application of apparent authority

The original concept of representation defines three parties who, by interacting with each other, create a valid relationship. However, the development of commercial relations on the international scale has created the need to consider the interests of parties who typically do not fit into the classic tripartite model, especially in cases where the agent acts outside the scope of authority.

While the introduction of fourth parties' concept is not commonly used yet, it cannot be denied that the relationship of representation might bear a potential risk to the interests of parties who are not directly involved in the original relationship but are closely related. Problems are particularly prevalent in cases of unauthorised agency when the agent without the due authority enters the transaction with the third party while the principal engages in a similar transaction with another party. Thus, while recognising the transaction made by the agent, the principal may expect the party to the second transaction (the fourth party) to also claim fulfilment of the obligation in kind. Moreover, in Dutch law, the right of the party to the second transaction takes priority over the right of the third party that contracts with the unauthorised agent[545].

The question arises as to how to balance the interests of the fourth parties who act in good faith toward the other participants in commercial agency relationships. It is

542 Art. 3:202, Lando, O., & Beale, H. G. *supra note* 47.

543 Art. 2.2.5(2). UNIDROIT (2016). *supra note* 46. See also Geneva Agency Convention, Art. 14(2).

544 Bennet, Howard. 'Agency in the Principles of European Contract Law and the Unidroit Principles of International Commercial Contracts (2004)'. *Unif. L. Rev. Ns* 11: 771.

545 Art. 3:69(5) DCC *supra note* 52.

considered fair and reasonable to prioritise the transaction that was concluded earlier, allowing the party to the other transaction to defend its violated rights by demanding damages. According to the principle, the bona fide acquirer cannot be deprived of property, so another creditor, who cannot exercise the right to demand fulfilment of the obligation in kind, may defend their violated rights only through the mechanism of compensation of losses.

The approach surely complicates already complex agency relationships, which is why many countries are reluctant to introduce these legal rules on protecting the fourth party's reliance interests into the national law. However, the New Zealand includes the norms that prevent amendment or cancellation of the third party's right once the third party's position has been materially altered by reliance on the promise by either the third party or by any other person[546]. The norm allows a related party to the initial contract to rely on the third party's expected benefit and suffers loss in case the third party's position has been altered under the initial transaction.

This position was also established in the case of the American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp[547]. The dispute involved the legal relationship established between the principal (American Society of Mechanical Engineers), issued a conclusion by their unauthorised representative to the third party (McDonnell and Miller), which affected the interests of the fourth party (Hydrolevel Corp.). Consequently, Hydrolevel Corp. suffered significant losses that eventually led to its bankruptcy. As a result of the case involving the third party, the court recognised the existence of apparent authority.

While the American Society of Mechanical Engineers, as the representative in the legal relationship with McDonnell and Miller, neither caused nor could have caused Hydrolevel Corp. to believe that the representative had the necessary authority—since the conclusion was not addressed to Hydrolevel Corp. but to McDonnell and Miller—the fact that the loss suffered by the fourth party was caused by the actions of a bona fide third party was recognised as a sufficient basis for the fourth party to rely on the doctrine of apparent authority.

Inclusion of the fourth parties' concept clearly turns the contracting parties to insurers of the interests of parties other than the third parties in the relationship, burdening them to take extra steps in safeguarding their position from having their rights abrogated even if neither they nor the third parties could foresee the potential issues. Also, it might seem unreasonable to check if any other party relied on the actions of the bona fide third party in a way that could affect their legal position. This explains the reluctance of the national law to introduce the extensive rules on this issue[548].

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546 Sec 5(1)(a) Contracts (Privity) Act 1982 No 132 (2017), Public Act Contents – New Zealand Legislation'. [accessed 02-09-2025]. https://www.legislation.govt.nz/act/public/1982/0132/latest/DLM63971.html.

547 American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp, 46 US 556 (1982).

548 Britain, Great, and Law Commission. Privity of contract: contracts for the benefit of third parties: item 1 of the Sixth Programme of Law Reform: The Law of Contract: presented to Parliament by the Lord High Chancellor by command of Her Majesty July 1996. HM Stationery Office, 1991, p.110.

The approach is partially supported by the case law. For instance, in the case Mlynarczyk v. Smith the court rejected the motion of the plaintiff's decedent against the agent acting on the basis of apparent authority, due to the reasoning that the fourth party, such as the plaintiffs' decedent, cannot be covered by the doctrine of apparent authority as the latter did not have any contract with the principal[549]. Though the Court has rejected the motion, it can be inferred from the reasoning that if the fourth party has a valid contract either with the principal or the third party, the doctrine of apparent authority can indeed be extended to cover related fourth party as well.

Also, the Restatement (Third) states that a principal may be subject to vicarious liability for a tort committed by an agent in dealing with a third party when the action taken by the agent acting with apparent authority constitutes the tort or enables the agent to conceal its commission[550]. This condition is also considered applicable to protect the interests of fourth parties.

Thus, in case of Jablonski by Pahls v. United States[551] the plaintiff's minor daughter filed a lawsuit against the hospital's psychiatrists who committed malpractice resulting in her mother's death. The court ruled that the doctors committed separate acts of malpractice by negligently failing to report the findings and to take action to protect the foreseeable victim.

From the perspective of the principle of sustainability, fourth parties may not only be protected by the consequences of applying the doctrine of apparent authority but also rely on it to defend their violated rights. As already mentioned, the doctrine of apparent authority presumes that the third party must prove reliance on the manifestation of authority while contracting. This rule can also be extended to fourth parties who had a reasonable belief that the contract concluded between the principal and a third person is valid due to the agent's actions performed on principal's behalf. If the fourth party suffered injury as a result of the third party's action related to the principal's manifestation concerning the agent's authority. Such reliance shall be considered a valid ground for claiming the presence of apparent authority[552].

3.2.2. Interrelation between alleged and implied authority in international commercial agency

Although the concepts of apparent and implied actual authority are well-separated in theory, identifying them in practice can be complicated, especially in jurisdictions that apply the same legal consequences to both cases. These blurred lines leave the parties to rely solely on subjective criteria while defining which concept to apply[553].

549 Mlynarczyk v. Smith, 2001 Ct. Sup. 10688 (Conn. Super. Ct. 2001)

550 § 7.08 restatement (Third) on Agency. *supra note* 62.

551 Jablonski by Pahls v. United States, 712 F.2d 391 (9th Cir. 1983).

552 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, p.230.

553 Kötz, Hein, and Axel Flessner, eds. *European Contract Law. 1: Formation, Validity, and Content of Contracts; Contract and Third Parties*. Oxford: Clarendon Press, 1997.

The utilisation of apparent authority infringes upon the freedom of the principal's will, as the agent's actions breach the boundaries set by the principal. The agent was never empowered to enter into the contract or undertake any other legally significant action. However, this exception is applied primarily to safeguard the third party's interests. In the case of implied authority, the agent is directly manifesting the will of the principal, as the authority is an inherent component of the mandate or arises from the implicit intentions of the principal[554].

Implied authority stems from the actual authority granted to the agent and is inherent in business relationships. It is impractical to define every possible power the agent may require performing the task under the mandate agreement or power of attorney. Implied authority complements actual authority, ensuring that the agent remains duly authorised while carrying out their duties. On the other hand, apparent authority arises when the agent acts beyond the scope of the granted powers. Unauthorised actions are validated through the application of the concept of apparent authority, resulting in legally binding consequences between the parties without the need for ratification[555].

Therefore, for the apparent authority to apply, the agent must exceed the conferred powers. Distinguishing between apparent authority and implied authority can be challenging, due to the difficulty in determining whether the specific agent's actions were inseparable from the specific powers granted by the principal. When assessing the scope of the agent's rights, we need to consider the third party's understanding of the agent's authority and the principal's goal in the relationship.

It is important to stress that the distinction applied above shall not be interpreted as a separation between the implied and apparent authority based solely on the type of relationship in which they are applied. While it may be perceived that apparent authority has a more significant influence on external agency relationships[556] regarding possible liability and changes of parties, it cannot be viewed as a feature of strictly external relationships.

The determination of the content of authority within an agency relationship must be assessed from the perspective of both an internal and external relationship[557]. When apparent or implied authority is established, it leads to legal consequences in both internal and external legal relationships.

When analysing agency relationships, apparent and implied authorities may supplement each other. Thus, apparent authority may be applied only to certain acts of the agent, while the rest may be covered by implied powers[558]. For instance, when an agent has the power to conclude contracts for a certain amount, a third party may invoke apparent authority if the agent exceeds that amount, provided the conditions for

554 Jurkevičius, V., and Bublienė B. (2021) *supra note* 390.

555 Busch, D. (2009), *supra note* 26.

556 Verhagen, H. L. E. *supra note* 41.

557 Stoljar, S. J. (1961). *supra note* 37.

558 Jurkevičius, V., & Bublienė, R. (2021*) supra note* 390 at p.94.

apparent authority are proven.

As for the burden of proof, in cases of apparent authority, the third party must prove the conditions for its application, as the doctrine relies on their reasonable belief in the existence of the agent's authority at the time of contract conclusion[559].

In the case of implied authority, there is a presumption that the agent possesses all necessary powers. Therefore, the third party needs only to present factual circumstances, while the principal must prove the contrary (e.g., that the exercise of certain powers was prohibited or limited at that time), which shifts the burden back to the third party[560].

Under German law, there is a concept of Duldungsvollmacht, which refers to authority granted by the tolerance of actions. This concept adds to the confusion in distinguishing between implied and apparent authority. It is linked to situations where the principal is aware of the agent acting outside the scope of granted powers or without any authority at all and does not interfere.

While Duldungsvollmacht is usually described as a type of apparent authority, it can also be considered part of implied authority. This conclusion can be drawn from the fact that English sources refer to Duldungsvollmacht as a type of constructive authority[561].

Applying Duldungsvollmacht as a type of implied authority may require an unnecessarily broad interpretation of the scope of authority since the agent exceeds the rights granted to them or acts without any granted rights. The conditions for apparent authority may also be questionable when the principal knowingly tolerates unauthorised actions not known to the bona fide third party. Such a principal's behaviour may undermine the basic condition for apparent authority.

As Duldungsvollmacht is a type of constructive authority, the distinction should be made between this concept and 'true' apparent authority Anscheinsvollmacht. Cases of constructive authority can be viewed as instances of legal fiction, where the agent is deemed authorised to act, even if authorisation was not explicitly granted. This legal fiction enables the formation of a valid contract, allowing both the principal and the third party to pursue legal action against each other. In such cases, both expectation damages and specific performance may be sought by the parties involved rather than solely relying on reliance damages[562].

The precise legal characterisation of cases involving "true" apparent authority

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559 Vogenauer, Stefan, and Jan Kleinheisterkamp. *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*. Oxford University Press Oxford, 2015. [visited 2024-02-27] https://pay.pbookshop.cn/media/filetype/s/p/1430205759.pdf.

560 Beale, Hugh G., ed. *Cases, Materials and Text on Contract Law*. 2. ed. Ius Commune Casebooks for the Common Law of Europe. Oxford: Hart, 2010. [visited 2023-11-28] https://research.vu.nl/en/publications/cases-materials-and-text-on-contract-law

561 Schmidt-Kessel, M., & Baide, A. 'Unauthorised Agency in German law' in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16.

562 Jurkevičius, V., and Bublienė B. (2021) *supra note* 390.

remains a topic of significant debate. The prevailing view is that it should be equated with constructive authority. However, the third party cannot invoke the unauthorised agency based on Article 179 of the BGB[563]. Some scholars argue that no legal fiction applies in these situations, meaning no valid contract is formed. Instead, it is seen as a mechanism primarily safeguarding the third party's reliance, entitling them to damages for reliance interest rather than expectation damages. Furthermore, it does not grant the third party the right to specific performance. Consequently, in such cases, the principal may not have the right to initiate legal action against the third party[564].

This perspective is relevant to the common law system and some international soft law instruments that follow the common law approach[565]. In contrast, in continental law systems, when the third party chooses to protect its interests based on the rules of apparent authority, the contract between the principal and the third party becomes valid and enforceable by the parties against each other[566].

Distinguishing apparent authority from other types of authority is of great importance since the type of authority defined in each specific case may have an influence within the context of both internal and external agency relationships between the parties.

3.2.3. Reconciling the interests between the parties within the doctrine of apparent authority

Despite the main aim of the doctrine of apparent authority being to protect the interests of the third party, strict conditions of its application have led to the opposite result, securing the principal's interests instead. The principal is typically not interested in applying the doctrine of apparent authority, as it imposes liability on them for actions the agent undertakes without authorisation[567].

Due to the substantive differences in interpreting the legal basis of apparent authority, its practical application also varies, confusing who is being protected[568]. Initially, court practice in the continental law system was based on the principal's liability under the doctrine of apparent authority on fault. Over time, however, both court practice and legal doctrine have shifted focus to protecting the third party's interests by eliminating the burden of proof regarding the principal's guilt and expanding the

563 Art. 16, Burgerliches Gesetzbuch (BGB), *supra note* 50.

564 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16.

565 UNIDROIT (2016), *supra note* 46.

566 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, p. 393-394.

567 Jurkevičius, V. & Pokhodun, Y. (2018) *supra note* 19.

568 See Jurkevičius, V., and Bublienė B. (2021) *supra note* 390 at p. 98 noting that, in England and other common law countries, apparent authority is based on the rule of estoppel, in France and Belgium – on the theory of false belief, in the Netherlands and PECL – on the principle of protection of legitimate expectations, in Germany – on the doctrine of culpa in contrahendo, in the principles of UNIDROIT – on provisions of fairness and prohibition of inconsistent behaviour.

list of circumstances that fall under the principal's risk area. Common law also broadened the condition of representation, applying the doctrine of estoppel, which is interpreted as to what is reasonable to imply within the agency relationship, allowing the application of the doctrine more effectively[569].

Applying the doctrine of apparent authority only to protect third parties could negatively affect the utility of the agency relationship, infringing upon the principal's autonomy of will. Moreover, the principal may also be liable to the third party for damages, particularly compensation for losses incurred.

The theory of risk developed by Dutch courts broadens the list of factual circumstances related to the principal that must be considered when applying the doctrine of apparent authority. Although this contributes to the flexibility of applying implied authority, it raises the question of whether the court's practice ensures a balance between the participants in the agency relationship. The broad list of circumstances regarding the principal's risk can lead to almost unlimited liability for the principal, even for the agent's unauthorised acts.

Application of apparent authority can be seen as a form of liability applied to the principal; however, whether the application of apparent authority implies liability depends on the legal system in which it is applied. Therefore, if the contract concluded by an unauthorised agent is considered valid, its application requires the principal to perform the obligation in kind, and only in case of failure the liability will follow. While in cases where the contract of an unauthorised agent is not concluded, the third party may protect the infringed rights by claiming indemnity. In such cases, apparent authority would be linked to civil liability under the contract (although not perceived as valid)[570].

For the principal it is beneficial to prove the existence of unauthorised agency to transfer the liability to the agent. The agent, in his turn, may be more interested in establishing the apparent authority to avoid negative consequences of unauthorised agency. Similarly, the third party will benefit from the establishment of either implied or apparent authority to hold the principal liable. It is therefore noted that, in a dispute with the principal, the agent and the third party are on the same side, trying to establish that the agent acted in accordance with the authority conferred on them, and the nature of the authority, whether it is apparent or implied, is a secondary issue[571].

Following the idea of apparent authority, the principal cannot be held responsible for something he has no connection to. Therefore, the practice of the French and Belgian courts of applying only the requirement of reasonable belief to recognise the presence of apparent authority is being criticised, since it ignores the principal's interests

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569 Reynolds, F. Apparent Authority. European Review of Private Law. Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at p. 975.

570 See section 3.3. for further analysis.

571 Jurkevičius, Vaidas. "The Legal consequences of apparent authority for sustainable agency relationships." In Law and sustainability: perspectives for Lithuania and beyond/editors: Alessio Bartolacelli, Dovilė Sagatienė, pp. 137-151. Księgarnia akademicka publishing, 2023 at p.146.

by applying the strict liability.

The culpability of the principal's actions should still be established to justify applying the doctrine of apparent authority. Thus, the absence of the principal's fault or relation to the creation of a third party's belief shall preclude the courts from the application of the doctrine of apparent authority.

The German law follows the rule that a single act of the principal is insufficient to create the third party's belief that the agent is duly authorised. The German Federal Supreme Court has reached a similar conclusion by stating that the apparent authority cannot be established when the third party was negligent in relying on the agent's manifestation of authority without requesting verification from the principal[572]. The absence of verification can be withdrawn in case it would jeopardise the conclusion of the transaction. Otherwise, it shall be included in the third party's standard of care. The rule tries to balance the interests of the principal and third party before deciding liability under apparent authority by considering all the circumstances to justify the third party's reliance in good faith upon a contract made with an unauthorised agent.

Therefore, a collision of approaches can be observed: one of which the principal's responsibility is exclusively determined by his own actions, and one in which liability is attributed solely based on the third party's reasonable belief in the agent's manifestation of authority[573].

Applying the least-cost avoider principle could help distribute the risk and balance the interests between the principal and the third party. The principle presumes that responsibility is attributed to the entity that can avoid the damage at the lowest cost.

Therefore, if it is proven that taking the necessary precautions to inform third parties about the limits of the agent's liability outweighs the costs incurred by the third party in exercising due care to verify the agent's authority prior to the conclusion of the contract, the principal should not be held responsible. In this case, the risk of unauthorised actions by the agent falls on the third party. Responsibility is divided between the parties in the legal relationship of representation based on which party had more opportunities to take precautions: the principal to avoid misrepresentation or the agent to assess the circumstances of their actions properly [574].

Thus, assessing the conditions for applying the doctrine of apparent authority from the perspective of the principal and the third party is reasonable. The principal can only be held accountable for the actions of an unauthorised representative if there is some connection - even indirect - between the circumstances leading to the unauthorised action and the principal. Furthermore, these factual circumstances must also

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572 BGH, Judgment of September 17, 1958, 1 Monatsschrift fur Deutsches Recht 30 (1959) cited in 66. Holmes, Edwin R. "Apparent Authority and Undisclosed Principal Under German Law," California Western International Law Journal: Vol. 4: No. 2 , Article 5, 1974 [visited 2024-05-29]: https://scholarlycommons.law.cwsl.edu/cwilj/vol4/iss2/5 at p.358.

573 Reynolds, F. Apparent Authority. European Review of Private Law. Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at p. 975.

574 Rasmusen, E. (2004), *supra note* 32, at p.17-19.

contribute to the third party's reasonable belief in the representative's proper authority. Essentially, a clear causal connection shall be found between factual circumstances related to the principal and those that created the third party's reasonable belief in the agent's authority.

3.3. Agent acting without a proper authorisation

3.3.1. Concept of ratification of actions performed by an unauthorised agent

Under ordinary circumstances, agency arises when a duly authorised agent interacts with a third party on behalf and in the interests of his principal. In some cases, the agent may be tempted to neglect the limits of the granted authority and conclude the contract with the third party, being confident that the principal will approve the transaction later, and the agent will receive the agreed commission from the contract. However, it may happen, that the principal disagrees with the conditions of the contract and refuses to authorise the actions of the agent. Therefore, the agent will have to suffer consequences for concluding an unauthorised agreement.

Rules on representation in France, Germany, the United Kingdom as well as the international and European legal instruments outline that the unauthorised agent is generally unable to form a contract between principal and third party. According to the Dutch law, the transaction is considered to be invalid, while in German law, it is described as *'floating'*, neither void, nor enforceable, nor completely valid. Thus, such an act is *'awaiting'* for either ratification or refusal by the principal or revocation by the third party[575] and it cannot be placed within any of the existing categorisation of void, voidable or invalid transaction[576].

Ukrainian legislator pursued a slightly different approach seeing the transaction as neither null nor void[577]. Thus, before the principal's approval, the act has features of both null and void transaction, however, is can be recognised as valid by the court at any time. Unlike the void transaction, which is valid at the time of its conclusion, but can be declared void by virtue of the court's decision, an unauthorised act is already invalid for the principal at the time of its performance and becomes valid only at the moment of its approval[578].

If the contract benefits the principal or the principal was mistaken with regard to the limits of the agent's authority, it is reasonable and advantageous for the principal to be allowed to ratify transactions initiated by their agents. Moreover, it would be unjust

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575 Neuner, Jörg, Manfred Wolf, and Karl Larenz. *Allgemeiner Teil des Bürgerlichen Rechts*. 12., Vollständig neu bearbeitete Auflage. München: C.H. Beck, 2020, para 49, no.4 et seq.

576 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 388.

577 Харитонов Є. О., (2010) *supra note* 256.

578 Гелецька І. О. 'Представництво без повноважень' *Науковий вісник Херсонського державного університету*. Випуск 5. Том 1. С. 155–159.- 2014.

to deprive the principal of the opportunity to enforce a beneficial contract although concluded without a proper authorisation. Thus, the law of agency offers a mechanism to enable the principal to benefit from such transactions.

The doctrine of unauthorised agency consists of three specific concepts: apparent authority, ratification, and the liability of ***falsus procurator*** (in continental law) or ***the breach of warranty of authority*** (in common law and mixed systems). Within each concept, the law of agency strives to balance the rights and obligations and to align the interests of all the parties[579].

Ratification is a vital component of agency law designed to balance the interests of both the agent and the principal, ensuring that the principal can benefit from actions that were undertaken in their best interest, and for the agent to avoid liability for acting without proper authorisation. It allows agents who have acted in good faith, albeit beyond their initial authority, to retroactively gain the necessary authorisation[580].

Although the doctrine is created to balance the interest of the parties and to fulfil the initial goal of agency, it should be seen as of limited applicability. For the ratification to become valid there are few main conditions to be maintained:

- the principal is in capacity to ratify the act[581];
- the principal needs to be clearly willing to ratify the act;
- the principal knows about all the acts carried out by the agent which either are outside his authority or exist in circumstances where the agent had no authority to perform[582].
- ratification must happen within a certain time limit.

All the conditions are interlinked and cumulative, thus the principal cannot ratify if he is not aware of all the transactions concluded by the agent or if he is not capable to ratify the act.

3.3.2. Unilateral declaration of approval the act performed by the unauthorised agent

There is no strictly defined form of a declaration of ratification. What is common is that ratification is considered to be a unilateral legal act that may be performed expressly or be implied from the manifestation of consent that must unequivocally show that the principal has affirmed the agent's acts (e.g. started to perform obligations under the contract).

The approval of the agent's actions can be implied from the principal's conduct. While this approach is more commonly observed in practice, it is important to note that implied authorisation, silence, or inactivity may not always be sufficient for

579 Pokhodun Y. (2017) *supra note* 191, p. 308-311.

580 Pokhodun Y. (2017) *supra note* 191 p.310.

581 Le Tourneau, Philippe, 'Mandat' *Répertoire de droit civil* 26–52, (2000) at 368.

582 Saintier, S. Unauthorised Agency in French Law. In Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16 at 46.

ratification. In fact, it could lead to estoppel against the principal, preventing them from denying ratification[583].

Nevertheless, under German law, the Court has made an exception for commercial transactions stating that silence may suffice to establish ratification under§ 177 BGB[584]. Courts generally make exceptions to the rule regarding ratification where agents act without authority. In these cases, the courts apply local government laws and regulations to outline the requirements for ratification declarations[585].

The concept of ratification is also known to Ukrainian legal doctrine where the approval (ratification) of an unauthorised act is defined as an action aimed at producing a legal result and should be expressly communicated to draw the attention of others[586]. Such an act is regarded as confirmation by the principal of the existence of agency relationship and agent's authority to represent the principal[587]. The availability of such mechanism allows the parties to restore their relationship retrospectively, benefit from the transaction concluded with a third party, and enable the agent to waive liability, even when fault is present.

Ukrainian scholars agree that ratification is a unilateral act that requires its perception by both a third party and a representative. It expresses the principal's intention to enforce an agreement entered into by the agent in the principal's interests, but with the excess of the powers granted to him[588].

Ratification can be done in written or oral or implied form, however, some Ukrainian scholars such as Y. O. Kharitonov, O. I. Kharitonova, O. V. Startsev consider approval by tacit consent to be possible under the civil law provisions[589]. This position differs from the prevalent perspective, which presumes that mere acquiescence without any subsequent actions aimed at executing a contract should not be regarded as an independent form of approval for unauthorised actions. A significant issue with tacit consent is the difficulty in establishing the true existence of such implicit consent. Moreover, this approach seeks to prevent potential abuse by the principal[590].

Therefore, it is prudent to adhere to the position that ratification must manifest either through an explicit statement, regardless of its form, indicating the approval of

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583 Smith v Henniker-Major & Co, Court of Appeal - Civil Division, July 22, 2002, [2003] Ch 182, EWCA Civ 762.

584 The case was decided by the Reichsgericht in 1921. See Schmidt-Kessel M., Baide A. Unauthorised agency in German law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 122.

585 Schmidt-Kessel M., Baide A. Unauthorised agency in German law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 122.

586 Цюра В. *supra note* 7, at 336.

587 Полтавський, О. В. 'До питання про правочин, який вчиняється з перевищенням повноважень'. *Право і Безпека,* (1), 272-276 at p. 274, 2012.

588 Харитонов Євген, Харитонова Олена, Старцев Олег. Цивільне право України Вид 2. Перероблене і доповнене. Видавництво Істина, 2009. p. 271.

589 *Ibid.*

590 Цюра В. *supra note* 7, at 337.

the unauthorised act, or through the consent implied through the decisive actions that signify the principal's intention to ratify.

According to Lithuanian law, the implied ratification is defined in the Art. 1.79 of the Civil Code. According to the Part 2 there are four cases in which it is presumed that the principal has approved the unauthorised act performed by the agent. Thus, ratification is deemed to be valid where the: 1) the transaction is fully or partially fulfilled; 2) demanded that the other party execute the transaction; 3) secured to another party fulfilment of its obligations; 4) transferred in whole or in part to another person in accordance with that transaction acquired rights[591].

These cases cannot be considered exhaustive, as each case must be separately analysed by the court. For example, if an action performed by the agent, in violation of the limits of mandate, is more favourable to the principal than the authorised one, the action shall be considered approved[592].

Though it may happen that the principal remains silent as to whether he approves the transaction. In such cases, it is essential to assess his knowledge about the agent's actions and contracts concluded, i.e. whether the second condition of ratification is fulfilled. Principal's knowledge alone can amount to ratification in case no action to reject the transaction was done. Nevertheless, the mere silence cannot bind the principal, the assessment of knowledge should be held by the Court in order to decide whether the principal's silence or inaction were sufficient to amount to ratification.

Moreover, Article 15, para. 8 of the Geneva Convention prescribes that any form of the approval shall be sufficient, unless the initial action performed by the unauthorised agent violated the law[593]. There are concerns regarding this, as it can provide a ground for abuse of power by the principal. Thus, if the principal has implicitly authorised the transaction, or failed to take any actions to prevent the agent from concluding a contract, he may rely on a violation of form of ratification. Such an imbalance of positions shall not be generally accepted, as it can greatly infringe upon the rights of the agent and place them in an unfavourable position.

Another crucial requirement for the ratification is that when ratifying, the principal must approve the entire act with the full knowledge of the circumstances surrounding the agent's unauthorised actions. Selective ratification is believed to amount to the contract modification that may be perceived as unjust and unfair to both the agent and the third party involved[594].

Allowing the principal to selectively ratify only certain parts of a transaction, while disregarding others, can interfere with the rights of both the agent and the third party. Comment 2 to Article 2.2.9 of the UNIDROIT Principles notes that partial withdrawal from a transaction would amount to a modification of the contract. As a result, many

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591 Civil Code of Lithuania (2000) *supra note* 341.

592 Art. 2153, Civil Code of Québec, 1991 [visited 2024-03-12] https://www.legisquebec.gouv.qc.ca/en/document/cs/CCQ-1991.

593 UNIDROIT (1983). Convention on Agency in the International Sale of Goods, *supra note* 11.

594 Comment 2 to Article 2.2.9 of the UNIDROIT Principles (2016), *supra note* 46.

legal systems, including Ukrainian law, typically do not permit partial ratification. In certain cases, though, the third party may be obliged to accept partial ratification to mitigate the damage suffered[595].

In civil law systems, however, there is no unified approach regarding which types of contracts may be ratified. Generally, ratification of null, illegal acts, or forgeries is deemed impossible, however, in some cases, ratification may be done even if the agency contract is affected by nullity[596].

Regarding the time limit, some jurisdictions do not define specific time frames for the principal to ratify an unauthorised act. For instance, ratification is not subject to any specific time frames under the Belgian and Dutch[597], or Ukrainian law[598]. However, the period within which the principal must ratify should be reasonable and not leave the third party in a position of uncertainty for too long. An unreasonably long period of inaction or silence shall be considered implied ratification enabling the third party to hold the principal liable for damages. Soft law stipulates the general period of three years[599], which can still be extended to maximum ten years beginning on the day after the day the unauthorised act was performed under the UNIDROIT Principles[600].

The Ukrainian legislator does not prescribe a specific timeframe for the approval of a transaction. However, in line with general civil law principles, approval should typically occur within a reasonable period, allowing the principal sufficient time to become acquainted with all the details of the transaction and other legal actions performed beyond the agent's authority. While there is no specific mandate regarding the form of the reply, it is worth noting that responding in writing might involve additional time for postal delivery, potentially subjecting the communication to review by third parties or representatives.[601].

Given the dynamic nature of commercial relationships, time constraints are often a critical factor. Therefore, it is recommended to opt for the most expeditious and time-saving means of communication. Furthermore, in today's business landscape, there is a broad array of communication tools available, all designed to streamline processes and conserve both time and financial resources[602].

The requirement for ratification to take place within the specific timeline is

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595 Art. 7.4.8, UNIDROIT Principles (2016), *supra note* 46 reads as follows: '(1) The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps. (2) The aggrieved party is entitled to recover any expenses reasonably incurred in attempting to reduce the harm.'

596 Article 1338, Civil Code of Belgium, 1804. [visited 2024-04-19] http://www.droitbelge.be/codes.asp#civ

597 Art. 3:306 DCC reads as follows: 'Unless otherwise provided for by law, rights of action are prescribed on the expiry of twenty years.' *supra note* 52.

598 Art. 241, Civil Code of Ukraine *supra note* 55.

599 Art. 14:201 PECL *supra note* 40 reads as follows: "The general period of prescription is three years".

600 Art. 10.2 UNIDROIT. (2016), *supra note* 46.

601 Цюра В. *supra note* 7, at .338.

602 Pokhodun Y. (2017) *supra note* 191, p.310.

expressly defined in several legal instruments under common law systems and mixed law systems. Under English law, courts are entitled to consider all circumstances and to determine the reasonable time for every case.

In assessing what constitutes a "reasonable" time, the courts will evaluate all relevant circumstances, including whether a time limit was stipulated and whether there is any unfair prejudice toward the third party. Therefore, ratification may be allowed even after the allocated time expired if the third party was put into the state of unfair prejudice[603]. If the parties will prove that the principal is willing to ratify the unauthorised transaction, ratification should be allowed even after the fixed time set for it, has expired[604].

This situation clearly illustrates that for ratification to be valid, the interests of all parties involved in the relationship must be aligned. Since jurisdictions following the civil law tradition generally fail to specify the time limit for the principal to ratify the unauthorised act, circumstances of each specific case should be considered based on the nature of transaction in question. It can happen that the third party specified the time limit for the transaction to be accepted. Although there are no defined limits restricting the third party, the period must be reasonable[605]. Therefore, if the agent accepts an offer outside the limits of his authority, which includes a timeframe for acceptance, the principal's subsequent ratification may be rejected by the court if that time limit has expired[606]. Nevertheless, there is no prohibition for the principal to ratify the transaction after the specified period if all the parties are interested in executing the transaction. This reasoning can also be applied to the agent. Although the unauthorised agent is considered the guilty party in this context, they may still be liable if the principal rejects the transaction.

3.3.2.1. Position of third party prior to ratification

The validity of ratification does not depend on communication to the third party or agent[607]. The approach seems practically problematic, since in the absence of communication the third party might be unaware of the ratification, or the principal may ratify the act after the third party had withdrawn the offer that is pending ratification. Therefore, it is essential to align the incentive of all the parties towards the ratification and communicate the decision to ratify or withdraw the offer.

The third party may address the principal to seek ratification of actions of the unauthorised agent. In such cases, the time limit for the principal to decide whether to

603 Presentaciones Musicales SA v. Secunda Ch 271 (1994), para. 279.

604 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34.

605 UNIDROIT. (2016), *supra note* 46.

606 Saintier, S. Unauthorized Agency in French Law. In The Unauthorized Agent: Perspectives from European and Comparative Law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16 at p.48.

607 §4.01(2), American Law Institute. (2006) *supra note* 63; Comment A to Art. 3:207, Lando, O., & Beale, H. (2000), *supra note* 47 p. 213.

authorise the actions, can be set by the law or defined by the third party. If the principal does not react to the third party's request within the time limit, it should be considered as a refusal to ratify the transaction, giving the third party valid grounds to withdraw the offer, thus making further approval impossible in case the principal changes his mind. Although the principal not expressing the will to ratify the transaction indeed should be perceived as a rejection to ratify, some scholars argue that the impossibility of the principal to ratify after the time limit has expired is not a valid point[608]. In these cases, the ratification should be seen possible way to restore the beneficial position of all the parties, otherwise, it could be considered unfair prejudice towards the third party

Indeed, ratification after the set time limit has expired should be deemed possible, however, only if such ratification would still appear reasonable, and the third party would still be interested in it. Moreover, the possibility of ratification after the set time limit must also be assessed based on the nature of the transaction itself; thus, the subject of the transaction should allow for it. For example, if the transaction relates to the sale of goods with an expiration date or the transfer of property rights subject to another legally imposed deadline, ratification by the principal after the defined time limit would be seen not only as impossible but also as irrelevant.

When the transaction entered into by the third party awaits ratification, their position is far from passive; they have the choice to either consent to the ratification or withdraw from the contract by notifying either the principal or the agent. Such a rule is present in BGB where the third party is granted a right to declare demand of ratification to the principal, after which the latter has two-week period to ratify the unauthorised act[609].

According to the Article 1156 para. 2 of the French Code civil the third party may invoke nullity of the contract concluded with the unauthorised agent. It is not clear whether the relationship between the third party and the unauthorised agent exist in the first place. Thus, if the principal does not proceed with ratification, the agent may face liability, however, whether it is contractual liability or non-contractual liability invoked by the nullity of the contract before the purported principal proceeds to such ratification. Therefore, the third party has a margin of freedom and can, by its own will, withdraw themselves from the transaction with the purported principal[610].

Thus, the German and French laws set the right for a third party to withdraw the offer indicating to the principal that they consider the transaction invalid. While the form of the declaration is not specified, it should be considered valid if expressed either verbally or in written. At the same time, the third party is precluded from the right to withdraw in case he knew at the time of concluding the contract with the agent that the latter did not have the necessary authority to conclude the contract. However, an

608 Jurkevičius, V.; Bublienė, R., *supra note* 5, at p.80.

609 Article 177 (2) Burgerliches Gesetzbuch (BGB), *supra note* 50.

610 Troncoso, Mauricio. "Unauthorized Agent and Company in Formation in French Law." *European Company and Financial Law Review* 20, no. 3 (2023): 519-546, at 544.

exception to this rule exists if the third party was aware of the agent being granted authority but did not realise its limitations[611]. A similar right is granted to third parties under the international soft law instruments[612].

Unlike the civil law and international law approaches, the opposite one has been taken by the common law representatives. English law denies the third party the right to withdraw from the transaction that awaits ratification even in cases where the withdrawal occurs before the principal's actual ratification.

The English case of Bolton Partners Ltd v. Lambert[613] has presented a controversial decision where the third party was precluded from withdrawing and had to wait for the principal's decision on the matter. The third party was deemed bound by the agreement from the moment the agent entered into it. Although the case was criticised for 'presenting difficulties', it remains a precedent until the House of Lords decides to overturn it[614].

English courts have gone further by ruling that an unauthorised act cannot be withdrawn even if the agent and third party agree to "undo" the transaction. The reasoning is that if the agent lacked the authority to enter into the transaction initially, they also do not have the authority to withdraw from it[615].

This legal position regarding the third party's withdrawal seems unjust, as it places the third party entirely at the principal's discretion. This situation potentially leads to a loss of commercial certainty and imposes significant risks due to market fluctuations while the principal decides whether to authorise the transaction.

3.3.2.2. Communication of ratification of an unauthorised act

As it was correctly outlined before, for the ratification to happen, the interests of all the parties involved must be aligned where both the principal and the third party are willing to become bound under the contract concluded by the unauthorised agent.

Communication of the ratification to the third party does not appear to be required by law of most of the civil law, common law, and mixed legal systems. Only under the Dutch law, the require of communication of the ratifications seems to be an absolute requirement[616].

The validity of the ratification does not depend on communication to the third

611 Parliamentary History Book 3, Part II, pp. 281, 1182–3, 1187 cited in Munday, R. (2011) *supra note* 434 at p.159.

612 Art. 2.2.9(3), UNIDROIT Principles (2016), *supra note* 46.

613 Bolton Partners Ltd v. Lambert 41 Ch D 295 (1889).

614 Fleming v. Bank of New Zealand AC 577 (1900), para. 587.

615 Walter v. James LR 6 Exch 124 (1871).

616 Art. 3:37(3) DCC, cited in Busch, D. (2009), *supra note* 26, at p.164.

party or agent under the French and English law[617], while German law[618] and the PECL[619] allow the principal to ratify by communicating the decision either to the agent or to the third party. The Restatement (Third) of Agency[620] and UNIDROIT Principles[621] went even further and permitted ratification without communicating the decision to neither of parties. Some scholars justify the approach by stating that the consent to be bound under the transaction has already been expressed by the third party, making it valid without the necessity to re-confirm.

The approach where the ratification must not be communicated to any party seems problematic from a practical point of view, since neither of them would be aware that the ratification took place. Moreover, given that the third party is allowed to withdraw from the transaction unilaterally prior to the ratification, their acts may overlap causing even bigger legal uncertainty. UNIDROIT Principles still claim an exception to the general rule where the ratification must be communicated to the third party where the third party set a time limit for ratification[622].

While the approach where the principal can decide to whom to declare the decision to ratify seems more reasonable, it is still difficult to call it practical. German law admits that declaration made to the agent is considered weaker as it can be nullified under the § 177(2) BGB if the third party begins the process of clarification[623]. Thus, giving the illusion of choice, the principal has only one option to declare the ratification to the third party.

The most practical position is outlined under the Dutch Civil Code, by clearly requiring the principal to communicate the ratification of the unauthorised act to the third party[624].

Communication is crucial to ensure that the third party is still willing to be bound by the transaction concluded by the unauthorised agent. Having the discretion to withdraw from the transaction, the third party may set the time to ratify or unilaterally withdraw, which could put the principal into the position of legal uncertainty where the ratification of the void contract will take place. Since the agent potentially may also become liable to the contract (in case the principal will decide not to ratify), it is essential for the principal to communicate the ratification to mitigate any liability associated with being bound by the contract. Thus, communication of the ratification towards all the parties to the agency would seem the most practical approach that

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617 Harrisons & Crossfield Ltd v. LNW Railway Co. Ltd 2 KB 755 (1917) para. 758.

618 Based on § 177(2), first sentence Burgerliches Gesetzbuch (BGB), *supra note* 50.

619 Lando, O., & Beale, H. (2000), *supra note* 47, p. 213.

620 §4.02(1) and comment b, American Law Institute. (2006) *supra note* 63.

621 Art. 2.2.9, UNIDROIT. (2016), *supra note* 46.

622 Art. 2.2.9, UNIDROIT. (2016), *supra note* 46.

623 Schmidt-Kessel M., Baide A. Unauthorised agency in German law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 122.

624 Art. 3:33 DCC *supra note* 52.

would restore legal certainty.

3.3.2.3. Ratification by undisclosed or unidentified principal

To ratify the act, the principal must have the capacity to do so. Apart from the capacity, principal should also be in existence at the time when the act was done on his behalf, meaning that the third party should be aware that the act is being done by the agent. The ability of an undisclosed principal to ratify an act performed by the unauthorised agent has taken a major place in discussion within the legal systems that recognise the concept of undisclosed principal[625].

The doctrine of undisclosed principal may be confusing, since it contradicts the main principle of agency where the *vinculum iuris* arises between the principal and the third party, creating rights and obligations flowing from the contract concluded by the agent on the principal's behalf. The doctrine, however, follows exactly opposite rules, where the third party becomes liable to the principal of whom he had no knowledge at the time of a contract conclusion[626].

The general approach is that the principal whose existence is not known to the third party cannot ratify the unauthorised act done by the agent. This, however, does not apply when the principal is unnamed but ascertainable who can ratify[627].

The peculiar aspect of common law, which allows an undisclosed principal to step into a contract when the agent acts within the scope of actual authority but precludes subsequent ratification, becomes clearer upon closer examination. The underlying logic derives from the implicit contractual relationship established between the third party, the agent, and the undisclosed principal at the contract's initiation. When engaging in an agreement with the agent, the third party implicitly enters into a contract with both the agent and the undisclosed principal right from the beginning.

Therefore, in cases, where the agent acts outside the scope of the granted authority, no implied contract can be materialised between the undisclosed principal and the third party. In such instances, the agent remains the sole party in the contract. Permitting ratification in this context would be inconsistent with the contractual arrangement initially established between the third party and the agent, as the undisclosed principal was not seen as a party to the agreement from the beginning. This approach serves to preserve the integrity of contractual relationships formed among parties, recognising that parties enter into contracts based on certain expectations and

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625 Concept of undisclosed principal is known to mainly common law and countries with mixed legal systems.

626 Nagel, C. J., and S. R. Van Jaarsveld. 'Undisclosed Principal – Locus Standi of Agent to Sue in His Own Name – Remedies for Breach of Contract. Botha v Giyose t/a Paragon Fisheries [2007] SCA 73 (RSA)'. SSRN Scholarly Paper. Rochester, NY, 2007 at 690. https://papers.ssrn.com/abstract=2727722.

627 Reynolds F. M. B, 'Some Agency Problems in Insurance Law', in Rose, Francis D., and Guenter H. Treitel, eds. *Consensus Ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel*. London: Sweet & Maxwell, 1996 at 77.

assumptions that should be respected throughout the course of the contractual relationship[628]. Ratification, in this case, would have the effect of modification of contract and, under the common law doctrine, would require new consideration.

The landmark case that caused significant discussion and introduced the rule on the highest level was Keighley, Maxsted & Co. v. Durant[629], where all eight members of the House of Lords hold different opinions yet agreeing that the third party is not able to claim damages from the undisclosed principal due to unauthorised act of the agent.

The reasoning to the conclusion consisted of the following opinions:

1. To permit ratification in this case would create a contract different than the one made meaning that undisclosed principals are not parties to the contract that was created by the unauthorised act of the agent[630].
2. Ratification is the fiction itself and should not be extended to undisclosed principals because undisclosed intentions do not create civil obligations[631].
3. In the event of the unauthorised agent acting on behalf of the undisclosed principal, the only contract that is being concluded is the contract between the agent and the third party. To allow ratification by an undisclosed principal would give one of the contracting parties the power to name others to be bound to him based on his intentions[632].
4. The ability of undisclosed principals to enforce authorised contracts is already an anomaly; permitting them to ratify would "add another anomaly to the law and not correcting an anomaly"[633].
5. Mutual consent is a requisite for contract formation and enforcing a contract based on unrecorded intention would "open wide a doorway to fraud and deception"[634].
6. Ratification should reflect real intentions of all parties to the contract. In case of undisclosed principals, the contract cannot be seen as completed at the time of the agreement between the agent and the third party, thus, allowing undisclosed principals to ratify would extend this principle[635].

Hence, the denial of the undisclosed principal's right to ratify should not be viewed as a rejection of that right, but rather to avoid potential liability. The emphasis is on imposing liability on someone who has control over the agent and has given consent for actions on their behalf. The principal's liability extends beyond the realm of contracts;

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628 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at 203.

629 Keighley, Maxsted & Co. v. Durant AC 240 (1901).

630 Comment of the Earl of Halsbury in Keighley, Maxsted & Co. v. Durant cited in Rochvarg, Arnold. 'Ratification and Undisclosed Principals'. SSRN Scholarly Paper. Rochester, NY, 1989. [visited 2024-01-18] https://papers.ssrn.com/abstract=1313692, at 293.

631 *Ibid*., comment of Lord MacNaghten at 44.

632 *Ibid*., comment of Lord Shand at 46.

633 *Ibid*., comment of Lord Davey at 48.

634 *Ibid*., comments of Lord James of Hereford and Lord Brampton

635 *Ibid*., comment of Lord Lindley.

although contract law is helpful to understand certain rules and concepts, agency is fundamentally a fiduciary relationship.

The liability of ratifying principal mirrors that of undisclosed principals in authorised contracts. Ratifying principals are liable because they hold the position of principals in agency relationships and inherently entails rights and liabilities. The key factor is their status as principals, rather than the third party's awareness of the principal's existence. In this context, disclosure is not a distinguishing feature, as all principals should have equal rights and liabilities under a ratification doctrine.

For this reason, undisclosed principals shall be treated the same as the disclosed or partially disclosed. Agents involved in unauthorised transactions bear liability to the third parties they engage with, irrespective of whether they act on behalf of undisclosed, partially disclosed, or disclosed principals. When an agent enters into a contract with a third party without prior authorisation from their principal, the agent is held liable to the third party. This liability exists irrespective of the third party's awareness of the agent's representation on behalf of another party, and regardless of whether that other party has been identified.

Following the principles of the identity theory, which asserts that the principal and their agent are legally seen as one person, the undisclosed principal is deemed to possess the same rights and liabilities as their agent. Since an agent of an undisclosed principal can both enforce and be held liable under the unauthorised contract, the same rights and liabilities shall extend to the undisclosed principal. This legal fiction facilitates the transfer of rights and liabilities on unauthorised contracts to undisclosed principals through the process of ratification.

Therefore, there is no justifiable reason to treat undisclosed principals differently from disclosed and partially disclosed principals concerning liability under a ratification theory. The logical conclusion is that all principals, regardless of their disclosure status, should be afforded the ability to ratify unauthorised contracts.

The similar approach is held in the US law, where the Restatement (Third) of Agency allows ratification by an undisclosed principal stating that a person may ratify an act "*if the agent acts on the principal's behalf*". Moreover, this formulation does not distinguish among disclosed principals, unidentified principals, and undisclosed principals.

The rationale can be extended to the concept of indirect agency when the principal steps into the transaction due to the agent's default or insolvency. The third party faces the same consequences under the contract as the principal (earlier undisclosed) may acquire rights and liabilities due to the actions of his agent. Therefore, denying the principal of choice whether to ratify the unauthorised act or not, does not appear necessary under both civil and common law.

The US approach may be seen as rather consistent, since if the agents are allowed to act on behalf of undisclosed or unnamed principals, such principals should also have the right to ratify the transaction concluded by the unauthorised principal. This perspective is difficult to reconcile with situations where third parties willingly engage with a principal, despite not being aware of their existence at the time of the contract's

conclusion. Thus, denying the principal's right to ratify could create more harm and uncertainty than simply altering the parties involved in the contract.

Further, the rule was established in the case Lockhart v. Moodie & Co[636], allowing the principals to ratify to the extent of the initial authorisation. Therefore, the rule distinguishes between the acts that go outside the scope of authority and cannot be ratified and those, that possess a "core" validity and are ratifiable. For instance, if the agent decides to conclude a contract that would be exceeding scope of powers granted by the principal (e.g. defined maximum price possible, amount of negotiated object, type, number of contracts, duration etc.), the undisclosed principal can ratify only to the extent of what was initially authorised. If the agent would conclude a contract with bigger price, the principal could ratify only to the extent of the initially approved price[637]. However, the specific boundaries of this rule can still be ambiguous, potentially leading to uncertainties when the agent exceeds their powers in other ways.

3.3.3. Relationship of ratification of actions of the unauthorised agent with apparent authority

Doctrine of apparent authority as well as doctrine of ratification have been created as a resort of third-party protection under which the principal can become bound and liable under the contract. Moreover, similarities can be found between the cases where the principal holds a silent (apparent) ratification and apparent authority. In both cases, the main question to be answered is whether the principal is aware of all the agent's acts and whether the third party genuinely believes in the appearance of authority created by the agent's actions.

As both doctrines serve the same goal to protect the interests of the third party, whenever the principal decides not to ratify the actions of the agent who stepped outside the scope of his authority, the evaluation of the agent's actions under the doctrine of apparent authority may be the additional resort of protection of the third party's interests.

Specific hierarchy between ratification and apparent authority precludes the principal to refer to the doctrine apparent authority where the unauthorised agency is established. It is worth noting that such prohibition is only present in legal systems where the doctrine of apparent authority is seen only as a defence of the third party's infringed interests (e.g. Germany, France, Lithuania)[638].

Dutch law together with the soft law instruments such as UNIDROIT Principles[639] and PECL[640] allow the third party to refer to both doctrines with the same facts while

636 Lockhart v. Moodie & Co 4 R 859 (1877).

637 *Ibid.*

638 Jurkevičius, V., & Bublienė, R. (2017) *supra note* 5, at 84.

639 Art. 4.3 (c) UNIDROIT. (2016), *supra note* 46.

640 Art. 5:102 (b), Lando, O., & Beale, H. G., *supra note* 47.

analysing the principal's behaviour "subsequent to the conclusion of the contract". Thus, the court will have to establish whether the circumstances that took place after the conclusion of the contract meet the conditions of apparent (silent) ratification as well as the conditions for apparent authority. In case the court rules affirmative, the doctrines of apparent authority and (apparent) ratification may coincide[641].

Even though the international legal acts allow the third party to raise questions of apparent authority and ratification regarding the same matter, both doctrines should be considered as two independent, perhaps even mutually exclusive ways of defending third party's infringed rights. The Supreme Court of Lithuania in the ruling UAB "Kreivė" v. UAB "Orgreitos transportas" analysed the validity of the contract concluded by the unauthorised agent and indicated that the principal's decision to ratify is conclusive only when the third party does not claim that they had a serious reason to believe that the agent was not duly authorised. Two logical conclusions can be made:

1. if a third party invokes the doctrine of apparent authority, there is no need to prove whether the principal by their actions or inactions have ratified a certain transaction;
2. if the principal has ratified a transaction, the rules of apparent authority shall not be applicable[642].

Indeed, by invoking the doctrine of ratification the third party indirectly acknowledges that the agent was not duly authorised at the time of a contract conclusion and the principal needs to grant him authority retroactively by ratifying the action. Such a position contradicts the primary condition of the doctrine of apparent authority which presumes that the third party genuinely believed that the agent was duly authorised and never doubted his authority. By invoking the doctrine of ratification for protection of their rights, third parties reject the reasonableness of their belief in the agent's authority, which leads to a higher risk of losing the case[643]. Nevertheless, even when the ratification cannot be invoked, the third parties should not be denied the right to protect the interests by invoking the doctrine of apparent authority.

3.3.4. Legal consequences of ratification within commercial agency relationships

The main consequence of ratifying the unauthorised transaction is its validity. By ratifying the transaction, the principal becomes bound to the third party in a valid relationship while also enabling the agent to avoid liability as a falsus procurator.

However, the principal can ratify the act due to many reasons which are not connected with the agent's personality. Since the approval of the agent's actions also binds

641 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16 at, 385-438.

642 UAB "Kreivė" v. UAB "Orgreitos transportas". 2011. Supreme Court of Lithuania Case. No. 3K-3-173/2011. [visited 2024-03-26]: http://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=a0ebbe96-f314-444f-a651-e671ff1c4184.

643 Jurkevičius, V., & Bublienė, R. (2017), *supra note* 5 at 86.

the principal to pay remuneration to the agent for the performed actions, it can be burdensome and unjust for the principal, considering that the latter had already agreed to the contract he was not anticipating.

Indeed, the distinction shall be made between the internal and external consequences of ratification. The principal may ratify the act due to many reasons, like preservation of commercial reputation or avoid losing a major supplier. However, this does not deny the fact that the agent committed a breach of fiduciary duty.

Thus, the main consequence within the external agency relations is the validation of the transaction and creation of mutual rights and obligations between the principal and the third party. Third parties may also request the confirmation of agent's authority from the principal in case of doubt. If the principal has not responded immediately to the third party of their intention not to ratify the unauthorised transaction, it is deemed to be approved. Therefore, the silence will be considered as tacit ratification. Such a rule can be explained by the need of the commercial relations and the time concerns. An exception to this rule can be the agent's failure to disclose all the necessary details of the transaction, which are essential for the principal's decision[644].

Verification of the agent's acts with the principal should not be considered as a rule but rather a possibility granted to the third party. This right is established in Article 3:208 of PECL, which allows the third party to verify the agent's authority with the principal. Thus, PECL allows the third party in case of doubt to request written confirmation or ratification from the principal regarding the agent's authorisation. If the latter does not object without a delay, the agent's acts can be treated as authorised[645].

The general idea of the article seems beneficial for the third party, providing the guarantee of the validity of agent's actions. However, certain inconsistencies can be found with regard to the general doctrine of ratification. The agent's actions require ratification post factum, meaning after the contract has been concluded. Requesting authorisation prior to the conclusion, could be interpreted not as additional guarantee to avoid unauthorised representation but rather as acknowledgment of unauthorised actions. This acknowledgment could preclude the third party from obtaining ratification in future. This is especially true when the third party decides to proceed with the contract conclusion without the principal's "prompt objection". Thus, it could prevent the third party from relying on the doctrine of apparent authority later, which might offer more effective protection of their interests.

While Article 3:208 of PECL represents a great contribution of authors in reconciling the interests between the third party and the principal, limitation of the principal's obligation to provide confirmation within a reasonable time is seen as a disadvantage. If the third party has a reasonable concern about the agent's authorisation, it is advised to proceed with requesting the validation from the principal and pause the negotiations until the 'green light' is obtained. Otherwise, the third party will be limited in protecting their rights afterward.

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644 Jurkevičius, V. (2014) *supra note* 43, at p.122.

645 Art. 3:208, Lando, O., & Beale, H. G. *supra note* 47.

The absence of verification done by the third party was justified in the case Butler v. Maples[646] holding the principal bound to the transaction concluded by the unauthorised agent. The Court unanimously decided that although the agent did not have the required authority to act, it would be impractical for the third party to request verification of the agent's authority from the principal.

By virtue of ratification the principal is bound under the contract with the third party, however, it does not preclude him from holding the agent liable. In common law the principal can ratify the transaction with the preservation of the agent's liability for damages caused by the breach of fiduciary duty.

Moreover, an unauthorised act might cause the destruction of a subject-matter or other substantial change, frustrating the agency relationship. These grounds are also valid for terminating the agency without notice; however, they must be reasonable[647].

Ratification with preservation of agent's liability is not a common practice, though, since it can be considered as a violation of agent's rights. The logic is that if the principal benefits from the ratified transaction, it is unreasonable to raise the claim of the agent's liability. Otherwise, the principal was not obliged to ratify the act in the first place.

It is also true that exceeding of the agent's powers can concern either qualitative (such as specific supplier, object, term, etc.) or quantitative (such as amount of goods purchased, price, etc.) characteristics of authority. Thus, in case of exceeding the qualitative characteristics, the ratification would concern only the excessive amount of goods purchased by the agent or difference in price. If the principal still decides to claim agent's liability, it shall be limited only to the actions that exceeded the scope of powers but not the whole transaction.

The principal, as a financially stronger party, must always be prepared to take the risk of his agent acting outside the scope of authority. To minimise the risk of negative consequences, businesses are forced to implement an overly strict control of agents, resulting in additional agency costs. This is especially important when the business undertaking is large and complex, making it nearly impossible to communicate all actions effectively. Constant control may cause agents to act more carefully, but it can diminish the overall utility of the agency relationship, rendering it less effective.

The agent, in his turn, is obliged to inform the principal of any act done outside the scope of authority without delay and disclose all the details about it. Ratification shall only be invoked if the agent's interests are properly aligned with those of the principal, meaning that agent was still acting in the principal's best interests, although outside the scope of authority.

Moreover, the legal effects on the position of third parties should be considered. It is generally recognised that ratification should not negatively influence their interest,

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646 Butler v. Maples 76 U.S. 766 (1869).

647 Bailey v Angove's Pty Ltd EWCA Civ 215 (2014), where the Court of Appeal held that an agent's authority to receive payments due from customers for goods already supplied and owed to the principal was not ended by the termination of the agency contract where ending the agent's authority was a breach of the agency contract by the principal.

as they are usually unaware of any agency violations. Therefore, although ratification is retrospective, the rights acquired by third parties prior to ratification shall remain intact (especially property rights). The same rule shall extend to fourth parties whose interests have been affected by the agent's unauthorised actions. In addition, if these related parties are interested in the legal consequences, they shall be empowered with the right to request the principal to confirm the actions of the unauthorised representative. [648].

The abovementioned rule is, however, subject to certain limitations as to the time when the fourth party learns about the affected interests as well as the nature of the agreement concluded by the unauthorised agent. Thus, in the case Landcastle Acquisition Corp v. Renasant Bank[649], Nathan Hardwick (the agent), a manager of his law firm, Morris Hardwick Schneider, LLC (the principal) took a loan from Crescent bank (the third party), for $631,276.71. When the third party went bankrupt, the Federal Deposit Insurance Corporation ("FDIC") (the fourth party) took over and sold Hardwick's loan and certificate of time deposit collateral to Renasant Bank. When the bank went bankrupt Hardwick stopped paying the loan.

Eventually, the Hardwick law firm also claimed bankruptcy having countless creditors, including plaintiff Landcastle Acquisition Corporation ("Landcastle"), which was assigned the law firm's potential claims against others. In 2017, Landcastle sued Renasant (as successor to the FDIC and Crescent), claiming that it was liable for $631,276.71. Landcastle asserted that Hardwick lacked authority to pledge the Hardwick law firm's certificate of time deposit as collateral for personal loan.

The principal never challenged the security agreement or in any other way responded to the loan default, the Landcastle's challenge came only seven years later. Therefore, the principal in no way has made manifestations, allowing the third party to conclude that the agent has actual or apparent authority. In this case, the agent generally lacked authority to act, having entered into an unauthorised agreement with the third party.

The contract transferred to FDIC "already had been voided by [a] judgment when the FDIC purchased [the bank's] assets", since the security agreement concluded by Harwick on behalf of the principal was unauthorised[650]. Thus, the question is not whether the FDIC (the fourth party) should bear the risk of entering into a contract with an agent without any reasonable basis for believing that the agent has authority, but whether the third party should bear it.

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648 Jurkevičius, V. (2014) *supra note* 43, at p.121.

649 Landcastle Acquisitions LLC v. Renasant Bank, 57 F.4th 1203, 1209 (11th Cir. 2023).

650 *Ibid.*

Nevertheless, by relying on the D'Oench doctrine[651] by which the note of cancellation can be enforced against FDIC only if the oral agreement is reflected in the bank's records, the Court held that the security agreement that the agent concluded on behalf of the principal was unauthorised but nonetheless are enforceable by fourth parties. Since the Landcastle relied on evidence outside of Crescent's records when the FDIC took over and sold the Hardwick loan and CD collateral to Renasant, the lack-of-authority claim was barred.

The court raises here the common law doctrine of ratification stating that for the contract to be formed mutual assent is required. An unauthorised agent generally does not form a contract enforceable against the principal. Such contract becomes enforceable only against the principal who has not (objectively) manifested assent to be bound by the contract. Thus, the application of the doctrine in the current case is arguably classic. Presumably, the modified rules are applied because of the interest of the Federal authority involved as a fourth party. Analysing the circumstances of the case, third party had no legally acceptable reason to believe that the agent had authority to enter the contract on behalf of his principal. Instead, the third party believed (unreasonably) that the agent had authority and understood his promises to be legally binding. Risk allocation shall be based on the least-cost avoider, deciding who bears the least cost in avoiding the harm. It was decided that the third party bank in Landcastle had the best opportunity to detect an unauthorised agent and was to blame for failing to secure any legally acceptable verification of the purported agent's authority[652].

Despite the Court's ruling that the contract concluded by the agent was void and cannot be ratified, the violated interests of the third party can still be protected holding the agent liable based on a tort claim for the agent's misrepresentations. For bona fide agent the liability may not follow, unlike for the one who was intentionally misleading or faking the information about the limits of his authority and shall be held liable for the breach of fiduciary duty towards the principal.

3.4. Liability of falsus procurator within the commercial agency relationships

3.4.1. The general concept of liability applied to the commercial agent

Within the present thesis commercial agency is considered a fiduciary relationship that presumes the existence of certain rights and obligations that entails specific rights and obligations for all participants, particularly agents. Given that the main goal of

651 D'Oench doctrine prevents any third party who has lent himself to a scheme or arrangement that is likely to mislead the FDIC from relying on evidence of the unrecorded agreement to support a claim or defense that would tend to defeat any interest that the bank transferred to the FDIC. See Lindley, Tyler B. 'Delegated Contract Formation'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2023 at p.32. [accessed 02-09-2025] https://doi.org/10.2139/ssrn.4465627 .

652 Lindley, Tyler B. 'Delegated Contract Formation'. SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2023 at p.24. [accessed 02-09-2025] https://doi.org/10.2139/ssrn.4465627.

commercial agency is profit maximisation, fiduciary obligations are inherent to this type of legal relations and arise independently of a contract. Nevertheless, the scope of such obligations may vary according to the contractual terms. Thus, liability should be imposed on the party that fails to comply with the obligations contained in the contract.

Where the agency is disclosed, the third party may hold the principal liable under the contract concluded by the agent. Thus, the agent will not be personally liable to the third party, unless it is established that the agent has personal liability under the agency agreement. Also, the principal may be liable for the breach of the express or implied terms of an agency contract, or other contractual obligations upon terminating the agent's authority[653].

When the third party is unaware of the principal's existence, the third party may hold either the agent or the principal liable depending on the circumstances of the case. In addition, the distinction should be made between the cases where the agent acted within and outside the scope of authority.

Therefore, further analysis of the agent's liability should be limited according to the following conditions:

1. Agent acted outside the scope of authority on behalf of a disclosed principal;
2. agent acted outside the scope of authority on behalf of an undisclosed principal;
3. agent acted within the scope of authority on behalf of a disclosed principal;
4. agent acted within the scope of authority on behalf of an undisclosed principal.

It should be stressed that there are more conditions to be considered while establishing if the agent should be personally liable under the contract concluded with the third party, i.e. whether the principal was partially disclosed, whether the principal was identified, etc. Such cases will be mentioned in the analysis, however, without special consideration.

3.4.2. Liability of the agent acting without authority or in excess of his authority

Whenever the agent performs an act outside the scope of his authority, and the principal is unwilling to ratify it *post factum,* the third party may appear in a difficult position, as the unauthorised act may cause damages. The most logical conclusion in this case would be to hold the agent liable, since the granted authority was exceeded, thus the primary goal of agency has been breached.

Many modern legal systems allow third parties to seek recourse against an unauthorised agent for any resulting damages. However, this liability arises only when neither the doctrine of apparent authority nor the doctrine of ratification is relevant or applicable. A bona fide third party can defend their violated rights under the concept of *falsus procurator* (in continental law) or *the breach of warranty of authority* (in common law and mixed systems). Although, the terms differ, these doctrines have similar

653 Bowstead, W., Reynolds, F. M. B., & Watts, P. (2018). *supra note* 34, at 675.

aim, rules of application and consequences. The liability of unauthorised agent is regulated by the laws of all countries analysed in the current thesis unlike the doctrine of apparent authority, which currently has a limited regulation.

The liability of an agent who exceeded the limits of authority or acted without any authority at all typically involves no-fault liability, as it arises from the misplaced trust of a bona fide third party. Therefore, the agent made the third party to engage in the legal activity based on the declaration of having the necessary powers. In such cases, subjective fault is not necessary, as the key element for establishing liability is the deceived trust of the third party who acted in good faith[654].

The liability of *falsus procurator* can also be distinguished based on whether the contract exists between the parties. This can result in contractual liability, tort liability, liability for *culpa in contrahendo* and liability for breach of the implied warranty of authority. The last two types vary depending on the jurisdiction.

Although the agent acting in excess of their authority in a disclosed agency relationship may become personally liable, the general approach across all legal systems is that the agent does not become a party to the contract with the third party instead of the principal, but only to the legal relationship under which the third party suffered damages[655]. So, there is no substitution of parties in the event of unauthorised agency, however, the agent is liable for the consequences created by his unauthorised act.

It follows that the third party may hold the unauthorised agent liable only if they acted in good faith and were unaware of the agent's lack of authority. Otherwise, the rules are not applicable. This exception is formulated in international soft law instruments, which may formulate it differently, but share the same intent: "... if the third party knew or could reasonably be expected to have known ... that the agent was acting outside the scope of his authority, no liability can follow. Thus, the third party shall be considered to have undertaken the risk of contracting with the unauthorised agent or that the purported principal would not ratify"[656].

As regards the basis for the agent's liability, common law countries, Dutch law[657], the Restatement (Third) of Agency[658] and the DCFR[659] build their concepts around the implied warranty of authority (i.e. on legal act), while from the wording of the PECL

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654 Yue, Xiangzhen. 'Liability for Unauthorized Agency: In the View of China-Germany Comparative Law'. In *Proceedings of the 2017 World Conference on Management Science and Human Social Development (MSHSD 2017)*. Arnoma, Thailand: Atlantis Press, 2018. https://doi.org/10.2991/mshsd-17.2018.88, at 464.

655 Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, at p. 421.

656 Art. 6:107, Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48. Article 3:204, Lando, O., & Beale, H. G. *supra note* 47.

657 Art 3:70 DCC: "He who acts as a procurator warrants to the other party the existence…." *supra note* 52.

658 Art, 6.10 American Law Institute. (2006) *supra note* 63.

659 Art. 6:107 (1) Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48: "When a person acts in the name of a principal or otherwise in such a way as to indicate to the third party an intention to affect the legal position of a principal but acts without authority…"

the liability of *falsus procurator* is based on the operation of law and does not involve a collateral contract or an implied warranty of authority.

The doctrine of breach of warranty of authority is well-developed within common law legal system and describes the situation where the agent becomes liable for contracting with the third party. When the agent breaches the warranty of authority by acting without proper authorisation, the third party is entitled to claim compensation for the loss of expectation related to the agent. By claiming the damages, the third party seeks to restore of the same financial position as they would have had if the agent was properly authorised[660].

The warranty may be either express or implied, however, a breach of either type results in damages measured by the expectations of the parties involved. Express warranties occur when the agent explicitly or implicitly assures the third party of their authorisation, often within a distinct agent/third-party agreement. Express warranties are uncommon. Implied warranties presume that an implied declaration of intention has been made to guarantee the effectiveness of the agent's act. These declarations create more complex situations as they are fictitious making the agent's fault irrelevant.

The situation becomes more complicated when the principal is undisclosed, and the agent concludes a contract with a third party without authority. In this case the principal cannot ratify the concluded transaction as previously discussed. Thus, undisclosed principals are treated differently from the disclosed and partially disclosed by not having the power of ratification and cannot be held liable for the unauthorised transactions. No rights or liabilities can be created for the undisclosed principals by ratification, meaning that in such cases the agent will be personally liable towards the third party for the contract in question.

Thus, the general principle is that the (undisclosed) principal can neither sue nor be sued under the unauthorised contract that was concluded on his behalf. The exception applies in case the agent has gone insolvent of failed to fulfil his duties towards the third party. Such rule reconciles the positions of civil law and common law[661].

Summing up, whenever the agent is acting outside the scope of their authority and the principal decides not to proceed with ratification, the agent shall become liable to the third party under different concepts depending on the jurisdictions where the parties are contracting in. Importantly, in these cases, the agent is liable to pay the damages or compensate the loss of expectancy, unless there is a proof that the parties intended to make the agent liable. However, holding the agent liable does not make him the party to the concluded agreement. Thus, the substitution of parties under the initial transaction does not occur.

The abovementioned scenarios are possible only if the principal was known to the third party. Conversely, in case of undisclosed agency, the third party is unaware of the existence of agency relationship. Thus, if the agent fails to disclose the name and

660 Wisman v Trijber, HR 28 March 1997, NJ 1997, 454 cited in Hondius, Ewoud H., and Van Kooten H. J. *The Principles of European Contract Law and Dutch Law: A Commentary*. Kluwer Law International B.V., 2002 at 155.

661 Art. 13 (2)(b) 1983 Geneva Convention on Agency in the International Sale of Goods, *supra note* 11.

identity of the principal or the fact of agency while making a contract, the agent will be personally liable under the contract for non-performance. It is also worth noting that since undisclosed agency is not widespread in continental law tradition and mostly used under the common law, similar rules are applicable to indirect agency relationships. The rule that holds the agent liable as a party to the contract is defined in many international legal instruments, such as PECL[662], DCFR[663], UNIDROIT Principles[664].

3.4.3. Conditions of holding the agent liable under the concept of falsus prokurator in continental law countries

Continental law views the imposition of liability on unauthorised agents as a matter of a last resort, applicable only when other remedies have been exhausted. Liability occurs even for actions that the agent performed within their due authority, if these actions are tied to conduct exceeding their authority and cannot be performed independently[665]. There are differences in the basis for liability in civil laws countries which may include tort (fault), contract or special basis (*culpa in contrahendo*). Most of the countries reserve the preference for a contractual basis of agent's liability as higher measure of damage and there is no need to establish fault.

Some states, such as France and Belgium require proof of the agent's fault and base the liability of unauthorised agent on tort (apply the doctrine of *mandate apparent*)[666]. In this context, the agent must make it clear to the third party that they lack the authority to act. If the principal does not subsequently ratify the actions, the agent may face personal liability. However, from the general practice of courts in these countries, it is debatable whether the guilt is an absolute requirement. It may be sufficient to establish unauthorised representation if the agent did not disclose their lack of authority to the third party[667].

Additionally, these countries provide a possibility for the agent to obtain an express guarantee from the principal that the latter will ratify the transaction, similar to the common law concept of the warranty of authority. Article 1997 of French civil code precludes the third party to make any claims if the contract was concluded despite the agent having disclosed the true nature of their authority. An exception applies if the agent personally guarantees subsequent ratification by the principal or if the agent also acts as a party to the contract jointly with the principal[668]. In such cases, the third party

662 Art. 3:203, Lando, O., & Beale, H. G. *supra note* 47.

663 Art. 6:108, Von Bar, C., Clive, E., & Schulte-Nölke, H. (2009), *supra note* 48. Lando, O., & Beale, H. G. *supra note* 47, Article 3:204.

664 Art. 2.2.4 UNIDROIT Principles, (2016), *supra note* 46.

665 Цюра В. *supra note* 7, at p.341.

666 Art. 1997, Civil Code of France, *supra note* 53.

667 Jurkevičius, V. (2014), *supra note* 43, at p.134.

668 Saintier, S. Unauthorized Agency in French Law. In The Unauthorized Agent: Perspectives from European and Comparative Law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16, p. 51-52.

(depending on the circumstances of the case[669]) has the right to hold the agent liable under the concept of falsus procurator as well as to demand the performance of the obligations under the contract. Therefore, French law also allows contractual liability in exceptional cases.

There's an option for the third party to demand specific performance, which is a contractual remedy designed to safeguard the innocent party's expectation interest. However, the implementation of this remedy varies depending on the legal system in question. In civil law jurisdictions and Scottish law, specific performance is recognised as the primary recourse for the third party.

In Germany, the third party can obtain protection under the principle of *culpa in contrahendo,* which establishes general pre-contractual duty of the principal not to frustrate the third party's reliance. Germany also permits the third party to demand performance of the obligation directly from the agent as an additional claim alongside the claim for damages[670]. While most jurisdictions award damages to the injured party based on expectation basis, German law constitutes an exception where the damages are awarded on the reliance basis[671]. Nevertheless, it's important to note that if the agent is found responsible under the doctrine of apparent authority, and the principal is unable to fulfil the contract, the third party may only be eligible for nominal damages.

Ukrainian law does not explicitly mention a specific doctrine under which the unauthorised representative will be held liable. However, upon further examination it becomes obvious that the legal framework aligns with the continental law approach. In the absence of subsequent ratification, the transaction is treated as non-existent, lacking any legal consequences. In such cases, the representative bears full responsibility toward the third party. The agent is obligated to return everything received in the execution of the transaction or to provide reimbursement. If the third party incurs damages, the representative is held accountable for compensating them[672].

Regrettably, the national legislation lacks the provision allowing the third party to seek specific performance, which seems to be a significant limitation. Given that contractual principles extend to the doctrine of agency, the absence of specific performance as a contractual remedy limits the protection of the innocent party's expectation interest in a contract[673].

Analysing the basis for the emergence of the liability under the doctrine of falsus procurator in civil law countries, it is believed to be a special type of liability specifically connected to the institute of representation. While the unauthorised agent may be obliged to compensate losses to the third party, this precludes categorising it as tort

669 The third party should also be aware of the potential risk that the principal will refuse to ratify.

670 Jurkevičius, V. (2014), *supra note* 43 at p.128.

671 Art 179(2) Burgerliches Gesetzbuch (BGB), *supra note* 50.

672 Гранін, Віталій. 'Поняття та наслідки неналежного представництва'. *Актуальні Проблеми Держави і Права*, Вип. 22 616–21, 2004.

673 Цюра В. *supra note* 7, at 340.

liability. Conversely, the liability of a falsus procurator cannot be classified as contractual, as the agent does not have any contractual obligations with the third party. Moreover, the liability of unauthorised representative should be considered strict i.e. applied without fault due to the priority of interests of the weaker third party who has limited opportunity to check the internal arrangement between the agent and the principal. So, the liability of unauthorised agent cannot be fully assigned as either delictual or contractual.

The civil law approach to the doctrine of representation is based on the direct and indirect representation. In general, under civil law, an agent who is not revealing the name of the principal within a specified period is considered to be acting without authority. Thus, the liability of the agent arises as if he was acting without authority at all. The third party may only take legal action against the agent, and the principal has no action against the third party. Liability of falsus procurator can also arise in cases where the agent acts on behalf of an undisclosed or unidentified principal[674]. In Austria, *a falsus procurator* may only be liable for reliance damages provided there was negligence or intent. However, a representative can avoid liability by identifying the principal before the commencement of the trial.

Estonian legal practice, although not having an express legal provision, views a representative who fails to disclose the principal's identity as acting without a proper authority, which leads to the nullity of the contract and liability for damages caused [675].

There are certain exceptions when the direct action between the principal and the third party will be allowed. A direct action against the undisclosed principal in indirect representation can be available to the third party in cases of agent's fraud (such as avoidance of law, misrepresentation), insolvency and serious breaches (both anticipatory and actual) of the intermediary's obligations or fundamental non-performance[676]. To enable the third party to hold the principal liable in such cases can be done by demanding the agent to disclose the name of the principal[677]. The agent, having been found liable, may file a counterclaim against the principal based on the claim that the principal improperly formed or disclosed the assignment. Thus, the reasonable belief can be invoked not only by the third party but also by the agent base on the reliance doctrine.

3.4.4. Liability of an unauthorised agent under the common law tradition

As it was indicated in the previous sections, common law doctrine bases liability of unauthorised agents on the breach of a contractual warranty of authority which results

674 Tan, Ch-H. Unauthorized Agency in English Law in Busch, D., & Macgregor, L. J. (Eds.). (2009) *supra note* 16.

675 Art.129 (1), 130 Civil Code of Estonia, 2002. [visited 2024-04-19]: https://www.riigiteataja.ee/en/eli/530102013019/consolide

676 *Ibid*., Art. 3:303(b).

677 *Ibid*., Arts. 3:302(a), 3:303(a).

in payment of damages on an expectation basis. Such damages seek to put the third party in the position they would have been in had the warranty been true. Under the English law the warranty is seen as a type of collateral contract which in case of breach holds the agent strictly liable[678]. Due to such feature, the agent's liability arising from the breach of the warranty of authority is considered to be contractual.

An agent who is acting without the proper authority on behalf of the disclosed principal shall be personally liable to the third party based on misrepresentation or breach of the warranty of authority. The latter may be invoked if the conduct of the agent could have led the third party to believe that the agent was properly authorised[679].Therefore, the agent shall be liable for causing any damage to the principal. In addition to damages, specific performance can also be available type of remedy. Common law states that specific performance is a discretionary remedy which is only available where damages cannot be regarded as an appropriate remedy.

At the same time, there cannot be awarded two or more remedies regarding one contract. The injured party must choose among all the possible remedies in the legal system and cannot "approbate and reprobate the contract" at the same time. Corresponding opinion was expressed by Friedman JP in Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd where he stated that: "When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract, or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approbate and reprobate. Once he has elected to pursue one remedy, he is bound by his choice and cannot resile from it without the consent of the other party[680]".

Similarly to the civilian approach, the rule extends only to cases when the third party genuinely was unaware that the agent was lacking authority during the negotiation and contract conclusion. If it is proved that the agent was not making a warranty of authority (either expressed or implied) or that the third party was aware about the lack of authority to perform an act, the third party may not be awarded damages or be compensated for the loss of profit in such case. Similar approach is carried out by the UNIDROIT principles in Article 2.2.6[681]. At the same time, the agent is held liable irrespective of whether he was acting in a good faith or with the presence of fault.

Whenever the unauthorised agent is acting on behalf of a partially disclosed principal, the former shall also be liable for the actions performed without the necessary authority. In such cases the agent may be both bound by the contract concluded and be liable under the terms of such contract. It is considered that the liability under the warranty differs from the one arising from the main contract, since the agent only promises that he has authority to conclude the contract but not that the contract is to

678 Collen v. Wright 8 E & B 647 (1857).

679 Art, 6.10, 6.11 American Law Institute. (2006) *supra note* 63.

680 Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd 2 SA 537 (C) 542E–F (1996).

681 Art. 2.2.4 UNIDROIT Principles, (2016), *supra note* 46.

be performed by the principal. Such a distinction matters where the contract cannot be performed due to the principal's fault, so the agent cannot be held liable for the breach.

As far as the common law doctrine generally allows agents to act on behalf of the undisclosed principals, such principals shall be liable under the contracts concluded by their duly authorised agents. Thus, the third party upon disclosure of the principal and the fact of agency (if it was concealed before) may enforce the contract before the principals and make him liable. Upon the development of mercantile relations, it was decided also to give the right to enforce the contract by the undisclosed principal as well. The doctrine facilitates the needs of trade and commercial relations in general.

Hence, contrary to continental law perspectives, common law asserts the establishment of a direct contractual connection between the undisclosed principal and the third party. Although opinions vary as to whether this contractual relationship comes into existence from the outset or only after the principal intervenes in the agent's contract, the principal is, or becomes, a participant in the contract. Therefore, it follows logically that the third party, upon discovering the presence of the undisclosed principal, can enforce contractual rights against the principal[682]. The principal is also allowed to enforce the contract with the direct actions against the third party even if at the stages of negotiation and contract conclusion he was not known to the third party.

Summarising, according to the principles of the common law, the unauthorised agent shall be personally liable for his actions to the third-party based on the breach of the warranty of authority unless the third party was aware that the agent was action outside the scope of his authority. The third party can sue either the agent or the principal to protect their interests. The different rule applies in the event where the principal is acting undisclosed. In such case the unauthorised agent fails to form the contract between the principal and the third party and becomes the party to the contract himself. Upon the discovery of the principal's existence, the third party may choose to enforce the contract against the principal which shall be balanced by the corresponding right of the principal to take direct actions against the third party.

Interim conclusions to Chapter 3

As a result of the research on the external agency relationship, the nature of apparent authority, ratification, and liability of unauthorised agents were researched, along with their delimitation and the effect of the reconciliation of interests among the parties to the international commercial agency relationship.

Among the main conclusions made within Chapter 3, the following should be highlighted:

1. Acting on behalf of the disclosed principal is the usual and the most stable form of agency, within both the civil law and common law systems which exempts the agent from liability towards the third party and where the parties can achieve their primary objectives. Therefore, all consequences of these actions, whether active or passive,

682 Kortmann, S. C. J. J., & Kortmann, J. (2016), *supra note* 486, pp. 83-94.

affect the principal directly.

2. Within the continental legal system, external agency relationship could be categorised into the relations of informational nature which the agent owes to the third party and relationship that arises between the principal and the third party because of the agent's actions. The division is subject to a debate in common law, especially when the principal is undisclosed. Cases of 'undisclosed agency' fall within the civil law doctrine of indirect representation as the requirements for the application of both doctrines are compatible, allowing the principal to participate in commercial transactions without disclosing his name. It is especially evident in cases of the intermediary's insolvency when the principal is allowed to sue under a contract that was not concluded in his name.

3. Within the international commercial agency, introducing and regulating the concept of unidentified principal could greatly contribute to the development of modern commercial relations and unification of approaches across continental law and common law. International and soft law legal instruments do not permit the principal to remain undisclosed at all stages, assuming the identification can follow later. This may put the agent into a situation of conflict where he may either become liable under the contract with the third party or breach the fiduciary duties to the principal who wishes to stay unnamed.

4. There is no unified approach to the definition of apparent authority even between the jurisdictions of the same legal system. Being comparatively new for common and continental law, the apparent authority is seen as quasi-authority due to the absence of real powers conferred to agent that become real only in case of legal intervention. For the apparent authority to arise, a triad of elements must be aligned: 1) agent's manifestation of the authority justifying a belief that an agency relationship exists, 2) principal's knowledge of the general circumstances, and 3) a third party's reliance on these manifestations.

5. Apparent authority differs from implied authority based on whether the principal facilitated the third party's belief in the agent's apparent authority. To prove apparent authority, it is necessary to demonstrate that the principal's conduct was such as to mislead the third party and induce them to rely on the agency's existence. To determine whether the principal's actions led the third party to believe in the presence of the agent's authority, it can be analysed whether the principal undertook the actions that fall within the principal's area of risk. For this purpose, only active actions are considered while disregarding indirect behaviour.

6. Fourth parties are not included in the agency relationship under normal circumstances; rather they bear potential risk of agent acting outside the scope of authority and deserve having mechanisms of interest protection. The need for the inclusion of fourth parties in the agency relationship could be defined based on the level of violation. Fourth parties who reasonably believed that the contract concluded between the principal and a third person is valid due to the agent's actions and suffered injury because of the third party's action related to the principal's manifestation concerning the agent's authority, shall be allowed to claim the presence of apparent authority.

7. Distinguishing apparent authority from other types of authority has a practical importance in cases of assigning liability to parties. While in civil law countries the prevailing view is that invoking of apparent authority validates the contract between the principal and the third party, making it enforceable, in countries following the common law system, apparent authority is seen as a mechanism of protection of the third party's interests, entitling them to damages for reliance rather than specific performance.

8. The existence of apparent authority presumes the violation of the principal's will. It may be further qualified as an unauthorised agency with the corresponding consequences and must be distinguished from the implied actual authority. When assessing the scope of the agent's rights, it is important to consider both how the third party perceived the agent's appearance of authority and how the authority was assumed between the principal and the agent internally.

9. For the ratification to happen, the interests of all parties involved must be aligned where both the principal and the third party are willing to become bound under the contract concluded by the unauthorised agent. Although jurisdictions following the civil law tradition generally fail to specify the time limit for the principal to ratify the unauthorised act, common law systems and mixed law systems provide the requirement for ratification to take place within the specific timeline. Moreover, despite the absence of the strictly prescribed form of ratification, tacit ratification is generally rejected by the national law for giving room for abuse of power by the principal.

10. In English law the undisclosed principal is allowed to step into the contract between the agent and the third party, however, is denied the right to ratify, which leads to misaligned expectations regarding the contract terms. For the principal to be able to ratify the agent's unauthorised actions, the existence of the agency relationship as well as the principal's identity should be disclosed or ascertainable to the third party, allowing them to decide whether to continue negotiations with the agent. It should be mentioned, however, that the principal can still be unnamed. More consistency is shown in the US law allowing both undisclosed and unnamed principals to ratify the transaction.

11. The existence of the specific relation between the ratification and the doctrine of apparent authority can be explained by the specific features inherent to both. In legal systems that see the doctrine of apparent authority only as a defence of the third party's infringed interests the hierarchy exists between the ratification and apparent authority precluding the principal to refer to the doctrine apparent authority where the unauthorised agency is established.

12. In cases where the agent acted outside the scope of the granted authority, without subsequent ratification, he does not become a party to the contract with the third party instead of the principal, but only liable for the consequences created by his unauthorised act. However, in cases of undisclosed or indirect agency, the agent will be personally liable under the contract for non-performance. Thus, the rule is applicable to both legal families.

Table 2

Key concepts related to reconciling of interests among external agency participants	Civil law	Common law
Allocation of risks	The theory of risk developed by Dutch courts broadens the list of factual circumstances related to the principal that must be considered when applying the doctrine of apparent authority. Although this contributes to the flexibility of applying implied authority, it raises the question of whether the court's practice ensures a balance between the participants in the agency relationship. The broad list of circumstances regarding the principal's risk can lead to almost unlimited liability for the principal, even for the agent's unauthorised acts.	The application of tort law least-cost avoider principle encourages all parties to take precautions ex ante to avoid liability and high costs. The principle assumes that liability should be borne by the party who can avoid the harm at the lower cost but has not taken the necessary steps to prevent the breach. The least-cost avoider principle simplifies the determination of liability by identifying who bears a lower cost of avoiding harm and assigns liability to that party. The principle is primarily applied in the US; however, it could serve as guidance for civil law judges when deciding which party shall bear the agency costs, thereby reducing the complexity of assigning liability.
Apparent Authority	Invoking of apparent authority validates the contract between the principal and the third party, making it enforceable.	Apparent authority is seen as a mechanism of protection of the third party's interests, entitling them to damages for reliance rather than specific performance.
Recognition of Undisclosed Agency	Indirect agency occurs where the agent acts in their name without valid contractual ties to the principal. The law protects third parties from enforcing contracts against the undisclosed principal.	Agents can act on behalf of undisclosed principals without revealing their identity. This creates a valid relationship where the principal bears duties and liabilities from the agent's actions. Third parties can enforce contracts against the agent.

Right to Intervene for Undisclosed Principal	Civilian legal systems grant undisclosed principals rights against third parties only in case of the agent's insolvency, although this may not apply if the agent acts unauthorised. Otherwise, the agent is held liable irrespective of whether he was acting in a good faith or with the presence of fault.	Common law asserts the establishment of a direct contractual connection between the undisclosed principal and the third party. The principal is also allowed to enforce the contract with the direct actions against the third party even if at the stages of negotiation and contract conclusion he was not known to the third party. This fosters a balance of rights between principals and third parties, even if the existence of the principal is unknown at contract conclusion. This rule should be balanced by granting the third party's right to take direct action against the undisclosed principal, protecting themselves against the agent's insolvency.
Right to Verify Agent's Authority	The obligation to verify the agent's authority is included in the third party's standard of care. The rule tries to balance the interests of the principal and third party before deciding liability under apparent authority by considering all the circumstances to justify the third party's reliance in good faith upon a contract made with an unauthorised agent.	A strict approach requires agents to verify their authority; failure to do so can lead to liability. This is related to the duty to disclose by which the agent is obligated to disclose the breach would facilitate the earlier disclosure and better chances to minimise the losses in case the principal is not interested in the transaction. This could also balance the agent's interests to avoid further claims to indemnify the losses, to which the principal is entitled under the common law rules.
Right of the third party to withdraw from ratification	Th third party may either withdraw from the contract before ratification by notifying either the principal or the agent. Also, French law allows the third party to invoke the nullity of the transaction concluded by the unauthorised agent. The right to withdraw shall be limited and granted to bona fide third parties unaware of the agent's lack of authority. However, an exception to this rule exists if the third party was aware of the agent being granted authority but did not realise its limitations. A similar right is granted to third parties under the international soft law instruments.	English law denies the third party the right to withdraw from the transaction that awaits ratification even in cases where the withdrawal occurs before the principal's actual ratification. The reasoning is that if the agent lacked the authority to enter into the transaction initially, they also do not have the authority to withdraw from it. This legal position regarding the third party's withdrawal seems unjust, as it places the third party entirely at the principal's discretion. This situation potentially leads to a loss of commercial certainty and imposes significant risks due to market fluctuations while the principal decides whether to authorise the transaction.

CONCLUSIONS

Regarding the conceptual issues of international commercial agency

1. International commercial representation can be defined as a legal relationship between the parties involved in the international business activity where one party (commercial agent) undertakes, for a fee, to perform actions on their behalf and at the expense of the other party (principal) to facilitate the sale of goods with the third party. This relationship facilitates business development internationally while leveraging the agent's local knowledge, connections, and expertise.
2. Based on the underlying research, continental law relationship of representation in a broad sense encompasses both contractual and non-contractual types that define private-law nature based on the principles of freedom of contract and autonomy of will. Such distinction is absent in the common law system, where the term agency is seen as a wide concept which covers every situation of fiduciary can be defined as a fiduciary legal relationship where one individual holds the authority to influence and control another person's legal standing concerning third parties by performing either legal or physical actions within the limits of the granted authority.
3. Within continental law, a commercial agent is a professional who is engaged in intermediary activities as a primary course of business to be able to deliver effective achievement of legally and economically significant results in the field of trade which is ensured by business and professional competence. Independent contractors also can act as commercial agents in agency relationships considering the degree of control exercised by the principal, type of contract governing their relationship, compensation and applicable laws. Definition of the agent in common law is broader due to the nature of fiduciary relationship that includes almost any person who has the capacity and necessary authority to act in the name, on behalf of the principal, and under his instructions to create, modify, or terminate a relationship between the principal and the third party.
4. In countries with continental legal system transactions conducted by the organs of a legal entity are regarded as expressions of the legal entity's own decision-making and operational activities conducted by individuals authorised to act on its behalf within their official capacities. While directors may be seen as representatives of the company in a broad sense, such a type of representation is deemed to be lacking fundamental features of representation, but in connection with the specific scope of powers granted by the legal entity is similar to voluntary representation as such.
5. Within continental law system, agency agreement is considered a primary basis for the emergence of internal legal relationships of a commercial representation, while the Power of Attorney cannot act as an independent legal fact of the emergence of representation relations, being always based on a contract between the principal and the representative due to mutual expression of will. Due to the specificity of the common law approach, the contract concluded

between the principal and the agent is the basis of creating both internal and external legal relationships of commercial representation.

6. Fourth parties can be defined as external stakeholders who, although not directly connected to the initial agency relationship, are closely related to it under the second transaction regarding the same object and rely on its validation. Though the interests of the fourth parties could be breached due to the third party's actions, fourth parties may not be strictly considered as the further layer in the chain of agency participants as they could be tied to agency relationships through the link with the principal.
7. Despite the existence of the international legal instruments that greatly contributed to unification of agency rules most of them choose a selective approach which harmonises only separate issues, omitting the problems of defining capacity of the principal and the agent, defects in consent, the abuse of power in general, failing to align the approaches of both legal systems by regulating both internal and external relationships and leaving the regulation of a vast number of issues for the disposition of national law. Therefore, the unification of national material laws on agency - at least those that apply to international commercial contracts - is essential to minimise conflicts between the parties and exclude the parallelism of actions in various national laws.

These conclusions confirm the defensive statement raised at the beginning of the investigation: *An international commercial agency relationship involves a specific set of parties different from other relationships of representation, whose characteristics are derived from the type, purpose, and nature of activity involved.*

As regards maintaining the balance of interests between the parties to the internal commercial agency relationship

1. A commercial agency is a fiduciary relationship, aimed at the imposition of the highest level of loyalty on the agent to act in the principal's best interests. The scope of duty to 'act dutifully and in good faith' as prescribed in the Directive overlaps with the common law fiduciary duties due to strong etymological connections. While the continental duty to act in good faith extends to pre-contractual negotiations and represents the objective standard of behaviour within any kind of relationship, the fiduciary duty of loyalty arises after the formation of a relationship that requires a party to act in someone else's interests.
2. Duty of care includes characteristics of other branches of private law, particularly tort law, however, it bears unique characteristics while being applied in a fiduciary context. Within commercial agency law, the duty of care may not fall within the scope of fiduciary duties owed by the commercial agent to the principal, considering that the commercial agent is covered by the professional duty of care at any time, regardless of whether they are representing the principal at that moment. Over enforcing the duty of care may undermine the duty of loyalty, restricting the agent from acting in the principal's best interests.

3. The presence of fiduciary duties does not preclude the commercial agent from engaging in multiple business transactions on behalf of different principals. The fiduciary nature presumes the absence of conflicts between the agent and the principal. From the perspective of the EU law, the duty to avoid conflict of interests is viewed through the duty to act dutifully and in good faith, while under the common law, the agent is under the fiduciary duty to avoid conflict of interest with the principal. This results in different outcomes where in civil law jurisdictions the agent who failed to disclose the conflict will be charged with material breach of the agency agreement allowing the principal to terminate the contract. Whereas in common law the agent's failure to disclose may not necessarily lead to a breach of duty of loyalty, meaning that the agreement may not be terminated, however, the principal will be entitled to an indemnity claim of compensation for losses.
4. An internal contract creating a commercial agency relationship sets the limits of the agent's actual authority to act on the principal's behalf, while the scope of apparent authority has an external nature and is defined by the participation of third parties. While the distinction is applied in common law, some civil law jurisdictions reject it, since the authority empowers the agent to perform actions in front of third parties, including all forms of authority within the scope of external relationships. To maintain the balance of interests, the agent acting in good faith while performing an act that was reasonably expected in that situation is deemed to be duly authorised by the principal.
5. Although fiduciary remedies do not intend to punish, the application of punitive damages for the severe, deliberate misconduct of the commercial agent is widely popular in the US. While still being rejected by the law of most EU Member States, the potential adoption of this remedy cannot be excluded. Despite the risk of overcompensation and the potential to undermine moral balance, punitive damages can provide full reparation, restore the status quo ante, and offer fair compensation for the aggrieved party.
6. Applying the least-cost avoider principle simplifies the determination of liability by identifying who bears the lower cost of avoiding harm and assigning liability to that party. The application of the principle relies on the level of precautions taken by the parties to avoid liability, considering the type of authority present in the relationship at the time the harm occurred while not entirely dependent on it. Thus, in cases where it is difficult to define an agent's powers, it may be easier to determine who is the least-cost avoider.
7. Adopting a proper compensation package can help align the incentives of agents and principals and motivate to perform better results. Compensation schemes adopted under the incentive contract might help constrain the agent's opportunism and increase the volume of damage compensation to the agent that would promote impartiality, due diligence, and loyalty in agency relationships. The contingent fee contract would give the agent a better economic

incentive to promote fairness and equality and to obtain the best possible outcome in the principal's interests, not being dependent on the fee issue.

The conclusions formed above substantiate the research hypothesis that *the enforcement of proactive risk mitigation strategies, supplemented by fiduciary duty remedial mechanisms and a contingent fee system for the agent's compensation, can help reconcile the interests within the internal agency relationship and maximise the agency's efficiency.*

Regarding the reconciliation of interests between the parties in an external international commercial agency relationship

1. Conditions of application of the civil law doctrine of indirect representation and the common law concept of partially undisclosed principal are compatible with the latter being narrower, applying to cases where the agent acts within the scope of the granted authority to create a valid relationship between the principal and the third party. This is especially evident when the principal intervenes into the contract that was not concluded in his name by the insolvent agent.
2. In jurisdictions following the continental law legal tradition, the agent acting in his own name on behalf of the undisclosed principal fails to create valid relationship between the principal and the third party and becomes contractually liable to the third party, with certain exceptions in case of agent's bankruptcy. In such cases, the undisclosed principal may be granted a right to intervene in the relationship between the agent and the third party. While this rule is recognised in both legal systems, it favours the principal and should be balanced by granting the third party's right to take direct action against the undisclosed principal, protecting themselves against the agent's insolvency.
3. The right of the third party to request the agent to disclose the principal's identity is identified in international legal acts as well as national law of both legal systems. While this rule places the agent in the position risking to infringe the duty of loyalty and confidentiality to the principal, it shall be balanced by the principal's right to remain unidentified in case the agent is acting within the limits of authority, and the principal's identity is not relevant for the contract performance.
4. The doctrine of apparent authority facilitates legitimising the unauthorised actions of an agent, providing the necessary protection to bona fide third party who reasonably believe that the agent has been duly authorised. Therefore, conditions of its application differ across the legal systems varying from the requirement of principal's fault for actions falling within the principal's risk area to shifting the focus to the third party's reasonable belief and standard of care. Applying the principle of least-cost avoider could help establish who bears the lowest cost of preventing the harm. For instance, if the third party could have checked the agent's authorisation without incurring high costs, however, has not done that, it would be reasonable to deny the requirement of acting in good faith.

5. Fourth parties, bearing the risk of agent acting without a proper authority, may rely on the doctrine of apparent authority if they have a reasonable belief that the contract concluded between the principal and a third person is valid due to the agent's actions performed on behalf of the principal. If the loss suffered by the fourth person was caused by the actions of an honest third person determined by the representative's statement regarding the granted rights, it can be a sufficient basis for the fourth person to rely on the doctrine of alleged representation.
6. Doctrines of apparent authority and ratification of an unauthorised agent's actions should be considered separate and mutually exclusive defences for protecting a third party's rights. In legal systems that see the doctrine of apparent authority only as a defence of the third party's infringed interests the application of the doctrine of ratification explicitly eliminates the application of the rules on apparent authority. When a third party invokes the doctrine of ratification, they implicitly acknowledge that the agent was not properly authorised when the contract was made, which contradicts the fundamental requirement of a good faith belief in the agent's authority.
7. Liability under the doctrine of falsus procurator in civil law countries is a special type of liability connected explicitly to the institute of representation that cannot be classified as contractual or delictual. While following the concept of direct representation, under the civil law approach, by invoking the concept of falsus procurator the agent can become personally liable for the unauthorised act performed on behalf of an undisclosed or unidentified principal for non-performance. Such an approach inherently unifies the positions of both legal families.

These findings support the third hypothesis of the study, that *the balance of interests between the principal and the third party can be reached by awarding them with the corresponding methods of interest protection and distributing the risk between the participants in case of agency malfunctioning.*

PROPOSALS

Based on the provided research and the conclusions made above, it is suggested that international commercial agency relationships are one of the most common ways of conducting business abroad nowadays. The following amendments are recommended to increase the value of the agency and align the interests of the parties.

1. The agent's authority to negotiate is one of the loopholes of the definition of commercial agent prescribed by the EC Directive 86/653, which is interpreted differently by the national courts. The CJEU has confirmed the way of interpretating the agent's power to negotiate multiple times and seems consistent in it. Therefore, to avoid misguidance, the definition in Article 1 (2) could be extended and specified as follows:
   "a commercial agent can be defined as a self-employed natural or legal person who is not bound by an employment contract nor having the power to change the prices of such goods or services, has the continuing authority to negotiate and to possibly conclude contracts with third parties relating to sale or purchase of goods in the name of and on behalf of principals and under their control".
2. The practical implementation of the legal regulation uncovers the shortcomings of the adopted rules. Agency, being a fiduciary relationship by nature, requires the parties to follow the default fiduciary duties, a breach of which may undermine the agency itself. Nevertheless, it is recommended that the over imposing of fiduciary duties be limited, and alternative legal arrangements be implemented, increasing trust and aligning the interests of the principal and agent. Moreover, increased application of fiduciary duties could contribute to increased agency costs, which could be minimised by adopting risk-sharing arrangements as prevention strategies rather than defensive. Particularly, it is recommended for the national courts, while deciding on the issues of allocating the liability within the agency agreement to apply the US tort law principle of least-cost-avoider, which would simplify the determination of liability by identifying who bears the lower cost of avoiding harm and assigning liability to that party. The application of the principle relies on the level of precautions taken by the parties to avoid liability, together with the type of authority existing at the time the harm occurred.
3. It is suggested to implement a contingency fee system of agent's compensation in cross-border transactions that can help align the interests of agents and principals effectively while promoting fairness and equality within the relationship. The EU Directive 86/653/EEC allows for flexible arrangements in defining agent compensation. Article 6 states that the level of remuneration can be determined by the parties, subject to the compulsory provisions of national law, which opens the door for the introduction of contingency fees. Therefore, it is possible to develop the national guidelines that, besides the general code of conduct, would provide rules for calculating the amount of compensation and limitations on allowable fee increases and requirements for periodic

performance assessments. Recognition of contingent fee arrangements varies by jurisdiction. While certain regulations are present across the EU Member States, a broader application should be implemented due to the absence of any prohibitions on defining the compensation of commercial agents on the EU level (unlike in the case of lawyers).

4. Extensive and balanced regulation of the cases of unauthorised agency is of crucial importance. Once the agent concludes the transaction outside the scope of the granted authority, the principal can ratify the transaction in question if the latter is interested in it. It is recommended that the principal's right to ratify is balanced by the right of the third party to withdraw from the unauthorised transaction. The right to withdraw shall be limited and granted to bona fide third parties unaware of the agent's lack of authority. Both the right to ratify the transaction and the right to withdraw shall be communicated to all the parties in the relationship influenced by the act to avoid legal uncertainties. The conducted research revealed that such clauses are absent or require communication only to one party within most legal systems; therefore, it is recommended to update the national legislation by requiring the principal to communicate the ratification to all the parties to agency relationships.

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MYKOLAS ROMERIS UNIVERSITY

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CONCEPTUAL FOUNDATIONS OF INTEREST ALIGNMENT IN INTERNATIONAL COMMERCIAL AGENCY: A CIVIL AND COMMON LAW PERSPECTIVE

Summary of the Doctoral Dissertation
Social Sciences, Law (S 001)

Vilnius, 2025

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CONCEPTUAL FOUNDATIONS OF INTEREST ALIGNMENT IN INTERNATIONAL COMMERCIAL AGENCY: A CIVIL AND COMMON LAW PERSPECTIVE

SUMMARY

The dissertation focuses on providing a fundamental legal analysis of the most pressing conceptual matters associated with reconciling the interests of key stakeholders, including agents, principals, third parties, and fourth parties through the norms of civil and common law and to provide the practical mechanisms of aligning their rights and interests to preserve the value of agency.

International commercial agency represents a contractual relationship of a fiduciary nature between the parties who reside in different states, and where one party (commercial agent) undertakes, for a fee, to perform actions on their behalf and at the expense of the other party (principal) to facilitate the sale of goods with the third party. This relationship facilitates business development internationally while leveraging the agent's local knowledge, connections, and expertise.

Commercial agency represents a complex type of commercial representation with its ground of occurrence, unique nature, set of legal participants, object, and legal regulation that are being created based on commercial agency agreement. The fiduciary nature of the agency determines the main and highest level of care and loyalty in the agent's behaviour to act in the principal's best interests. Although having a noble aim, over imposing of fiduciary duties may lead to increased agency costs and undermine the value of the agency. To limit the application of fiduciary duties, it is recommended to implement alternative legal arrangements, such as enhancing the agent's personal liability for actions performed outside the scope of authority or fostering trust and aligning the interests of the principal and agent within the agency relationship that can serve functions akin to fiduciary duties while promoting efficiency and addressing contemporary challenges. Moreover, increased application of fiduciary duties could contribute to increased agency costs, which could be minimised by the adoption of risk-sharing arrangements as prevention strategies rather than defensive.

The dissertation divides the analysis of agency concepts and problems into internal and external according to the types of legal relationships formed because of the creation of the commercial agency. Internal level of the legal relationship of representation is a legal relationship by virtue of which one person (the agent) has the right to perform certain legal actions on behalf of and in the interests of another person (the one who is being represented) in relation to third parties, and the person represented by the representative is obliged to assume all legal consequences of these actions. An external level of the relationship of representation is being created between the principal and the third party.

While the presence of internal relations does not cause any disputes, the existence of the external relationship is being questioned by stating that the representation is the relationship between the agent and the principal that emerges from the conclusion of the mandate agreement. The author, however, indicates that without the inclusion of external relationship into the concept of agency, the sole purpose of the representation is being neglected, since the main aim of the representation is to perform actions and conclude contracts on behalf of the principal with the third party. Therefore, the agency relationship has three levels of legal relationship between the principal and agent, between the agent and the third party, and between the principal and a third party. Nevertheless, the thesis also raises the debatable issue of the expansion of tripartite relationship to the inclusion of fourth parties. This category may include external stakeholders who are not directly involved into the relationship but are also entitled to protection due to their reliance on the validation of initial agency contracts. Thus, the question arises as to how to balance the interests of the fourth parties who act in good faith toward the other participants in commercial agency relationships. Problems are particularly prevalent in cases of unauthorised agency.

When engaging in a relationship of an international commercial agency, the principal expects to make use of the agent's knowledge of the market. Conflicting objectives and information asymmetry are the two basic ingredients of an agency problem and without proper communication and misalignment of incentives agents may act outside the scope of authority. To prevent and resolve conflicts in international commercial agency relationships, parties can employ strategies such as clear and detailed contractual agreements, regular communication, dispute resolution mechanisms, and legal counsel experienced in international business law. Unfortunately, there is no universal set of mechanisms for the resolution of agency problems as well as no universal set of conflicts, however, the author found the least-cost-avoider principle helpful in the allocation of liability to the party who has the lower cost of avoiding the harm but has not exercised the means to prevent the breach. Moreover, the adoption of a proper compensation package can be used as a mechanism to align the incentives, particularly the contingent fee contract that would promote a better economic incentive for the agent and motivate the latter to obtain the best possible outcome in the principal's interests.

The author also discusses the right of the undisclosed principal within the agency relationship as well as the right of the third party to request the agent to disclose the identity of the principal. In certain cases, the identity of the principal is irrelevant to the third party, thus, the undisclosed principals shall be treated the same as the disclosed or partially disclosed. Agents involved in unauthorised transactions bear liability to the third parties they engage with, irrespective of whether they act on behalf of undisclosed, partially disclosed, or disclosed principals. In instances where an agent enters into a contract with a third party without prior authorisation from their principal, the agent is held liable to the third party. This liability exists regardless of whether the third party was aware that the agent was acting on behalf of someone else, and irrespective of whether that person had been identified.

The thesis dedicates a great amount of attention to the doctrine of apparent authority and its part in ensuring the balance of interests between the commercial agency participants. Application of the doctrine solely to protect third parties could negatively affect the utility of the agency relationship, infringing upon the principal's autonomy of will. The thesis provides a deep analysis of the differences between the implied and apparent authority, reconciliation of the parties' interests when applying the doctrine of apparent authority as well as the interrelations between the doctrine of ratification and the doctrine of apparent authority.

Doctrine of apparent authority as well as doctrine of ratification have been created as a resort of third-party protection under which the principal can become bound and liable under the contract. Specific hierarchy between ratification and apparent authority precludes the principal to refer to the doctrine apparent authority where the unauthorised agency is established. By invoking the doctrine of apparent authority, the third party indirectly acknowledges that the agent was not duly authorised at the time of a contract conclusion and the principal needs to grant him authority retroactively by ratifying the action. Such a position contradicts the primary condition of the doctrine of apparent authority which presumes that the third party genuinely believed that the agent was duly authorised and never doubted his authority. Although when the ratification cannot be invoked, the third parties should not be denied the right to protect the interests by relying on apparent authority.

The author concludes by finding that the balance of interests between the principal and the third party can be reached by awarding them with the corresponding methods of interest protections and distributing the risk agency malfunctioning.

Considering the issues raised above, the present research is considered to be a pilot scientific work that will systematically evaluate the legal regulation of commercial agency from a comparative perspective, analyse the concept of authority, nature and causes of imbalance of interests between the subjects to international commercial agency. It is aimed at providing theoretical insights as well as practical solutions that would enhance efficiency, reduce conflicts, increase trust in cross-border commercial relationships and ensure the balance of the legitimate interests of all parties involved.

The results of the research may also be relevant in various practical aspects to the legislators of analysed jurisdictions, court practice, and legal doctrine.

For the legislators, the research may be useful for eliminating the gaps and deficiencies in the legal norms regulating international commercial agency to complete the regulation of these relations and to ensure the balance of interests of subjects participating in them.

The Courts may use the results of this scientific research to avoid mistakes in explaining and implementing the norms of civil law and commercial law regulating agency relations, and to find the proper legal solutions that would consider the interests of all the parties to agency relations. Depending on whether the country has a monist or dualist legal system, commercial law could be either incorporated into the civil law norms or not. Such a difference is considered while providing further analysis.

This research contributes to both academic discourse and practical implementation

that would be a significant contribution to the development of the international doctrine of agency. The research shows the problems of the legal regulation of international commercial agency relationships and its implementation in practice, offering a fresh perspective that incorporates two significant legal traditions in the context of global commerce. It is also believed that this work will encourage further research including the issues raised by the reviewer regarding the technological development and digital transformation and will have value to scientists who analyse separate aspects of similar problems and to the institute of representation in general.

LIST OF PUBLICATIONS

1. Jurkevičius, V.; Pokhodun, Y. 2018. The doctrine of apparent authority as a precondition for sustainable business, Entrepreneurship and Sustainability Issues 6(2): 649-661. http://doi.org/10.9770/jesi.2018.6.2(13)
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PRESENTATIONS AT SCIENTIFIC CONFERENCES

1. The International Conference of young researchers "SOCIAL TRANSFORMATIONS IN CONTEMPORARY SOCIETY 2021" (STICS 2021) organized by the MRU Doctoral Students' Association, Vilnius Lithuania, 3-4 June 2021.
2. The 12th International Scientific Conference "Business and Management 2022" (VILNIUS TECH), Vilnius, Lithuania, 12-13 May 2022.
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MYKOLO ROMERIO UNIVERSITETAS

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KONCEPTUALŪS INTERESŲ DERINIMO TARPTAUTINIUOSE KOMERCINIO ATSTOVAVIMO TEISINIUOSE SANTYKIUOSE PAGRINDAI: KONTINENTINĖS IR BENDROSIOS TEISĖS PERSPEKTYVOS

Mokslo daktaro disertacijos santrauka
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KONCEPTUALŪS INTERESŲ DERINIMO TARPTAUTINIUOSE KOMERCINIO ATSTOVAVIMO TEISINIUOSE SANTYKIUOSE PAGRINDAI: KONTINENTINĖS IR BENDROSIOS TEISĖS PERSPEKTYVOS

SANTRAUKA

Disertacijoje daugiausia dėmesio skiriama fundamentaliai komercinio atstovavimo teisinei analizei konceptualių klausimų, susijusių su pagrindinių suinteresuotų šalių, įskaitant atstovus, atstovaujamuosius, trečiuosius asmenis ir ketvirtąsias šalis, interesų derinimu pasitelkiant kontinentinės ir bendrosios teisės normas, ir praktinių mechanizmų, kaip suderinti jų teises ir interesus pateikimui.

Tarptautinis komercinis atstovavimas - tai fiduciarinio pobūdžio sutartiniai santykiai tarp skirtingose valstybėse veikiančių šalių, kai viena šalis (prekybos agentas) įsipareigoja už atlygį atlikti veiksmus kitos šalies (atstovaujamojo) vardu ir sąskaita, kad palengvintų prekių pardavimą trečiajai šaliai. Šie santykiai palengvina verslo plėtrą tarptautiniu mastu, kartu panaudojant atstovo vietines žinias, ryšius ir patirtį.

Komercinis atstovavimas yra sudėtinga atstovavimo rūšis, turinti savo atsiradimo pagrindą, unikalų pobūdį, teisinių dalyvių grupę, objektą ir teisinį reguliavimą, kuris sukuriamas komercinio atstovavimo sutarties pagrindu. Fiduciarinis atstovavimo pobūdis lemia aukščiausią rūpestingumo ir lojalumo lygį atstovo elgesyje, siekiant veikti atstovaujamojo interesais. Nors prekybos agentas ir turėdamas aiškų tikslą, pernelyg griežtas fiduciarinių pareigų nustatymas gali lemti didesnes atstovavimo išlaidas. Siekiant apriboti fiduciarinių pareigų taikymą, rekomenduojama taikyti alternatyvias teisines priemones, pavyzdžiui, griežtinti prekybos atstovo asmeninę atsakomybę už veiksmus, atliktus viršijant įgaliojimus, arba skatinti pasitikėjimą ir derinti atstovaujamojo ir atstovo interesus atstovavimo santykiuose, kurie gali atlikti fiduciarinėms pareigoms artimas funkcijas, kartu skatinant veiksmingumą ir sprendžiant šiuolaikines problemas. Be to, dažnesnis fiduciarinių pareigų taikymas galėtų prisidėti prie didesnių atstovavimo išlaidų, kurias būtų galima sumažinti priimant rizikos pasidalijimo susitarimus kaip prevencines, o ne gynybines strategijas.

Disertacijoje atstovavimo sampratos ir problemų analizė skirstoma į vidinę ir išorinę pagal tai, kokie teisiniai santykiai susiklosto sukūrus komercinį atstovavimą. Vidinis atstovavimo teisinių santykių lygmuo - tai teisiniai santykiai, pagal kuriuos vienas asmuo (atstovas) turi teisę kito asmens (atstovaujamojo) vardu ir interesais atlikti tam tikrus teisinius veiksmus su trečiaisiais asmenimis, o atstovo atstovaujamas asmuo privalo prisiimti visas šių veiksmų teisines pasekmes. Tarp atstovaujamojo ir trečiojo asmens sukuriamas išorinis atstovavimo santykių lygmuo.

Nors vidinių santykių buvimas nekelia ginčų, išorinių santykių buvimas kvestionuojamas teigiant, kad atstovavimas yra atstovo ir atstovaujamojo santykiai, atsirandantys sudarius pavedimo sutartį. Tačiau autorė nurodo, kad neįtraukus išorinių santykių į atstovavimo sampratą yra ignoruojamas pagrindinis atstovavimo tikslas yra atlikti veiksmus ir sudaryti sutartis atstovaujamojo vardu su trečiuoju asmeniu. Todėl atstovavimo santykiai turi tris teisinių santykių lygmenis: tarp atstovaujamojo ir atstovo, tarp atstovo ir trečiosios šalies bei tarp atstovaujamojo ir trečiosios šalies. Nepaisant to, disertacijoje taip pat keliamas diskutuotinas klausimas dėl trišalių santykių išplėtimo įtraukiant ketvirtąsias šalis. Šiai kategorijai gali būti priskiriamos išorinės suinteresuotosios šalys, kurios nėra tiesiogiai įtrauktos į santykius, tačiau taip pat turi teisę į apsaugą dėl to, kad yra priklausomos nuo pirminių atstovavimo sutarčių patvirtinimo. Taigi kyla klausimas, kaip subalansuoti ketvirtųjų šalių, kurios veikia sąžiningai kitų komercinio atstovavimo santykių dalyvių atžvilgiu, interesus. Ypač daug problemų kyla neįgalioto atstovavimo atvejais.

Užmegzdamas tarptautinio komercinio atstovavimo santykius, atstovaujamasis tikisi pasinaudoti prekybos agento žiniomis apie rinką. Prieštaringi tikslai ir informacijos asimetrija yra dvi pagrindinės atstovavimo problemos sudedamosios dalys, o be tinkamo bendravimo ir paskatų nesuderinimo prekybos agentai gali veikti viršydami įgaliojimus. Siekdamos užkirsti kelią konfliktams tarptautiniuose komerciniuose atstovavimo santykiuose ir juos išspręsti, šalys gali taikyti tokias strategijas kaip aiškūs ir išsamūs sutartiniai susitarimai, reguliarus bendravimas, ginčų sprendimo mechanizmai ir teisininkai, turintys patirties tarptautinėje verslo teisėje. Deja, nėra universalaus atstovavimo problemų sprendimo mechanizmų rinkinio, taip pat nėra universalaus konfliktų sprendimo mechanizmų rinkinio, tačiau, autorės nuomone, mažiausių sąnaudų išvengimo principas padeda paskirstyti atsakomybę šaliai, kuri turi mažesnes sąnaudas siekiant išvengti žalos, tačiau nepasinaudojo priemonėmis, kad išvengtų pažeidimo. Be to, tinkamo kompensavimo paketo priėmimas gali būti naudojamas kaip paskatų suderinimo mechanizmas, ypač sąlyginio atlygio sutartis, kuri teiktų geresnes ekonomines paskatas atstovui ir motyvuotų pastarąjį pasiekti geriausią įmanomą rezultatą atstovaujamojo interesais.

Autorė taip pat aptaria teisę neatskleisti atstovaujamojo atstovavimo santykiuose ir trečiosios šalies teisę reikalauti, kad atstovas atskleistų atstovaujamojo tapatybę. Tam tikrais atvejais atstovaujamojo tapatybė trečiajam asmeniui nėra svarbi, todėl neatskleisti atstovaujamieji traktuojami taip pat, kaip ir atskleisti ar iš dalies atskleisti. Agentai, dalyvaujantys sandoriuose, yra atsakingi prieš trečiąsias šalis, su kuriomis bendrauja, nepriklausomai nuo to, ar jie veikia neatskleistų, iš dalies atskleistų, ar atskleistų atstovaujamųjų vardu. Tais atvejais, kai agentas sudaro sutartį su trečiąja šalimi be išankstinio atstovaujamojo leidimo, atstovas atsako trečiajai šaliai. Ši atsakomybė taikoma nepriklausomai nuo to ar trečioji šalis žinojo, kad atstovas veikia kito asmens vardu ir nepriklausomai nuo to, ar tas asmuo buvo nustatytas.

Disertacijoje daug dėmesio skiriama tariamo atstovavimo doktrinai ir jos vaidmeniui užtikrinant komercinio atstovavimo dalyvių interesų pusiausvyrą. Šios doktrinos taikymas tik siekiant apsaugoti trečiąsias šalis gali neigiamai paveikti atstovavimo

santykių naudingumą, pažeidžiant atstovaujamojo valios autonomiją. Disertacijoje išsamiai analizuojami numanomo ir tariamo įgaliojimo skirtumai, šalių interesų derinimas taikant tariamo įgaliojimo doktriną, taip pat ratifikavimo doktrinos ir tariamo atstovavimo doktrinos sąsajos.

Tariamo atstovavimo doktrina ir ratifikavimo doktrina buvo sukurtos kaip trečiosios šalies apsaugos priemonė, pagal kurią atstovaujamasis gali tapti įpareigotas ir atsakingas pagal sutartį. Specifinė ratifikavimo ir tariamo įgaliojimo hierarchija neleidžia atstovaujamajam remtis tariamo atstovavimo doktrina, kai nustatomas neįgaliotas atstovavimas. Remdamasi tariamo atstovavimo doktrina, trečioji šalis netiesiogiai pripažįsta, kad atstovas sutarties sudarymo metu nebuvo tinkamai įgaliotas ir atstovaujamasis turi suteikti jam įgaliojimus atgaline data, ratifikuodamas veiksmus. Tokia pozicija prieštarauja pagrindinei tariamo atstovavimo doktrinos sąlygai, pagal kurią preziumuojama, kad trečioji šalis nuoširdžiai tikėjo, jog atstovas buvo tinkamai įgaliotas, ir niekada neabejojo jo įgaliojimais. Vis dėlto atvejais, kai ratifikavimu negalima remtis, tretiesiems asmenims neturėtų būti atimta teisė ginti interesus remiantis akivaizdžiu įgaliojimu.

Autorė daro išvadą, kad atstovaujamojo ir trečiosios šalies interesų pusiausvyra gali būti pasiekta suteikiant jiems atitinkamus interesų apsaugos būdus ir paskirstant netinkamo atstovo veikimo riziką.

Atsižvelgiant į iškeltus klausimus, šis tyrimas laikytinas bandomuoju moksliniu darbu, kuriame bus sistemiškai vertinamas komercinio atstovavimo teisinis reguliavimas lyginamuoju aspektu, analizuojama įgaliojimų samprata, tarptautinio komercinio atstovavimo subjektų interesų disbalanso pobūdis ir priežastys. Siekiama pateikti teorines įžvalgas bei praktinius sprendimus, kurie padidintų tarpvalstybinių komercinių santykių efektyvumą, sumažintų konfliktų skaičių, padidintų pasitikėjimą ir užtikrintų visų dalyvaujančių šalių teisėtų interesų pusiausvyrą.

Tyrimo rezultatai įvairiais praktiniais aspektais taip pat gali būti svarbūs analizuojamų jurisdikcijų įstatymų leidėjams, teismų praktikai ir teisės doktrinai.

Įstatymų leidėjams tyrimas gali būti naudingas šalinant tarptautinį komercinį atstovavimą reglamentuojančių teisės normų spragas ir trūkumus, siekiant užbaigti šių santykių reguliavimą ir užtikrinti juose dalyvaujančių subjektų interesų pusiausvyrą.

Teismai, naudodamiesi šių mokslinių tyrimų rezultatais, gali išvengti klaidų aiškinant ir taikant atstovavimo santykius reglamentuojančias kontinentinės ir komercinės teisės normas bei rasti tinkamus teisinius sprendimus, kurie atsižvelgtų į visų atstovavimo santykių šalių interesus. Priklausomai nuo to ar šalyje galioja monistinė, ar dualistinė teisinė sistema, komercinė teisė galėtų būti įtraukta į kontinentinės teisės normas arba ne. Į tokį skirtumą atsižvelgiama pateikiant tolesnę analizę.

Šis tyrimas prisideda tiek prie akademinio diskurso, tiek prie praktinio įgyvendinimo, kuris būtų reikšmingas indėlis į tarptautinės atstovavimo doktrinos plėtrą. Tyrime atskleidžiamos tarptautinio komercinio atstovavimo santykių teisinio reguliavimo ir jo įgyvendinimo praktikoje problemos, siūloma nauja perspektyva, apimanti dvi reikšmingas teisines tradicijas pasaulinės prekybos kontekste. Taip pat manoma, kad šis darbas paskatins tolesnius mokslinius tyrimus, apimančius recenzento iškeltus

klausimus, susijusius su technologine plėtra ir skaitmenine transformacija ir bus vertingas mokslininkams, analizuojantiems atskirus panašių problemų aspektus, bei atstovavimo institutui apskritai.

Tyrimo objektas ir tikslai

Disertacijos objektas - pagrindinių tarptautinio komercinio atstovavimo dalyvių, įskaitant agentus, atstovaujamuosius, trečiąsias ir ketvirtąsias šalis, interesų derinimas per kontinentinės ir bendrosios teisės sistemų normas bei jų praktinį įgyvendinimą.

Siekdama atskleisti disertacijos tikslą, autorė nagrinėja pagrindinius atstovavimo principus ir sąvokas, tokias kaip neatskleistas atstovavimas, tariamas atstovavimas, neįgaliotas atstovavimas ir ratifikavimas, iš vidinių ir išorinių atstovavimo santykių šalių interesų pusiausvyros perspektyvos.

Tyrimo tikslas - iš esmės išanalizuoti dažniausiai pasitaikančias problemas, susijusias su tarptautinio komercinio atstovavimo santykių dalyvių interesų nesuderinamumu lyginamuoju aspektu ir praktinius tarptautinio komercinio atstovavimo santykių dalyvių (atstovo, atstovaujamojo, trečiųjų šalių) ir kitų susijusių (ketvirtųjų) šalių teisių bei teisėtų interesų derinimo mechanizmus, nagrinėjant teisinę bazę, reglamentuojančią atstovavimo santykius kontinentinės ir bendrosios teisės jurisdikcijose.

Disertacijos tikslui pasiekti keliami šie uždaviniai:

1. Apibrėžti tarptautinio komercinio atstovavimo sampratos ypatumus, teisinio reguliavimo raidą ir nustatyti tarptautinio komercinio atstovavimo sutartims taikytiną teisę lyginamuoju aspektu;
2. Nustatyti vidinių atstovavimo santykių konfliktines sritis, analizuojant atstovo ir atstovaujamojo interesų derinimo mechanizmus;
3. Atlikti išorinio atstovavimo santykių šalių santykių analizę, nustatant mechanizmus, kurie palengvintų interesų derinimą ir suteiktų apsaugą netinkamo atstovavimo atveju.

Disertacijos ginamieji teiginiai:

- Tarptautinio komercinio atstovavimo santykiai apima specifinę šalių grupę, kuri skiriasi nuo kitų atstovavimo santykių, o jų ypatybės kyla iš atitinkamos veiklos rūšies, tikslo ir pobūdžio.
- Aktyvių rizikos mažinimo strategijų įgyvendinimas, papildytas fiduciarinių pareigų atitaisymo mechanizmais ir sąlyginio atlyginimo sistema, skirta atstovo kompensacijai, gali padėti suderinti vidinių atstovavimo santykių interesus ir padidinti paties atstovavimo veiksmingumą.
- Interesų pusiausvyrą tarp atstovaujamojo ir trečiosios šalies galima pasiekti suteikiant jiems atitinkamus interesų apsaugos būdus ir paskirstant netinkamo atstovavimo riziką.

IŠVADOS

Tarptautinio komercinio atstovavimo konceptualūs klausimai

1. Tarptautinis komercinis atstovavimas gali būti apibrėžiamas kaip teisiniai santykiai tarp tarptautinėje verslo veikloje dalyvaujančių šalių, kai viena šalis (prekybos agentas) įsipareigoja už atlygį atlikti veiksmus kitos šalies (atstovaujamojo) vardu ir sąskaita, siekdama palengvinti prekių pardavimą trečiajai šaliai. Šie santykiai palengvina verslo plėtrą tarptautiniu mastu, kartu panaudojant atstovo vietines žinias, ryšius ir patirtį.

2. Remiantis pagrindiniais tyrimais, kontinentinės teisės santykių atstovavimas plačiąja prasme apima tiek sutartinius, tiek nesutartinius tipus, apibrėžiančius privatinės teisės prigimtį, grindžiamą sutarčių laisvės ir valios autonomijos principais. Tokio skirstymo nėra bendrosios teisės sistemoje, kur atstovavimo terminas suvokiamas kaip plati sąvoka, apimanti kiekvieną fiduciarinę situaciją, gali būti apibrėžiamas kaip fiduciariniai teisiniai santykiai, kai vienas asmuo turi įgaliojimus daryti įtaką ir kontroliuoti kito asmens teisinę padėtį, susijusią su trečiaisiais asmenimis, atlikdamas teisinius arba fizinius veiksmus suteiktų įgaliojimų ribose.

3. Kontinentinėje teisėje prekybos agentas yra profesionalas, kuris užsiima tarpininkavimo veikla kaip pagrindine verslo veikla, kad galėtų veiksmingai pasiekti teisiškai ir ekonomiškai reikšmingų rezultatų prekybos srityje, kuriuos užtikrina verslo ir profesinė kompetencija. Nepriklausomi rangovai gali veikti kaip prekybos agentai tarpininkavimo santykiuose nepriklausomai, tačiau atsižvelgiant į atstovaujamojo vykdomos kontrolės laipsnį, jų santykius reglamentuojančios sutarties rūšį, atlyginimo ir taikytinus įstatymus. Bendrojoje teisėje atstovo apibrėžtis yra platesnė dėl fiduciarinių santykių pobūdžio, kuris apima beveik bet kurį asmenį, turintį teisę ir būtinus įgaliojimus veikti atstovaujamojo vardu, jo naudai ir pagal jo nurodymus, siekiant sukurti, pakeisti ar nutraukti atstovaujamojo ir trečiosios šalies santykius.

4. Kontinentinės teisės sistemos šalyse juridinio asmens organų atliekami sandoriai laikomi paties juridinio asmens sprendimų priėmimo išraiška ir operatyvine veikla, kurią vykdo asmenys, įgalioti veikti juridinio asmens vardu pagal savo oficialias pareigas. Nors direktoriai gali būti laikomi bendrovės atstovais plačiąja prasme, tokio pobūdžio atstovavimas laikomas kvaziatstovavimu, kuris savo esme neturi fundamentalių atstovavimo požymių, tačiau yra panašus į savanorišką atstovavimą.

5. Atstovavimo sutartis gali būti laikoma vieninteliu komercinio atstovavimo vidinių ir išorinių teisinių santykių atsiradimo pagrindu, o įgaliojimas nesukuria komercinio atstovavimo santykių, bet yra atstovo įgaliojimų patvirtinimas prieš trečiuosius asmenis. Dėl bendrosios teisės požiūrio specifikos atstovaujamojo ir atstovo sudaryta sutartis yra pagrindas atsirasti tiek vidiniams, tiek išoriniams komercinio atstovavimo teisiniams santykiams.

6. Ketvirtąsias šalis galima apibrėžti kaip išorės suinteresuotąsias šalis, kurios, nors ir nėra tiesiogiai susijusios su pirminiais atstovavimo santykiais, tačiau yra glaudžiai susijusios su jais pagal antrąjį sandorį dėl to paties objekto ir remiasi jo patvirtinimu. Nors ketvirtosios šalies interesai gali būti pažeisti dėl trečiosios šalies veiksmų,

ketvirtosios šalys negali būti griežtai laikomos tolesniu atstovavimo dalyvių grandinės sluoksniu, nes jos gali būti susijusios su atstovavimo santykiais per ryšį su atstovaujamuoju.

7. Nepaisant to, kad egzistuoja tarptautiniai teisės aktai, kurie labai prisidėjo prie atstovavimo taisyklių suvienodinimo, dauguma jų pasirenka selektyvų požiūrį, kuris suderina tik atskirus klausimus, praleisdamas atstovaujamojo ir atstovo veiksnumo nustatymo problemas, sutikimo trūkumus, piktnaudžiavimą įgaliojimais apskritai, nesuderina abiejų teisės sistemų požiūrių, reguliuodamas tiek vidinius, tiek išorinius santykius, o daugybės klausimų reguliavimą palieka nacionalinės teisės dispozicijai. Todėl, siekiant sumažinti šalių konfliktus ir išvengti veiksmų paralelizmo įvairiuose nacionaliniuose įstatymuose, būtina suvienodinti nacionalinius materialinius įstatymus dėl atstovavimo - bent jau tuos, kurie taikomi tarptautinėms komercinėms sutartims.

Šios išvados patvirtina tyrimo pradžioje pateiktą gynybinį teiginį: Tarptautinio komercinio atstovavimo santykiai apima specifinę šalių grupę, kuri skiriasi nuo kitų atstovavimo santykių, o jų ypatybės kyla iš atitinkamos veiklos rūšies, tikslo ir pobūdžio.

Dėl vidaus komercinio atstovavimo santykių šalių interesų pusiausvyros išlaikymo

1. Komercinis atstovavimas - tai fiduciariniai santykiai, kuriais siekiama užtikrinti aukščiausio lygio lojalumąatstovo veiksmuose atstovaujamojo interesais. Direktyvoje nustatytos pareigos "veikti pareigingai ir sąžiningai" apimtis dėl stiprių etimologinių sąsajų sutampa su bendrosios teisės fiduciarinėmis pareigomis. Kontinentinė pareiga elgtis sąžiningai apima ikisutartines derybas ir yra objektyvus elgesio standartas bet kokio pobūdžio santykiuose, o fiduciarinė lojalumo pareiga atsiranda susiklosčius santykiams, dėl kurių šalis turi veikti kito asmens interesais.

2. Rūpestingumo pareiga apima kitų privatinės teisės šakų, ypač deliktų teisės, bruožus, tačiau ji turi unikalių bruožų, kai yra taikoma fiduciariniame kontekste. Komercinio atstovavimo teisėje rūpestingumo pareiga gali nepatekti į fiduciarinių pareigų, kurias komercinis atstovas turi vykdyti atstovaujamajam, taikymo sritį, atsižvelgiant į tai, kad komercinio atstovo profesinė rūpestingumo pareiga taikoma bet kuriuo metu, nepriklausomai nuo to, ar jis tuo metu atstovauja atstovaujamajam. Pernelyg griežtas rūpestingumo pareigos vykdymas gali pakenkti lojalumo pareigai ir apriboti atstovo galimybę veikti atstovaujamojo interesais.

3. Fiduciarinių pareigų buvimas netrukdo prekybos agentui dalyvauti keliuose verslo sandoriuose skirtingų atstovaujamųjų vardu. Fiduciarinis pobūdis suponuoja, kad tarp atstovo ir atstovaujamojo nėra konfliktų. ES teisės požiūriu pareiga vengti interesų konflikto vertinama per pareigą elgtis pareigingai ir sąžiningai, o pagal bendrąją teisę atstovas turi fiduciarinę pareigą vengti interesų konflikto su atstovaujamuoju. Tai lemia skirtingus rezultatus, kai kontinentinės teisės jurisdikcijose atstovas, kuris neatskleidė interesų konflikto, bus apkaltintas esminiu atstovavimo sutarties pažeidimu, leidžiančiu atstovaujamajam nutraukti sutartį. Tuo tarpu bendrojoje teisėje atstovo neatskleidimas nebūtinai gali lemti lojalumo pareigos pažeidimą, o tai reiškia, kad sutartis negali būti nutraukta, tačiau atstovaujamasis turės teisę reikalauti atlyginti

nuostolius.

4. Vidinė sutartis, kuria sukuriami komercinio atstovavimo santykiai, nustato atstovo faktinių įgaliojimų veikti atstovaujamojo vardu ribas, o tariamų įgaliojimų apimtis yra išorinio pobūdžio ir ją apibrėžia trečiųjų šalių dalyvavimas. Nors šis skirtumas taikomas bendrojoje teisėje, kai kuriose kontinentinės teisės jurisdikcijose jis atmetamas, nes įgaliojimai suteikia atstovui teisę atlikti veiksmus prieš trečiuosius asmenis, įskaitant visų formų įgaliojimus, patenkančius į išorinių santykių apimtį. Siekiant išlaikyti interesų pusiausvyrą, laikoma, kad atstovas, veikdamas sąžiningai ir atlikdamas veiksmą, kurio pagrįstai tikėtasi toje situacijoje, yra tinkamai įgaliotas atstovaujamojo.

5. Nors fiduciarinių teisių gynimo priemonių tikslas nėra bausti, JAV plačiai paplitęs baudinių nuostolių taikymas už sunkius, tyčinius prekybos atstovo nusižengimus. Nors daugumos ES valstybių narių teisėje ši priemonė vis dar atmetama, negalima atmesti galimybės, kad ji gali būti priimta. Nepaisant pernelyg didelės kompensacijos rizikos ir potencialaus moralinės pusiausvyros pažeidimo, baudžiamieji nuostoliai gali visiškai atlyginti žalą, atkurti status quo ante ir suteikti teisingą kompensaciją nukentėjusiajai šaliai.

6. Taikant mažiausių sąnaudų išvengimo principą, atsakomybė nustatoma paprasčiau, nes nustatoma, kam tenka mažesnės žalos išvengimo sąnaudos ir atsakomybė priskiriama tai šaliai. Taikant šį principą remiamasi atsargumo priemonių, kurių šalys ėmėsi siekdamos išvengti atsakomybės, lygiu, atsižvelgiant į žalos atsiradimo metu santykiuose buvusią valdžios rūšį, tačiau ne visiškai nuo jos priklausančią. Taigi tais atvejais, kai sunku apibrėžti atstovo įgaliojimus, gali būti lengviau nustatyti, kam tenka mažesnės žalos išvengimo sąnaudos.

7. Tinkamo kompensavimo paketo priėmimas gali padėti suderinti atstovų ir užsakovų paskatas ir motyvuoti siekti geresnių rezultatų. Pagal paskatų sutartį priimtos kompensavimo schemos gali padėti apriboti atstovo savivaliavimą ir padidinti žalos atlyginimo atstovui apimtį, o tai skatintų nešališkumą, deramą rūpestingumą ir lojalumą atstovavimo santykiuose. Neapibrėžtojo atlygio sutartis suteiktų atstovui geresnių ekonominių paskatų skatinti sąžiningumą ir lygybę bei pasiekti geriausią įmanomą rezultatą atstovaujamojo interesais, nepriklausantį nuo atlygio klausimo.

Pirmiau pateiktos išvados pagrindžia tyrimo hipotezę, kad aktyvių rizikos mažinimo strategijų įgyvendinimas, papildytas fiduciarinių pareigų atitaisymo mechanizmais ir sąlyginio atlygio už atstovo atlygį sistema, gali padėti suderinti vidinių atstovavimo santykių interesus ir padidinti atstovavimo efektyvumą.

Dėl šalių interesų derinimo tarptautinio išorinio komercinio atstovavimo santykiuose

1. Kontinentinės teisės netiesioginio atstovavimo doktrinos ir bendrosios teisės iš dalies neatskleisto atstovaujamojo sąvokos taikymo sąlygos yra suderinamos, pastaroji yra siauresnė ir taikoma tais atvejais, kai atstovas veikia suteiktų įgaliojimų ribose, siekdamas sukurti galiojančius santykius tarp atstovaujamojo ir trečiojo asmens. Tai ypač akivaizdu, kai atstovaujamasis įsikiša į sutartį, kurią jo vardu sudarė nemokus atstovas.

2. Kontinentinės teisės tradicija besivadovaujančiose jurisdikcijose atstovas, veikiantis savo vardu neatskleisto atstovaujamojo vardu, nesukuria galiojančių santykių tarp atstovaujamojo ir trečiosios šalies ir tampa sutartiniais santykiais atsakingas trečiajai šaliai, išskyrus tam tikras išimtis atstovo bankroto atveju. Tokiais atvejais neatskleidžiamam atstovaujamajam gali būti suteikta teisė įsikišti į atstovo ir trečiosios šalies santykius. Nors ši taisyklė pripažįstama abiejose teisės sistemose, ji yra palanki atstovaujamajam ir turėtų būti subalansuota suteikiant trečiajam asmeniui teisę imtis tiesioginių veiksmų prieš neatskleistą atstovaujamąjį, apsisaugant nuo agento nemokumo.

3. Trečiosios šalies teisė reikalauti, kad atstovas atskleistų atstovaujamojo tapatybę, nustatyta tarptautiniuose teisės aktuose ir abiejų teisės sistemų nacionalinėje teisėje. Nors dėl šios taisyklės atstovas atsiduria padėtyje, kurioje rizikuoja pažeisti lojalumo ir konfidencialumo pareigą atstovaujamajam, ji turi būti subalansuota atstovaujamojo teise likti neidentifikuotam tuo atveju, kai atstovas veikia neviršydamas įgaliojimų, o atstovaujamojo tapatybė nėra svarbi sutarties vykdymui.

4. Tariamo atstovavimo doktrina padeda įteisinti neteisėtus atstovo veiksmus, suteikdama būtiną apsaugą sąžiningoms trečiosioms šalims, kurios pagrįstai tiki, kad atstovas buvo tinkamai įgaliotas. Todėl jos taikymo sąlygos įvairiose teisės sistemose skiriasi, pradedant atstovaujamojo kaltės reikalavimu dėl veiksmų, patenkančių į atstovaujamojo rizikos sritį, ir baigiant dėmesio perkėlimu į trečiosios šalies pagrįstą įsitikinimą ir rūpestingumo standartą. Mažiausių išlaidų išvengimo principo taikymas galėtų padėti nustatyti, kam tenka mažiausios žalos prevencijos išlaidos. Pavyzdžiui, jei trečioji šalis galėjo patikrinti atstovo įgaliojimą nepatirdama didelių išlaidų, tačiau to nepadarė, būtų pagrįsta paneigti reikalavimą veikti sąžiningai.

5. Ketvirtosios šalys, kurioms tenka rizika, kad atstovas veikia neturėdamas tinkamų įgaliojimų, gali remtis tariamo atstovavimo doktrina, jei jos pagrįstai tiki, kad atstovaujamojo ir trečiojo asmens sudaryta sutartis galioja dėl atstovo veiksmų atstovaujamojo vardu. Jeigu ketvirtojo asmens nuostolius lėmė sąžiningo trečiojo asmens veiksmai, nustatyti pagal atstovo pareiškimą dėl suteiktų teisių, tai gali būti pakankamas pagrindas ketvirtajam asmeniui remtis tariamo atstovavimo doktrina.

6. Tariamo atstovavimo ir neįgalioto atstovo veiksmų ratifikavimo doktrinos turėtų būti laikomos atskiromis ir viena kitą išskiriančiomis gynybos priemonėmis, skirtomis trečiosios šalies teisėms apsaugoti. Teisės sistemose, kuriose tariamo atstovavimo doktrina laikoma tik trečiojo asmens pažeistų interesų gynyba, ratifikavimo doktrinos taikymas aiškiai eliminuoja tariamo atstovavimo taisyklių taikymą. Kai trečioji šalis remiasi ratifikavimo doktrina, ji netiesiogiai pripažįsta, kad atstovas sutarties sudarymo metu neturėjo tinkamų įgaliojimų, o tai prieštarauja pagrindiniam reikalavimui sąžiningai tikėti atstovo įgaliojimais.

7. Atsakomybė pagal falsus procurator doktriną kontinentinės teisės šalyse yra speciali atsakomybės rūšis, aiškiai susijusi su atstovavimo institutu, kuri negali būti priskirta sutartinei ar deliktinei atsakomybei. Vadovaujantis tiesioginio atstovavimo koncepcija, pagal kontinentinės teisės požiūrį falsus procurator atsakomybė gali kilti ir tais atvejais, kai atstovas veikia neatskleisto ar neidentifikuoto atstovaujamojo vardu,

suvienodinant dviejų teisinių šeimų požiūrius.

Šie rezultatai patvirtina trečiąją tyrimo hipotezę, kad atstovaujamojo ir trečiosios šalies interesų pusiausvyra gali būti pasiekta suteikiant jiems atitinkamus interesų apsaugos būdus ir paskirstant atstovavimo sutrikimų riziką.

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PRANEŠIMAI MOKSLINĖSE KONFERENCIJOSE

1. MRU Doktorantų asociacijos organizuojama tarptautinė jaunųjų tyrėjų konferencija „SOCIALINĖS TRANSFORMACIJOS ŠIUOLAIKINĖJE VISUOMENĖJE 2021" (STICS 2021), Vilnius, Lietuva, 2021 m. birželio 3-4 d.
2. 12-oji tarptautinė mokslinė konferencija „Verslas ir vadyba 2022" (VILNIUS TECH), Vilnius, Lietuva, 2022 m. gegužės 12-13 d.
3. XI tarptautinė socialinių inovacijų mokslinė konferencija (SOCIN'22), Vilnius, Lietuva, 2022 m. spalio 20 d.

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CONCEPTUAL FOUNDATIONS OF INTEREST ALIGNMENT IN INTERNATIONAL COMMERCIAL AGENCY: A CIVIL AND COMMON LAW PERSPECTIVE: doctoral dissertation. – Vilnius: Mykolas Romeris University, 2025, P. 220.

Bibliogr. 181–198 p.

The dissertation focuses on identifying the agency problem and finding ways to reconcile the interests between parties to the international commercial agency through the norms of civil and commercial law. It seeks to define the conceptual peculiarities of international commercial agency, develop legal regulation, and identify laws applicable to international commercial agency agreements from a comparative perspective. The dissertation also focuses on the determination of conflict areas within the internal agency relationship, analysing the mechanisms of reconciliation of interests between the agent and the principal. Also, the research aims to analyse the relationship between the parties to an external agency relationship, identifying the balance of interest between the subjects in case the agent is acting outside the scope of authority. The thesis dedicates a great amount of attention to the doctrine of apparent authority and its part in ensuring the balance of interests between the commercial agency participants. The thesis provides a deep analysis of the interrelations between the doctrine of ratification and the doctrine of apparent authority.

Disertacijoje daugiausia dėmesio skiriama atstovavimo problemai identifikuoti ir ieškoti būdų, kaip suderinti tarptautinio komercinio atstovavimo šalių interesus pasitelkiant bendrosios ir kontinentinės teisės nuostatas. Disertacijoje siekiama apibrėžti tarptautinio komercinio atstovavimo sampratos ypatumus, nustatyti tarptautinio komercinio atstovavimo sutartims taikytiną teisę ir pateikti pasiūlymus dėl teisinio reguliavimo ir lyginamuoju aspektu. Disertacijoje taip pat daug dėmesio skiriama konfliktinių sričių nustatymui vidiniuose atstovavimo santykiuose, analizuojami atstovo ir atstovaujamojo interesų derinimo mechanizmai. Taip pat šiuo tyrimu siekiama išanalizuoti išorinius atstovavimo teisinius santykius, nustatant subjektų interesų pusiausvyrą tuo atveju, kai atstovas veikia viršydamas įgaliojimus. Disertacijoje daug dėmesio skiriama tariamo atstovavimo doktrinai ir jos vaidmeniui užtikrinant komercinio atstovavimo dalyvių interesų pusiausvyrą. Disertacijoje pateikiama išsami ratifikavimo ir tariamo atstovavimo doktrinų sąsajų analizė.

Yuliia Pokhodun

CONCEPTUAL FOUNDATIONS OF INTEREST ALIGNMENT IN INTERNATIONAL COMMERCIAL AGENCY: A CIVIL AND COMMON LAW PERSPECTIVE

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