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Summary

It is very common that business transactions, in particular internationally, are made through agents. It is therefore interesting and clearly relevant to be aware of the diversities in the agency laws of different countries. The major differences between the Swedish agency law on the one hand and the English and American on the other hand are encountered when focusing on how authority can be established. Since authority of an agent is required in order to conclude a binding contract between the principal and the third party this means that the agency laws differ also in the area of liability in contract.

In English and American law authority is divided into actual and apparent authority depending on what has appeared in the eyes of the third party. Apparent authority entails that the third party can reasonably assume that the agent has been given authority when the principal has held him out as if he did. This provides English and American agency law with an exception from the general rule that actual authority is based on the message to the agent only, irrespective of what the third party knows or does not know. In Swedish law on the other hand the most important element of authority, according to the general rule, is that the third party has received a message of authority from the principal. There is, however, an exception from this rule, called dependent authority, which has much in common with the notion actual authority in English and American law. This shows that both situations, i.e. holding out to the third party and a simple message to the agent, are recognised as grounds for authority although the general rule and the exception are reversed in Swedish law.

Further, the doctrine of undisclosed principal is recognised in England and the U.S.A. This entails that there is a binding contract between the third party and the principal even when the former did not know that the agent was not acting for himself, but in the capacity of an agent. This is a much discussed feature of agency law, which is sometimes considered an anomaly since it is an obstruction to ordinary rules of contract law. Since Swedish law does not recognise this doctrine other categories of agents have been created and the general rule is that the commission agent and the *bulvan* cannot bind the principal since they are acting in their own names.

Having mentioned some of the differences in agency law brings me to the core of this essay, namely what happens when there is a conflict of laws regarding an international agency relationship. The Rome Convention does

not cover the relation between the principal and the third party and no other binding statutory rule can be found on this issue. Instead one has to consider different connecting factors such as the place where the agent performs (*lex loci actus*) or the country where the agent or the principal have their business establishments or habitual residence. All suggestions in this essay include advantages as well as disadvantages depending on whose interests one aims to preserve. The most appropriate connecting factor is probably not just one of these but a combination of at least two of them. For instance it has been argued that the country where the agent has his business establishment could function especially well in combination with the *lex loci actus*. This is to say that the law of the country where the agent is established would determine whether the principal is bound in relation to the third party as long as it is reasonable to assume that the third party can ascertain which law this would be. If the agent does not have an established place of business or performs his acts in another country it may be more appropriate that the law of the country where the agent acts governs the question of authority.

In a leading English textbook on private international law¹ it is suggested that the law that governs the main contract should also be applicable to the external relationship by way of consistency. Two advantages with this rule are that third party would be able to rely on the same law whether his problems relate to general contract matters or specific agency matters and also that it makes a choice of law affecting the external relationship possible. A disadvantage with this suggested factor is that the principal may not be able to assess the applicable law if the connection to the main contract is fortuitous, which it may be for instance if the agent is given a wide sphere to act within. Another disadvantage is that the agent's conclusion of a contract may consist in several transactions resulting in different laws being applicable on each transaction.

To sum up, the most important factors to keep in mind when assessing the value of a connecting factor are: the interests of the third party and to a lesser extent those of the principal; whether it is possible that the connecting factor is fortuitous; whether the connecting factor could have been fraudulently chosen by either party and whether the appointed governing law is foreseeable to the parties.

¹ Dicey & Morris (see further 3.1.6 and notes).

Preface

My interest in agency law has become greater while working with this thesis. I did not know what the differences were in Swedish law compared to English and American law when I first began and find that I have learnt a lot during this term. My choice of subject was really that of private international law since I find international relations very interesting and writing a comparative survey on agency law sort of came up along the way. Applying the conflict of laws to agency law indeed has been a challenge, especially considering the inconsistent terminology in literature and case law. My hope is that I have made some sense and that this essay will bring some light on the conflict of laws relating to agency matters.

I would like to thank Peter Wells who has corrected my English and my father for all the help with my computer and the layout.

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Abbreviations

A.	Atlantic Reporter
A.C.	Appeal Cases
All ER	All England Law Reports
Art.	Article
CA	Court of Appeal
C.L.R.	Cambridge Law Journal
Ch.	Chancery Division
Cir.	Circuit
Cit.	Cited
Co.	Company
E.D.Pa.	Eastern District of Pennsylvania
EEC	European Economic Community
F.	Federal Reporter
F.Supp.	Federal Supplement
HAC	The Hague Agency Convention
Inc.	Incorporated
Ins.	Insurance
K.B.	King's Bench
L.J.	Lord Justice
L.Q.R.	Law Quarterly Review
L.R.	Law Reports
N.J.Super.L.	New Jersey Superior Court Reports
N.W.	North Western Reporter
N.Y.S	New York Supplement
NJA	Nytt Juridiskt Arkiv (Cases from the Swedish Supreme Court)
Pa.	Pacific Reporter
par.	Paragraph (corresponding to the abbreviation "st." for "stycke" in Swedish references)
Prop.	Proposed bill from the Swedish Government (<i>proposition</i>)

Q.B.	Queen's Bench
Q.B.D.	Queen's Bench Division
Rome Conv.	Rome Convention
s.	Section (corresponding to "§" in Swedish references, e.g. 10 § AvtL will be referred to as s. 10 Contracts Act)
So.	Southern Reporter
SOU	Statens Offentliga Utredningar (Legal reports of the Swedish state)
U.S.A.	The United States of America

1 Introduction

1.1 The issue

The concept of agency is of great importance and is frequently used in order to render the creation of commercial contracts all over the world less troublesome. As an introduction I would like to present a hypothetical story relating to agency with the purpose of demonstrating the importance of contractual agency and the conflict of laws in relation thereto. I will get back to this story at the very end of the essay, where some conclusions are made.

Peter Principal, who runs a business in the U.S.A., wants to sell electricity to Tom's firm in Sweden. He has neither the time nor the expertise needed to achieve this by his own means. Therefore Peter chooses to enter into an agency contract with Adam Agent, a polite Englishman. This contract gives Adam the mandate and authority to sell the electricity from Peter to *inter alia* Tom's firm in Sweden on Peter's behalf. Knowing that Tom's confidence in him might have slightly diminished after their former affairs in the grocery business, Peter tells his agent not to disclose his name when contracting with Tom. Adam completes his mission and signs the contract that entitles Tom to electricity (specified in detail, but leaving out the name of the seller i.e. Peter) with his own name. When the electricity has already been delivered to Sweden, Peter discovers that the payment due on his account has not been fully paid and consequently he wants to sue Tom. Or should he sue his agent, Adam?

Come to think of it Peter never gave Adam instructions to sell the electricity without demanding payment in advance according to the usual custom in the business. In relation to this he wonders which law governs the authority given to Adam? What are the rules in Sweden, England and the U.S.A. respectively concerning agency and how authority is established? Which law governs the external relationship, i.e. whether there is a binding contract between Peter principal and Tom, the third party? Can Peter sue Adam, Tom or both according to the applicable law?

1.2 Terminology

There are lots of notions in relation to agency law, which may be somewhat confusing if not straightened out at an early stage. The following explanations refer to how these notions are used in this thesis only, and may be

found to have slightly different meanings elsewhere. The order in which the notions are explained is not alphabetically but rather in the order I found it more appropriate to present them.

Principal

The principal is the person or company, who wants to enter into a contract or other relation with someone, but is unable or unwilling to achieve this through his own acts. For this reason he needs an agent to act on his behalf.

Agent

An agent is the intermediary who acts on the principal's behalf and sometimes, but not necessarily, in his name.

Third party

The third party is the person dealing with the agent, who becomes bound in relation to the principal, the agent or both, depending on the circumstances and the law applied.

External relationship²

The relationship between the principal and the third party will be referred to as the external relationship since it is intended that these two parties end up in a binding relationship notwithstanding that they may never have met. The external relationship covers the question whether the agent had authority to bind the principal *vis-à-vis* the third party under the main contract.

Internal relationship

The internal relationship is that between the principal and the agent, who are the parties concluding the contract of mandate (see *infra*).

External authority

The external authority is what the agent is allowed to do. This authority is visual to the third party and is a free translation of the Swedish notion *behörighet*.

Internal authority

The internal authority consists in the instructions given to the agent without being shown to the third party, i.e. it is what the agent may do on the principal's behalf. This is a free translation of the Swedish notion *befogenhet*.

² The relationship of the agent *vis-à-vis* the third party is also of an external nature, but this will not be dealt with further in the following. Therefore the external relationship for the purpose of this essay will refer to the relation between the principal and third party.

Contract of mandate

The contract of mandate refers to the contract between the principal and the agent in which the mission to be accomplished on behalf of the former is given. Usually this contract will also include the authority of the agent to act accordingly.

Main contract³

The main contract is the contract, entered into by the agent with the third party, which is intended to bind the principal *vis-à-vis* the third party.

Express actual⁴ authority

The express actual authority is the most obvious authority and is given by the principal in a written statement or orally to the agent. The third party as well as the agent can always rely on this kind of authority. Furthermore it is important to add already that no matter what the authority is called it is equally effective.⁵

Implied actual authority

If the principal acts as if he intended to give further authority than expressly stated and the agent relies on this conduct, the actual authority is extended to and includes implied actual authority. This authority must be based on the actual authority, but is understood impliedly rather than being inferred from a written or oral statement. Most frequently this will be referred to as simply “implied authority”, but I have chosen the heading above to show that it is just another form of actual authority.

Apparent authority⁶

In contrast to the implied authority the apparent authority is based on communication to and reliance by the third party directly. In some cases the third party may have relied on the conduct of the principal as being acquiescence in the acts of the agent. If this reliance is reasonable it is called apparent authority. This kind of authority can exist even where there was no actual (express or implied) authority. It is never reasonable for the third party to rely on apparent authority if he knew that the principal had given no such authority. Hence, the third party must rely on his assumptions in good faith and he must know who the principal is.

³ When several contracts are in question the proper notion would be “main transaction”.

⁴ This is also referred to as “real” authority in the literature (e.g. Reuschlein & Gregory).

⁵ Reuschlein & Gregory, p. 33, however it may under rare circumstances make a difference which kind of authority is established, Verhagen, p. 308.

⁶ This is sometimes referred to as “ostensible authority” in English case law and literature, but this is a notion I have chosen not to use in this thesis.

Usual⁷ authority

The usual authority is also called customary or incidental authority and derives from a situation when the agent performs acts normally related to the position in which he is acting. Rather than being a type of authority to be dealt with separately, it may be seen as a term used to interpret the scope of the existing authority.⁸ If this view is accepted, the wider the implied or apparent authority is, the more usual powers may be connected to it.

1.3 Statement of purpose

My purpose with this thesis is firstly to explain some of the differences in the law of agency in Sweden, a civil law country, on the one hand and in England and the USA, two common law countries on the other hand. The central questions in the introductory comparative part will be whether or not the principal becomes legally bound in relation to the third party through the acts of an agent and whether the agent drops out of the contract to the same extent. In order to understand how the parties become bound I will also give a brief description of the different forms of authority and how they are established.

For the purpose of this comparative survey I will, without asserting that this is the proper view, presuppose the coincidence of English and American law⁹ on this matter and only separate the two legal systems when diversities are encountered.¹⁰ Conversely I will assume the legal situation relating to agency in Sweden to be essentially different from the former and therefore present the Swedish legal aspect separately. To stress the diversities I will conclude the second chapter by summarising and comparing the special features of Swedish law and common law.

If the regulations on agency were not different in some aspects, the conflict of laws would not create a problem. This explains why the comparative part was an essential introduction to the aspect of private international law, which leads me to the second object of this thesis.

⁷ N.B. It should not be confused with the American notion “inherent agency powers” found in the Restatement (Second) of Agency § 8A (see *infra* 2.1.4).

⁸ Grönfors, p. 37.

⁹ Note that American law will be dealt with as an entity and that the states’ different laws will not be approached separately.

¹⁰ It may, according to Grönfors p. 35, not be far from the truth to presuppose the coincidence of English and American agency law today.

In the second part the purpose is to discuss different principles used to solve the conflict of laws relating to agency. The central question herein is what law should decide whether or not the agent had authority to bind the principal through his act and create a binding external relationship. If the question of liability, i.e. whether the principal is a party to the main contract or not, is answered in the affirmative in accordance with the law of one country but not in the law of another, it is material which law governs the external relationship. Different connecting factors are considered appropriate for the choice of law and it is my intention that these theories will be accounted for in part two of this thesis.

1.4 Statement of restraints

This essay deals with *consensual* agency only. This includes all forms of agency contracts where the principal gives his consent that a binding contract will be entered into on his behalf. Thus all forms of trusts and legal representation, i.e. agents whose authority is predetermined by law¹¹, are excluded. Furthermore I will not deal with every aspect of agency; rather the focus is on the contractual liability that may be incurred by the principal in relation to the third party. Hence the liability of an agent for acts completed without authority (*falsus procurator*) in relation to the third party will not be accounted for in this essay.

In the second part the conflict of laws will be discussed exclusively with regard to the external relationship between the principal and the third party. The reason for this is that the internal relationship is one of pure contractual nature, which is already regulated in The Rome Convention¹². This convention tells us that the law of the country to which the contract has the closest relationship governs the contract of mandate between the principal and agent unless the parties have agreed on another law.¹³ The easiest way to establish such a close relationship is to find that the characteristic performance is related to one country. The external relationship on the other hand does not fall within this convention, which is explicitly stated in article 1 (2)(f).

¹¹ e.g. where the agent is acting as shareholder in company or where a parent is acting on behalf of a minor.

¹² The Convention on the law applicable to contractual obligations 80/934/EEC, Rome on 19 June 1980 (implemented in England as well as in Sweden).

¹³ Art 4 Rome Convention.

1.5 Outline and sources

The first part of this thesis contains a description of agency law in three different jurisdictions, namely that of Sweden, England and the U.S.A. respectively. The focus is on the different forms of authority and different categories of agents, since this is what affects the principal's liability on the contract. The method in this part will be mainly descriptive in order to give an outline of some important features of agency law in these countries.

The second part of this thesis contains the private international law perspective of agency law. Here, I will focus on the conflict of laws and the problem of concluding which principle is likely to be more suitable and ascertainable to stipulate the law to govern the external relationship of agency. Accordingly, six different connecting factors will be described, followed by some of the relevant case law. The final sub-chapter contains a summary of the situation on private international law and conclusions on the effect of the connecting factors in relation to the hypothetical story in the introduction.

The primary sources in the first part are Swedish, English and American legal textbooks (preferably by Grönfors, Tiberg, Bowstead (edited by Reynolds) and Reuschlein & Gregory), case law and also the American Restatement (Second) of Agency. The latter is not a law but rather consists in descriptive recommendations, which are voluntarily respected or disregarded in the different states. It gives a simple outline of the law, without being legally binding and without separating the laws of different states.¹⁴ The Restatement of Agency is however accepted in most American courts and is given a high status.¹⁵

In the second part I will rely mostly on literature, as there are very few cases directly relevant. The primary textbooks are Scoles & Hay, Dicey & Morris, Bogdan (1999) and a very detailed book on the subject written by Verhagen, a Dutch author. Also the American Restatement (Second) Conflict of laws is used as a reference. It is important to stress that there is not one unified law of agency and one of private international law in the U.S.A., but rather separate laws in every state.¹⁶ In fact, the regulations on the conflict of laws

¹⁴ Bogdan 1993, p. 166f.

¹⁵ Grönfors, p. 35 note 5 and e.g. *Ortiz v. Duff-Norton Co., Inc.* 975 F.Supp. 713 (E.D.Pa 1997) at p. 722 (the Pennsylvania court has adopted part of the Restatement of Agency).

¹⁶ However the substantive agency law within the U.S.A is quite uniform, according to Scoles & Hay, p. 714.

were first developed to operate in interstate conflicts rather than international conflicts; thus, the regulations of this area differ from state to state, although fortunately the Restatement on Conflict of laws is much referred to.¹⁷ Having said this about interstate diversities it must be added that many of the laws of the various states are in fact similar, which is natural considering most of them are based on the common law tradition.¹⁸ With this kept in mind I intend to account for the American rules as uniformly as possible. It should be mentioned in this context that there is a uniform law in the U.S.A. in the business law area: The Uniform Commercial Code. This codification contains rules on for instance partnership, but there are no uniform agency rules therein, except for those relating strictly to negotiable instruments.

2 The concept of agency

Business through agency is generally used to broaden the scope of the business arena with the use of another person's services. In short, a principal employs an agent and pays him for the benefits assimilated through his acts. The basic element of agency is the same in Swedish, English and American law, i.e. there must be a manifestation coming from the principal, inferring that he consents to that the agent will act on his behalf. There are however some differences when it comes to labelling the consent, i.e. the authority, and also in ascertaining to what extent the principal and / or the agent becomes a party to the contract.

One aspect of agency is that the rules on liability are related to a problem of conflicting interests between the principal, the agent and the third party respectively. Several principles must therefore be constructed to protect the interest of only one of the parties and it is with this choice of protection that the laws sometimes differ and present different views. In general, the protection of the agent could be preferred since agents otherwise may be intimidated from performing services for others at all, whereas the reason to protect either the principal or the third party is more of a contractual nature. However, if the law never protected the principal and instead had him bound against his will to every contract through an agent, the use of agency would

¹⁷ Bogdan 1993, p. 149 and 166.

¹⁸ Bogdan 1993, p. 148.

probably become less interesting no matter how much the agents were protected. The rules must therefore be well balanced and protect all parties. It is important not to underestimate the need to provide protection for third parties, who enter into contracts with agents in good faith presuming the agent has valid authorisation.

2.1 The English and American approach

In England as well as in the U.S.A. the concept of agency is based on the message of authority from the principal directly to the agent.¹⁹ Hence to find actual authority it is irrelevant whether or not the third party had any knowledge of the authority given to the agent. Consequently, the concept is very wide and includes several different forms of agency, which in many other jurisdictions are separated from the traditional agency rules. This is mainly so because it is of less importance whether or not an agent acts in his own name in England and the U.S.A.; in both cases the intermediary will be considered an agent and his acts will be governed by the rules on agency.²⁰ However, the object of agency is in English and American law, just as in most other jurisdictions to my knowledge, to create a legal relationship between the principal and the third party.²¹

The general definition of agency is “[...] the relationship which exists between two persons, one of whom expressly or impliedly consents that the other should represent him or act on his behalf, and the other of whom similarly consents to represent the former or so to act.”²² Hence, the consent of the principal to have a particular agent acting on his behalf constitutes authority to create a legal relationship externally. Even though the general rule is that only the principal and the third party will become bound to the transactions committed in agency, there are several exceptions to this rule. The English and American approach opens up for the possibility of the agent or the principal alternatively to become bound in relation to the third party. Further, the fact that the third party never knew of the existence of a principal is not an obstacle to a binding relationship between the two. These peculiarities, or necessary anomalies if you like, will be accounted for in chapter 2.1.6.

¹⁹ Tiberg 1991, p. 417 and Grönfors p. 37f.

²⁰ SOU 1988:63, p. 150f.

²¹ Halsbury's, p. 418, para. 701.

²² Bowstead, p. 1.

Apart from becoming bound due to actual authority, the principal may also rely on one or more of the following concepts: apparent authority, authority by estoppel or agency powers.²³ These will be accounted for in the following and I will also try to explain the so called usual / incidental / customary authority. It should be added that authority might also result from a subsequent ratification by the principal, when the acts were not authorised to begin with. This will not be dealt with further in this essay and nor will the kind of authority²⁴ arising from emergency situations.

2.1.1 Actual authority

It is indeed characteristic for the concept of agency that the agent has been given authority by means of a manifestation or conduct emanating from the principal. The authority is equal to what and how much the agent “may” do, i.e. it is distinguished from what he has the ability to do.²⁵ Inasmuch as the agent acts within his authority he will be able to create a contractual relationship between the principal and the third party. Usually it is not necessary for the third party, purporting to hold a principal liable, to specify which type of authority he relies on, but there must be authority of one type or another to establish agency.²⁶ The most obvious and easiest way to establish authority is when the principal has expressly communicated to the agent that he delegates to the latter the power to act in specific matters on his behalf. This can be achieved through a written power of attorney but it is in most situations sufficient that it is communicated orally.²⁷ Apart from this so called express actual authority, it may also be established impliedly, e.g. when the agent rightfully interprets the authority to sell chattels on behalf of the principal also to include authority to receive payment. In short the actual authority is based on the words, the acts or the conduct of the principal.²⁸

The implied actual authority can be established only when the circumstances suggest that it is reasonable for the agent to rely on his belief that the principal meant for him to have this authority. The implied authority cannot include something outside the ordinary course of business, but rather should

²³ Grönfors p. 33.

²⁴ This is called “agency by necessity” in English and American law and “negotiorum gestio” in Swedish law.

²⁵ Reuschlein & Gregory, p. 32.

²⁶ *Lind v. Schenley Industries, Inc.* 278 F.2d 79 at p. 80 (8).

²⁷ Reuschlein & Gregory, p. 34.

²⁸ Reuschlein & Gregory, p. 34f.

be implied by the usage in the employment.²⁹ In a case from a Pennsylvanian court the implied authority was defined as an authority “[...] to do those acts of agent that are necessary, proper and usual in exercise of agent’s express authority”³⁰. As will be understood from chapter 2.1.3 this can easily be confused with usual authority but I still find that these words very well explain what implied authority can be and that there in such cases most frequently is express authority as well. Irrespective of in which manner the authority is given it is equally “real” and the acts of an agent will incur legal consequences as long as there is some kind of authority. It is also important to add that both the express and the implied actual authority can exist whether or not the third party knows about it.³¹

The major consequence of there being authority is that the principal, as a general rule, becomes legally bound and entitled by the acts of the agent. Acts *outside* the scope of authority, whether express or implied, do however not as a general rule bind the principal and vice versa.³² When the agent acts within the scope of authority and the result of the agent’s acts is that a contract is entered into, the parties to the contract are the principal and the third party. Hence, the agent will normally be left outside the relationship and lack the possibility to claim any rights or be held liable under the contract. This is normally referred to as the agent dropping out of the contract.

A possible exception to the rule on contractual liability on the principal was under English case law for a long time thought to be the situation where the principal was a foreigner, i.e. when the agent was contracting in England for a principal from another country.³³ The case of *Armstrong v. Stokes*³⁴ shows that the judges must have disliked the idea of businessmen contracting over the borders because of the risk that they would subject themselves to problems relating to conflict of laws. More recent case law shows that this is not really an exception to the general rules of agency.³⁵ The fact that the principal is a foreigner shall however still be one of many circumstances of importance when determining whether or not a contractual relationship between the principal and the third party has been established.³⁶

²⁹ Halsbury’s, para. 736, p. 441 and Reuschlein & Gregory, p. 33.

³⁰ *Ortiz v. Duff-Norton Co., Inc.* 975 F.Supp. 713 (E.D.Pa. 1997) at p. 713 (4).

³¹ Reuschlein & Gregory, p. 34.

³² Halsbury’s, p. 492, para. 820.

³³ *Armstrong v. Stokes* [1872] L.R. 7 Q.B. 598.

³⁴ [1872] L.R. 7 Q.B. 598.

³⁵ *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545.

³⁶ *Teheran-Europe Co. Ltd. v. S.T. Belton (Tractors) Ltd.* [1968] 2 Q.B. 545, 558.

Moving on to what may be referred to as the instructions given to the agent in secret, the question comes up whether these internal instructions in fact becomes a part of the authority given. At least the American view seems to be that the secret instructions do limit to the scope of authority, but that the principal still becomes bound when the agent only slightly deviates from the instructions.³⁷

2.1.2 Apparent authority and estoppel

It should be mentioned under this heading that the authority discussed above is based on contractual consent and never on estoppel.³⁸ Under this heading however, I have chosen to discuss two forms of authority that are similar in many respects but where the second one is based on estoppel.³⁹ This means that it is not a contractual authority but rather one arising from torts, with the object to save the third party from loss.⁴⁰ Some heavy criticism can be found against the quite often used description of authority as apparent and based on estoppel at the same time, i.e. when estoppel is used to explain apparent authority. The basis for this criticism is that apparent authority creates a “real” contract, enforceable by both the third party and the principal, whereas only the third party has a right to enforce the contract by grounds of estoppel.⁴¹ Another requisite for basing authority on estoppel is that the third party must have suffered a loss in order to be compensated for loss, i.e. there must have been a change of position to his detriment, which is not necessary when simply entering into a contract.⁴² I have despite this fact chosen to deal with both these types of authority under the same heading since there is often a matter of estoppel when there is apparent authority and because the English view seems to be that the apparent authority is based on estoppel.⁴³ Further, both aspects of authority are based on the principle that one should be bound by his words, rather than the underlying intention,⁴⁴ which will be explained in the following.

Apparent authority and authority by estoppel have in common that they are based on external appearance i.e. the element of holding out. In order to hold

³⁷ Restatement (Second) of Agency, § 160 and Reuschlein & Gregory, p. 64f.

³⁸ Reuschlein & Gregory, p.34.

³⁹ See further Restatement (Second) of Agency §§ 8, 8A and comments.

⁴⁰ Reuschlein & Gregory, p. 66 and Restatement (Second) Agency § 8 (comment d).

⁴¹ Steffen, p. 128f and Reuschlein & Gregory, p. 58f.

⁴² Reuschlein & Gregory, p. 58 and 66f and Steffen, p. 128f.

⁴³ Bowstead, p. 240f and Reuschlein & Gregory, p. 67.

⁴⁴ Restatement (Second) of Agency § 8 (comment d).

the agent out as having authority the principal must lead the third party to believe that he wishes the acts to be committed on his behalf.⁴⁵ Further, the third party must have acted on this reliance, which is enough to bind the principal even though there might be no actual authority.⁴⁶ Because the principal must hold the agent out as being his agent this is also called *the doctrine of holding out*⁴⁷ and obviously can only be established where the third party knows who the principal is. It goes without saying that if the principal is unknown to exist (undisclosed) he cannot possibly reveal anything about the agency to the third party.

For any of these two authorities to be established it is also material that the third party has acted in good faith relying on some sort of declaration or conduct on the part of the principal or someone else who is permitted to make the representation.⁴⁸ It is important to stress that it is the third party, i.e. not the agent, who is the one relying on whatever emanates from the principal, for otherwise we would be talking about an implied form of authority⁴⁹.

It must be considered fair that it is the principal's duty to inform the third party, engaged in a contract, of the true facts, especially if he has once falsely declared that the agent had authority to act on his behalf. If it was not so, the third party would be left to act at his own peril as soon as he did not have something equal to a written evidence of the authority given. When the third party is relying on an act being authorised due to what the principal implies, and the agent too relies on this implication, the authority established is both apparent and implied. Even though there is an important distinction between the two in theory, it is of less importance how the authority is labelled considering that the result is the same no matter how the authority is established. It is more important to know the difference between actual authority at the one hand and apparent authority on the other. The reason that this separation must be kept in mind is that apparent authority to bind the principal can be established even when it is obvious that there was no actual authority. By way of illustration I will give an example of a situation where this would be the case.

⁴⁵ Bowstead, p. 235.

⁴⁶ Bowstead, p. 235.

⁴⁷ Halsbury's, p. 434, para. 725.

⁴⁸ Verhagen p. 23 and Restatement (Second) of Agency §§ 8,8B and Bowstead, p. 236.

⁴⁹ See supra 2.1.1.

Let us assume that the agent was never authorised to sell anything on the principal's behalf. However, prior to this case the principal has frequently employed agents to act for him with, among others, the third party in question. Furthermore, if the third party only knows that the principal has accepted similar acts through this agent in the past, there is probably no reason for him to assume that the principal would not like the agent to act in this particular case. These being the facts, there is obviously no actual authority for the agent to act, but there may well be apparent authority due to the principal holding the agent out as still being authorised to act for him.

The situation may often be that there is both actual authority and a representation coming from the principal, in which case it is satisfactory to refer to actual authority and no need to invoke apparent authority.⁵⁰ Hence, the actual authority should be considered as a first step to establish an agency relation and the apparent authority becomes of interest only when the former fails.

2.1.3 Usual authority

In some cases there might be authority based on the principal having placed the agent in a special position, which implies to the agent as well as to the third party that he has certain powers. Hence, if the agent appears to be having authority when handling ordinary business transactions, the third party and the agent himself may rightly assume that he has the authority to do so. This is called usual (or customary / incidental) authority and may be considered an extension to the concepts of apparent and implied authority or may be treated independently.⁵¹ If this authority can indeed exist without actual or apparent authority as a base, it seems that it is consistent with the outcome of the case *Wattaeu v. Fenwick*⁵², which will be thoroughly discussed in the next chapter regarding agency powers. It seems more appropriate to assume that at least an element of holding out is required to avoid the risk of agents creating authority on their own, with reference to the usual handling of matters.

The question of liability in these cases can be considered a problem since the principal and the third party are equally innocent; neither of them has created the appearance of authority. Instead it is the custom that has led the third party to rely on the authority. When usual authority is successfully

⁵⁰ Bowstead, p. 236.

⁵¹ Bowstead, p. 71f and Reuschlein & Gregory, p. 41.

invoked liability can be placed upon the principal, which is reasonable considering it is he who should be able to control the agent and who has employed him to perform the acts.⁵³ Another explanation to why some acts, not specifically authorised, ought to bind the principal by reference to the usual authority bestowed in the position, is that it is virtually impossible to encompass every detail in the express granting of authority.⁵⁴

2.1.4 Agency powers

The concept of agency powers that will be elaborated in the following is first and foremost an American tool, however it can be suggested that it has also been used in English case law. The Restatement of Agency lists agency powers as some kind of power not deriving from neither actual nor apparent authority.⁵⁵ This third ground for liability exists purely as a product of the agency relationship and its object is to protect third parties who have suffered loss dealing with an agent.⁵⁶ There are two groups of agency powers: the first is the power of a servant to subject his master to liability for acts committed in the latter's business and the second is the power of an agent to subject his principal to liability where the agent has acted improperly when entering into contracts.⁵⁷ It must be noticed however, that the courts are not consistent when using these grounds to hold the principal liable and quite often they stretch apparent authority to encompass these situations as well, which is unfortunate.⁵⁸

A much-debated case in England is *Wattaue v. Fenwick*⁵⁹, in which case the American concept of agency powers possibly was adopted.⁶⁰ The judgement may be explained in terms of agency powers (although this is not mentioned by the court) since it was held that a principal was bound even when the acts of his agent were unauthorised. There is also the possibility that the judgement is inconsistent with English agency law and therefore should be distinguished. Given the fact that it has been analysed by many and because

⁵² [1893] 1 Q.B. 346, see further infra chapter 2.1.4.

⁵³ *Ortiz v. Duff-Norton* 975 F.Supp. 713 (E.D.Pa. 1997) at p. 714 (15), c.f. *ställningsfullmakt* in chapter 2.2.2 .

⁵⁴ Reuschlein & Gregory, p. 37f.

⁵⁵ Restatement (Second) of Agency § 140 (c) and § 8A.

⁵⁶ Restatement (Second) of Agency § 8A (comment a) and c.f. authority by estoppel supra.

⁵⁷ Restatement (Second) of Agency § 8A (comment b).

⁵⁸ Reuschlein & Gregory, p. 69.

⁵⁹ [1893] 1 Q.B. 346.

⁶⁰ Steffen, p. 185 and Bowstead, p. 73f.

it is useful in order to understand agency law in a practical scenario, I will summarise the facts and comments on the case in the following paragraphs.

Watteau v. Fenwick is a case where the manager (Humble) of a beer house lacked authority to buy goods other than bottled ales and mineral water on behalf of the owner. Despite these instructions from his principal, he bought cigars and some other products for the business and was given personal credit from the third party. This third party had reason to believe that Humble was the owner of the beer house and his only counter-party, since the real principal was undisclosed to him at the time of the transaction. Upon later discovery that Humble had been acting on the actual owner's behalf the third party sued the owner to receive payment for the articles delivered. It was crystal clear that Humble had no actual authority to act as he had done, and nor could there have been apparent authority since the third party did not, at the time the contract was entered into, know about the existence of a principal. Assuming there was no contact between the undisclosed principal and the third party, the owner could not have been holding Humble out as an agent. Despite all these facts speaking for the contrary the court held that the owner, as principal, was liable due to the fact that the agent had bought only what would usually be supplied in a beer house.

What kind of authority the liability of the principal was based on is not clear from the words of the judges, but it is obvious that they decided to protect the third party from secret instructions that he could not reasonably have guessed the contents of. It seems to me that there was some sort of usual authority to buy these products since the court held "[...] that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and agent, put upon that authority."⁶¹ Is it possible that the authority to buy mineral waters etc. was extended to include cigars as a usual authority? This is only a possibility if an agent's usual authority can be established despite the fact that he is acting contrary to his instructions and therefore without actual, implied or apparent authority to buy the cigars. It seems unlikely that usual authority could include transactions explicitly forbidden by the principal and perhaps this is the reason as to why it has not been the most common view that the court based the liability on usual authority. Therefore the analysis of the case needs to continue with other possible solutions.

Rather than usual authority, it might have been some sort of independent agency power that led the court to its judgement. It may be that the liability was simply based on the principle that the owner must be held liable in contract and tort for all actions of his partners or employees in carrying on ordinary business.⁶² Another way of putting it is that the companies that benefit from the work of agents must also be responsible for an agent's acts, even

⁶¹ *Watteau v. Fenwick* [1893] 1 Q.B. 346, 348f.

⁶² Steffen, p. 186.

when the latter has failed to act with care.⁶³ This seems reasonable, however I find that it is not clear whether the rules on agency law were expanded with this judgement or whether it was based on other principles.

Perhaps this case shows that there is a need for establishing authority even when there is no actual authority and no element of holding out. Instead of the principal holding the agent out as being authorised to buy cigars, the agent had held *himself* out as having authority, which normally cannot bind the principal without his consent. It is important to remember the limits to the doctrine of holding out, which can be understood from the statement that “the doctrine of apparent authority rests upon an appearance created by the principal”⁶⁴, i.e. not an appearance created by the agent. With this view in mind one can easily understand that the judgement has been much debated and criticised for it may seem as if it is letting the agent create a part of the agency relationship on his own, without the consent of the principal.

My final comment on this case concerns why the principal should not be allowed to drop out even when his agent has acted contrary to his orders. I can see one good reason to follow this judgement and that is because it makes it incentive to all principals, giving secret instructions contradicting the usual business, to manifest this instruction and make it visible to potential third parties.⁶⁵ That way the creditor in the case would not have been reasonable to believe that the agent was allowed to buy the cigars and the principal would have been protected from responsibility due to the agent’s disobedience, or at least be entitled to indemnification from his agent. This view might actually correspond to the explanation made by Goodhart and Hamson, using the notion “estoppel by conduct”.⁶⁶ In their view the principal must be estopped from denying liability where he has not manifested to the third party that the agent was forbidden to act according to customs. Indeed, it may well be that the agency power works to profit the commercial community as a whole by making business transactions through agents easier.⁶⁷ Because of this rule principals will have the incentive to choose

⁶³ Restatement (Second) of Agency § 8A (comment a).

⁶⁴ Reuschlein & Gregory, p. 62.

⁶⁵ c.f. Restatement (Second) of Agency § 195 which states that undisclosed principals should become bound by acts of managers appearing as owners even if the acts are contrary to the directions of the principal.

⁶⁶ Goodhart & Hamson, [1932] 4 C.L.J. at p. 336.

⁶⁷ Reuschlein & Gregory, p.69.

loyal agents and to supervise their actions, which is certainly favourable to all.⁶⁸

To approve of agency powers as a ground for liability or not, depends on who is considered most suitable to bear the risk of loss caused by an agent – the third party or the principal? The American and probably the English attitude as well, are to protect the third party. Thus, the rules on agency power have been created to save the third party from detriments when it seems fairer to place the risk of loss upon the principal.⁶⁹

2.1.5 Disclosed principals

The main purpose of this and the subsequent chapter is to present the circumstances in which the agent himself, in addition to the principal or alone, becomes a party to the contract entered into by the agent. This is an important deviation from the object of agency in general, i.e. to have the principal and third party becoming the only parties liable and entitled under the contract. The agent will become liable on the contract and not drop out in some circumstances depending on whether the agency is fully disclosed, partially disclosed or undisclosed.⁷⁰

When a contract is entered into there is an element of reliance that is supposedly important to both parties. This means that a precondition for negotiating with someone may well be that this person has earned the trust of the other party and vice versa. In some situations, when the third party knows very well the principal with whom he is contracting, he is indifferent to the qualities of the agent and naturally relies on those of the principal. We are then dealing with the category of disclosed principal / agency. Another situation is where the principal is known to exist, however not identified or specified in any way. This is commonly referred to as a partially disclosed principal or unidentified principal. In these cases the third party assumingly intends to deal with whoever might appear to be the principal and cannot rely on the qualities of his counter-party.⁷¹ The prima facie rule in fully disclosed agency is that the third party becomes bound to the contract with the principal whereas the agent drops out. When it comes to partially disclosed principals on the other hand, not only the principal but also the

⁶⁸ Reuschlein & Gregory, p. 69.

⁶⁹ Restatement (Second) of Agency § 8A (comment b).

⁷⁰ Cheeseman, p. 685.

⁷¹ Reuschlein & Gregory, p. 158.

agent can sue and be sued by the third party, however the latter is then entitled to indemnification from his principal.⁷²

It is quite easy to understand that the agent will drop out of the contract and the principal will become bound in relation to the third party when we are dealing with one of the disclosed forms of agency. The third party then knows that the agent is not the one who wishes to become bound on the contract. It may, depending on the context, be sufficient for the agent to describe himself (or be described by someone else) as an agent by using words like “as agents”, “on account of”, “on behalf of” or simply “for” in order to escape liability in relation to the third party.⁷³ The major difference between the principal being only partially disclosed and him being identified is that only in the latter situation can and must the third party rely on the principal’s credit and reputation. Hence, when the principal is identified the third party cannot sue the agent in the event that the duties under the contract are not performed.⁷⁴ This situation can be exemplified with the American case *The New York Times Company v. Glynn-Palmer Associates, Inc.*⁷⁵, succinctly accounted for in the following.

In this case an advertising agency placed an ad in The New York Times for a client (the principal), who afterwards did not pay its bill.⁷⁶ The advertising company had stated the identity of its client, i.e. it had fully disclosed who was the principal. Consequently the New York Times Company (the third party) had no success in the suit to recover the money from the agency, since it had dropped out of the contract according to the general rule of disclosed agency.

An example of a case where the principal was only partially disclosed is *Venezio v. Bianchi* where a property owner refused to sell when he after the contract had been concluded found out who the principal was.⁷⁷ The contract was entered into between the property owner and the broker conducting business under the trade name “King Realty” (the agent). The agent simply signed the contract “King Realty for Customer”, implying that there was a principal, although not giving away his identity. Based on the rule that an agent for a partially disclosed principal is a party to the contract, and consequently may enforce it, the agent could successfully sue the property owner (the third party) for specific performance.

⁷² Cheeseman, p. 685

⁷³ Halsbury’s, p. 512, para. 854 and Cheeseman, p. 688.

⁷⁴ Cheeseman, p. 285.

⁷⁵ 525 N.Y.S.2d 565 (1988).

⁷⁶ *The New York Times Company v. Glynn-Palmer Associates, Inc.*, 525 N.Y.S.2d 565 (1988).

⁷⁷ *Venezio v. Bianchi* 508 N.Y.S.2d 349 (1986).

2.1.6 The doctrine of undisclosed principal

After having dealt with the disclosed and partially disclosed principal I will now move on to the more controversial area of undisclosed principals. The doctrine of undisclosed principal (or undisclosed agency) is given a great deal of attention in English and American case law and literature.⁷⁸ This refers to a situation where the third party deals with an agent without knowing that this person is acting on behalf of someone else at all.⁷⁹ In other words, the person dealing with the agent knows neither about the existence nor the identity of the principal. In the eyes of the third party the contract is entered into between him and the other party signing it (the agent). The types of contracts most frequently involving an undisclosed principal are those where the agent is used to sell the principal's goods in his own name.⁸⁰ In a situation like this the agent is acting on an implied general authority to sell, which is given to him when put in the position of a factor.⁸¹ Another type of agency where the principal may be kept a secret is where the agent is given express authority to buy something for the principal in his own name. The reason that a principal may prefer to use the undisclosed form of agency is often the fear of a less advantageous transaction would his identity be known to the counter-party.⁸²

The peculiarity of the doctrine of undisclosed principal is that it entails that neither the agent nor the principal can drop out of the contract.⁸³ One might say that there are in fact two equally liable principals to the contract, although this is a highly controversial submission. By reference to the general rules on contract law we must assume that there can only be privity of contract between the two parties intending to be bound upon it.

The question of liability again, as in the field of agency powers, concerns whether the principal or the third party should suffer / profit as a consequence of a contract made for an undisclosed principal. This doctrine is often criticised for letting the third party both suffer and profit unjustly in making the undisclosed principal a party to the contract.⁸⁴ If the principal is

⁷⁸ See e.g. *Shasta Livestock Auction Yard Inc v. Bill Evans Cattle Management Corp.*, 375 F Supp. 1027 (D Idaho 1974) and *Armstrong v. Stokes* [1872] LR 7 QB 598 and Goodhart & Hamson, [1932] 4 C.L.J., p. 320-356 and Ames, 18 (1909) Yale Law Journal p. 443.

⁷⁹ E.g. *Watteau v. Fenwick* [1893] 1 Q.B. 346 (accounted for supra in chapter 2.1.4).

⁸⁰ Goodhart and Hamson, [1932] 4 C.L.J. at p. 328.

⁸¹ Goodhart and Hamson, [1932] 4 C.L.J. at p. 335.

⁸² Cheeseman, p. 686.

⁸³ Cheeseman, p. 686.

⁸⁴ Ames, Yale Law Journal, at p. 452f.

in a better economical position than the agent, the third party will profit on the discovery, whereas he might suffer if he is liable to perform to a party in a different position than that of the agent. The latter might for instance be a situation where the third party sold something to the agent, relying on his personal qualities.⁸⁵

Starting from what is much less debated, it seems only fair that the third party is entitled to sue the agent when he is unaware of there being a principal to the contract. I would like to back up this argument in the next paragraph by referring to an American case where the interests of the third party were protected owing to this rule.

In the case *You'll See Seafood v. Gravois*⁸⁶ the claimant had delivered seafood to the restaurant "The Captain's Raft" in the belief that Gravois, in his capacity as owner, was the real and only counter-party. When Gravois failed to pay and was sued by the Seafood Company, he argued that there was an agency relationship between him and the corporation owning the restaurant, and that this corporation was the real counter-party on the contract. The onus was on Gravois to prove that he, in accordance with his submission, had been acting for a disclosed principal, in which case he would drop out of the contract. Not only was the Seafood Company (the third party) unaware of the agency, but Gravois had also implied that he was the only counter-party by signing all the checks in his own name. Hence, the judgement against Gravois was affirmed and the third party was rightfully paid.

My opinion that it was appropriate to allow the third party to hold the agent liable in this case is based on what would have been the outcome if this had not been the rule. The corporation that Gravois argued was the principal, was bankrupt, which means that the third party would not have been paid at all if Gravois could not have been held liable. A reverse judgement would therefore have opened up the possibility for parties to escape liability by appointing a bankrupt principal as a reconstruction after the event.

To recapitulate the relevant rule on agency the following can be observed under English and American law. Unless the contrary is stipulated in the contract of mandate the undisclosed principal is liable and entitled in relation to the third party, provided that the agent had actual (express or implied) authority to enter into the contract in question.⁸⁷ However, the Restatement provides further exceptions when the existence of the principal is fraudulently concealed and when there is a similar defence against the

⁸⁵ *Dyster v. Randall* [1926] Ch. 932 and infra.

⁸⁶ 520 So.2d 461 (1988) Court of Appeals of Louisiana.

⁸⁷ Bowstead, p. 256 and Halsbury's, para. 821, p. 493.

agent.⁸⁸ Thus, normally the principal may sue as if he was a party to the contract, unless it would be considered unjust, e.g. where it is a contract for personal services of the agent.⁸⁹

The doctrine of undisclosed principals is not an easily accepted rule and has been accused of being an anomaly since it departs from the legal principles of contract law, in particular the rule that the identity of the parties is a term of the agreement.⁹⁰ For example, not even a third party acting in good faith is protected from the hidden principal's claims when the agent deceptively sells goods in his possession without authority, as if he was the true owner.⁹¹

The object behind this doctrine, when it was developed, probably was to protect the principal and the third party from the bankruptcy of the agent, which was done without further notice as to whether there was any consent to that effect from all parties.⁹² By making the principal entitled directly from the acts of the agent, the economical position of this intermediary has become more or less irrelevant to the principal, although he is the only person the third party can rely on. Thus, a deceiving principal can pick an agent with excellent reputation or one that he knows nothing about all the same.

The effect of this doctrine is that it confirms a relation between two parties that have no direct relation or even knowledge of each other, viz. the third party and the undisclosed principal. However, some authors submit that the third party only obtains what he is rightfully entitled to and that the anomaly of agency is needed to do justice between the three parties.⁹³ This justice may be explained in terms of the third party obtaining a choice to hold the principal liable as well as a risk of being sued by the principal; the latter rule being completed with the protection against suits by undisclosed principals where these would be unfair to accept.⁹⁴ Further, it can always be stipulated in the contract that all undisclosed principals are excluded and a third party can never be forced to deal with a principal once he has clearly expressed that he will refuse to do so.⁹⁵ Another way of defending the doctrine of undisclosed principal is by comparison with the law of torts: "if the undis-

⁸⁸ Restatement (Second) of Agency § 302, e.g. certain businesses are unlawful to conduct as undisclosed principals (comment d.).

⁸⁹ Reuschlein & Gregory, p. 13.

⁹⁰ Ames, Yale Law Journal, p. 443 and 445 and Reuschlein & Gregory, p. 158.

⁹¹ Goodhart and Hamson, [1932] 4 C.L.J. at p. 328f.

⁹² Bowstead, p. 256 and Verhagen, p. 46.

⁹³ Reuschlein & Gregory, p. 14.

⁹⁴ Reuschlein & Gregory, p.13f and supra.

⁹⁵ Reuschlein & Gregory, p. 160.

closed principal must answer for his agent's torts, why not also for his agreements; contract law can bend that much, and has."⁹⁶

There is a possibility that the principal is not really a party but rather an intervener on the contract of the two other parties. This argument is reasonable, considering that the third party's defences against the agent are permitted also against the principal.⁹⁷ Further, the principal should not be considered a real party to the contract if he has used the agent to hide his own existence knowing that the third party would never have entered into the contract with him being a disclosed counter-party.⁹⁸ When describing the doctrine in terms of intervention it seems less revolting that the undisclosed principal is allowed to sue on the contract and it must be remembered that it works both in his favour and to his detriment. This right to intervene is not one without limitations so if there is a principal named in the main contract the right of any other person to intervene as an undisclosed principal is excluded.⁹⁹ If this was not so, basically anyone who wished to benefit from a contract would be able to intervene and pretend to be the real counter-party.

The next question is whether the doctrine applies when the undisclosed principal knew that the third party would not have entered into the contract if he had been told on whose behalf the agent acted. Is it still accepted that an undisclosed principal may sue on the contract when he has deceptively kept his own identity a secret from the third party? It has been suggested that the undisclosed principal should be forbidden to do so, but only under exceptional circumstances encompassing fraudulent behaviour.¹⁰⁰ It is submitted that a general rule, accepting that the principal may sue despite these circumstances, can be inferred from the case *Dyster v. Randall*¹⁰¹.

In this case Dyster was working for Randall & Sons (a company selling estates) until he was discharged from his office due to personal matters. A couple of months after this event Dyster wished to buy two plots of land from Randall & Sons. Since he was certain that the company would not sell to him personally he asked his friend Crossley to buy the plots on his behalf without disclosing the agency relation. The contract was entered into and Dyster started building on his plots. When Randall & Sons discovered the building operations they wrote to Crossley on the matter, believing he was building on the plots that he himself had bought. What happened next was that Crossley and Randall & Sons, i.e. the agent and the third party, cancelled the contract without any consent from Dyster, who sued the third party

⁹⁶ Steffen, p. 184.

⁹⁷ Bowstead, p. 256f.

⁹⁸ Goodhart & Hamson, [1932] 4 C.L.J. at p. 347.

⁹⁹ Bowstead, p. 260.

¹⁰⁰ Reuschlein & Gregory, p.172 and Bowstead, p. 262.

¹⁰¹ *Dyster v. Randall* [1926] Ch. 932 and Bowstead, p. 261f .

for specific performance. The court held that although Dyster had been discharged and was distrusted by the third party, the personality issue was not a material element in the sale of plots and therefore the undisclosed principal was entitled to enforce the contract.¹⁰²

This case confirms that failure to reveal who the principal is does not constitute misrepresentation; the general rule is that the agent is under no such duty to disclose the principal. It can also be inferred from the case that when the personality of the principal is indeed material to the contract, the agent should consider revealing his identity to the third party in order to avoid committing a fraud.

Finally, there is the question if there are any appropriate alternatives to this doctrine of undisclosed principals, which has been criticised *inter alia* because it is unknown to most countries apart from England and the U.S.A.¹⁰³. It appeared in England more than 200 years ago¹⁰⁴, but initially even the jury there would sometimes object to its application. An American author has questioned the fairness of the doctrine and has tried to come up with a better alternative in which to achieve justice.¹⁰⁵ This author would prefer that the agent held the legal title to the claim in trust for the principal, who would be unable to claim the third party directly and lack all defences, based on estoppel.¹⁰⁶ Instead the only one the third party would have to face claims against would be the agent; likewise the third person would have no other party to sue but the agent, which is in fact the only party he contracted with to his knowledge. The analogy is however not completely satisfying, for the rights of an undisclosed principal who intervenes go further than that of a trust beneficiary.¹⁰⁷

2.1.7 The doctrine of election and merger

Where the agent does not drop out of the contract, which is an exception to the general rule¹⁰⁸, both the principal and the agent will be considered liable on the main contract. In English law the third party may then at his option enforce the contract either against the agent or the principal, provided that he, if the principal is undisclosed, subsequently discovers who the principal

¹⁰² *Dyster v. Randall* [1926] Ch. 932, at p. 938, 939.

¹⁰³ Where it is expressed in the Restatement (Second) of Agency §§ 186, 302.

¹⁰⁴ Ames p. 446.

¹⁰⁵ Ames, *Yale Law Journal*, p. 448f According to this alternative a person who buys land from an agent, without the knowledge that there is a principal for whom this land is held in trust, is protected against any claims from the undisclosed principal.

¹⁰⁶ Ames, *Yale Law Journal*, p. 448 and 453.

¹⁰⁷ Bowstead, p. 257.

¹⁰⁸ See *supra* 2.1.5; it is certainly justified when the principal is undisclosed.

is.¹⁰⁹ This is called *the doctrine of election* and encompasses an alternative right to sue either of two promissors.¹¹⁰

The doctrine operates in England but some American states have chosen not to apply it fully and instead their laws entitle the third person to actions on joint and several basis until full payment.¹¹¹ Some American decisions suggest that the doctrine applies only in cases of undisclosed principals¹¹² and that the action is alternative only if the third party has already discovered the principal when he makes the choice to sue the agent.¹¹³ This entails that where the third party does not know about the election since he is unaware of the principal's existence, he is not deprived of the right to sue once again. The Restatement rejects the whole concept of an election and recommends that the principal will not be discharged from liability until the third party has received satisfaction from either the agent or the principal.¹¹⁴ Summarily it seems as though the doctrine is most frequently applied in England and in relation to undisclosed principals. However it is possible, although not likely according to Reynolds, that it applies to the disclosed agency as well.¹¹⁵

Even though it seems quite clear that the doctrine brings about that there is an alternative action, it is not fully agreed what constitutes an election or what the basis of the doctrine is.¹¹⁶ There is a dispute as to whether a simple statement of will, to accept one party as a debtor, is enough to constitute an election or whether there must actually be a judgement recovered against that party. According to Bowstead, the election is not completed until the third party has obtained a judgement against the agent.¹¹⁷ The judgement and nothing short of that will then be considered an obstacle to any future action against the principal, irrespective of whether the third party knows about the agency relation. This is called the *doctrine of merger* and is another way of explaining why there should be only one lawsuit allowed on one obligation.¹¹⁸

¹⁰⁹ Steffen, p. 195 and Bowstead, p. 271.

¹¹⁰ Steffen, p. 196.

¹¹¹ e.g. *Beymer v. Bonsall*, 79 Pa. 298 (1875); a Pennsylvanian case.

¹¹² Reynolds, 86 L.Q.R. (1970), p.328.

¹¹³ Restatement (Second) of Agency § 186 (comment a) and Reuschlein & Gregory, p. 159.

¹¹⁴ Restatement (Second) of Agency § 209, and comment.

¹¹⁵ Reynolds, 86 L.Q.R. (1970), p. 328ff, especially p. 330.

¹¹⁶ Reynolds, 86 L.Q.R. (1970), p. 319.

¹¹⁷ Bowstead, p. 271f.

¹¹⁸ Reynolds, 86 L.Q.R. (1970), p. 319.

In the English case *Clarkson Booker v. Andjel*¹¹⁹ it was suggested in the obiter dicta that an election short of judgement would have been sufficient to hinder another lawsuit against the agent. This can be understood from the words of Willmer L.J. that “I do not think that the plaintiffs, by the mere institution of proceedings against Peters & Milner Ltd., made such an unequivocal election as to debar them from taking the present proceedings against the defendant.”¹²⁰ The court held that a writ issued against the principal, although it is strong evidence of election, needs to be considered in the light of all the circumstances.¹²¹ Hence, the outcome of the case was that the writ alone did not constitute election and consequently the third party was allowed to sue the agent instead of the principal when discovering that the latter was going into liquidation.

2.2 The Swedish approach

The Swedish approach to contracting through agency in general is that the third party becomes legally bound *vis-à-vis* the principal and the agent drops out of the contract. This prima facie rule is functional and reasonable, inasmuch as there really is an agency relation, i.e. there must be a legal transaction based on the principal’s will and made on the principal’s behalf. Further, the constellation must be an honest one and the purpose of using an agent should be to facilitate the contracting business. The agency must be disclosed in order to belong to the traditional agency, since constellations involving undisclosed principals are singled out and considered as a separate category governed by specific regulations.

The presumption in Swedish law is that a person contracting is doing so in his own name and on his own behalf, unless proven that the third party is aware of that someone other than this person is the real counter-party.¹²² The concept of agency in the Swedish Contracts Act¹²³ can therefore be explained in terms of a message, declaring agency, received by the third party.¹²⁴ This is true, at least regarding the larger group based on independent authority, which will be explained in chapter 2.2.2.¹²⁵ To ascertain whether a transaction was actually made through agency in these cases, it is therefore most relevant what has appeared or at least should have appeared

¹¹⁹ [1964] 2 Q.B. 775.

¹²⁰ *Clarkson Booker v. Andjel* [1964] 2 Q.B. 775 at p. 793-794.

¹²¹ *Clarkson Booker v. Andjel* [1964] 2 Q.B. 775 at p. 776.

¹²² Grönfors, p. 277 and Tiberg 1997, p. 44.

¹²³ 1915:218 The Contracts Act.

¹²⁴ Tiberg 1991, p. 417 and Grönfors, p. 79.

¹²⁵ See also Grönfors, p. 85.

in the eyes of the third party.¹²⁶ In other words this is a publicity principle, which consists in a bilateral consent since both the principal and the third party must be aware of and consent to the agency relationship. There need not be an express statement regarding the name of the principal to fulfil the publicity requirement, but it must be clear to the third party that there is a principal involved.¹²⁷ According to this, the doctrine of undisclosed principals cannot be accepted under the traditional agency law since it contradicts the concept of agency based on a message received by the third party inferring that the agent is not the real counter-party. The principal can however be only partially disclosed and still the general rule that the agent drops out and the principal becomes bound will apply, provided that it is not a matter of commission agency¹²⁸ or that the secret identity is just a reconstruction after the event to save the agent from liability.¹²⁹ Such a reconstruction could be for example when an agent does not really act for anyone but later argues that an insolvent person was the principal. In a dishonest situation like that the third party is entitled to sue the agent directly, i.e. the agent will not be allowed to drop out and the third party is protected from loss.

As mentioned earlier, the Swedish concept of agency is divided into separate categories where the rules on liability differ. Two examples of non-typical agencies are those with a commission agent (*kommissionär*) and those with a *bulvan*.¹³⁰ Both these categories lack the traditional characteristics of agency since they do not invariably result in the principal becoming liable and entitled directly in relation to the third party.¹³¹

One kind of traditional authority in Swedish law is the *ställningsfullmakt*, which is a kind of power by position. This authority is attributed to agents working in a specific position, which implies that he is indeed authorised to act in a certain manner. Another kind of authority is the agent who acts the same way for a longer period of time without any protest coming from the principal. This agent will in time be considered authorised by means of a *toleransfullmakt*. These categories both belong to what is called independent authority and will be more thoroughly accounted for below, in chapter 2.2.2.

¹²⁶ It is however uncertain, in Swedish law if “the third party” is just the one person dealing with the agent or if it could be a larger group, see Grönfors, p. 85f.

¹²⁷ Verhagen, p. 32.

¹²⁸ *Infra* 2.2.3.

¹²⁹ Tiberg 1991, p. 422f.

¹³⁰ See further *infra* 2.2.3-2.2.4.

¹³¹ Grönfors p. 22 and Tiberg 1997, p. 23.

2.2.1 Internal and external authority

When speaking of authority Swedish law separates the instructions given in secret to the agent, the internal authority, from the authority given with the purpose of being declared to the third party, the external authority. This division is strictly used to decide the scope of authority and should not be understood as the only tool to determine liability, for which other data are decisive.¹³² The external authority, nearly always apprehended by the third party, sets the boundaries of authority and the internal authority cannot be wider than the external version, except in very non-typical situations.¹³³ Conversely, the internal authority often operates to limit the scope of the agent's authority, e.g. by declaring a price limit to the procuring of goods.

The object behind this distinction is the protection of the third party acting in good faith.¹³⁴ If the agent acts without having external authority he cannot bind the principal to the third party at all, irrespective of good or bad faith. If, on the other hand, the agent acts outside the scope of his internal authority, the principal will become bound to the extent that the third party acted in good faith, i.e. not knowing about the secret restrictions.¹³⁵ My interpretation of s. 10 and 11 The Contracts Act is that bad faith is required in order to include the internal instructions in the scope of authority.¹³⁶ Conversely, the third party will not be protected if he trusts an agent, without any proof of external authority.

The quite common use of an agent with *uppdragsfullmakt* in Sweden is based on that the external and internal authorities always coincide. The reason for this is that the *fullmäktige* merely has the mandate from his principal to base his authority on and what appears to the third party is just what the *fullmäktige* tells him and nothing more. Not only in this aspect is the *uppdragsfullmakt* singled out from the other forms of agency, it is also the only *fullmakt*, which is categorised as a dependant authority. This will be elaborated further in the following chapter.

¹³² Grönfors, p. 90f.

¹³³ Grönfors, p. 99.

¹³⁴ Grönfors, p. 83.

¹³⁵ s. 11 par.1 The Contracts Act.

¹³⁶ c.f. Grönfors, p. 96.

2.2.2 Independent or dependent authority

The Swedish classification of agency is roughly divided into two groups: dependent and independent authority.¹³⁷ The first category consists in the kind of authority given to the agent without any notice to the third party whereas under the latter category there is a message from the principal directly to the third party. Thus, the diversity lies in what the third party can “see”, which means that there is always an element of holding out included in the independent authority but not in the dependent version. This separation aims at protecting third parties in good faith relying on an independent authority, i.e. a third party is allowed to trust the message of independent authority from the principal and secret instructions will not prevail.

I would like to give a practical example of a very common kind of the independent authority. The story is that when I moved to my new flat I was out of the country and had to collect my keys with the use of an agent. What happened was that I instructed my boyfriend to go and sign for the keys on my behalf with my written permission, i.e. my authority. He did as he was told and brought the permission (the *fullmakt*) to the landlord and signed for the keys in his name on my account. Obviously, in Swedish law, the landlord could rely on this authority and I became bound in relation to him. It would not have mattered if I had given my boyfriend secret instructions only to collect one key, not two, for this could not have affected the landlord in good faith of such instructions. The outcome of this scenario would not have been different in English or American law, since there was both actual and apparent authority to act on my behalf.

In the following I will account for three different kinds of *fullmäktige* (henceforth referred to as “agents”, except when needed to point out the difference from other agents) namely those who base their authority on:

Uppdragsfullmakt (a dependant authority)

Ställningsfullmakt (an independent authority)

Toleransfullmakt (an independent authority)

In s. 8 of the Contract Act the *uppdagsfullmakt* is described as the kind of dependent authority that is based on a message to the agent. The third party dealing with such an agent does not have anything to rely on apart from the

¹³⁷ Tiberg, p. 47f and 52; the Swedish terms are: *självständig / osjälvständig fullmakt*. Cf. Grönfors, p. 76f, 82, who uses the terms “open” and “shut” (*öppna och slutna fullmakter*).

message his counter-party claims to base his authority on.¹³⁸ In a situation like this there must be personal liability attributed to the agent when he has acted without authority, since he himself was the real counter-party in such a case.¹³⁹ The paragraph further states that when the principal wishes to withdraw the authority it is sufficient for him to give notice to the agent. Where the representation from the principal never existed, or has been withdrawn, there is not a real agency situation but a contract between the third party (who is not really a third party in this case) and the agent. Conversely, where the agent has acted within the scope of the mandate, the principal becomes a party to the contract in accordance with the general rule on agency.

By way of illustration there is a Swedish case in which a broker was considered an agent with *uppdragsfullmakt*.¹⁴⁰

In NJA 1940 p. 687 a broker was employed by his principal to find a buyer for a consignment of seeds and he acted in accordance with this mandate. The principal however did not approve with the broker's choice of buyer and refused to deliver on the contract. The principal claimed that there was not a binding contract between him and the third party, since he had never given his approval of the buyer in question. The court found that it was a custom in the seed business for the seller to make an offer without a commitment to be bound.¹⁴¹ However, for this custom to apply it would have been necessary for the seller to include this reservation in his mandate to the broker. Hence the court held that the broker had acted within his authority and the buyer was entitled to the seed.

Apart from illustrating how a contract can be created through an *uppdragsfullmakt*, this case shows that the principal must be careful in assuming that customs will apply automatically and he ought to ensure himself that the agent is not unaware of the custom. The third party must use even greater caution considering that the principal would not have been bound on the contract if the reservation had been made to the agent, regardless of what the third party knew or did not know. This simply shows that third parties in good faith take a risk in relying on an *uppdragsfullmakt*.

The *ställningsfullmakt* belongs to the category of independent authorities and is distinguished by the fact that the principal has put his intermediary in a position associated with certain powers in law or custom.¹⁴² Because the agent is put in this position the third party is reasonable to presume that he

¹³⁸ Grönfors, p. 87.

¹³⁹ Tiberg 1997, p. 52f.

¹⁴⁰ NJA 1940 p. 687.

¹⁴¹ NJA 1940 p. 687 at p. 689.

¹⁴² Tiberg 1997, p. 48.

has a certain authority. To use the English or American terms, this authority would be either apparent or implied depending on whose reliance it emanates from. In Swedish law this independent authority comes out of law or custom and the intermediary is given his status as a *ställningsfullmäktige* (agent by position) through s. 10, 2nd par. Contracts Act. Further, everybody must not know about this custom, rather it is sufficient that it is in a typical way visible for the circle or branch to which the third party belongs.¹⁴³ What may be noted in regard to the case dealt with in the preceding paragraph is that if the custom in the seed business had been such that it must have been known to the branch of the third party, there could have been a *ställningsfullmakt* related to his position. This custom of non-binding offers would thus have been included in the authority and the third party would not have been able to sue the principal for performance since he would not have been reasonable to assume that the custom did not apply.

Where an agent has acted and affected the principal for a longer period of time, without any objections coming from the latter, the agent has achieved a *toleransfullmakt*.¹⁴⁴ In other words, it is the tolerance towards the acts, implied from the passivity of the principal, which constitutes the authority. In order to escape liability the principal must actively ensure that the third party is no longer in the illusion that the agent's acts are authorised.¹⁴⁵ Again, this shows that if something is reasonable for the third party to assume it is vital in Swedish agency law that the rules protect a third party in good faith. How soon the principal must react, i.e. how many acts are required before the *toleransfullmakt* is fully established probably depends on the circumstances.¹⁴⁶ Of course the authority can only be established provided that the principal knew about the acts of the agent.

The *toleransfullmakt* is not an authority explicitly deriving from any section in the Contracts Act, but rather has been developed in case law, even before the Contracts Act was enforced.¹⁴⁷ For instance in a case from 1906¹⁴⁸, a businessman had led the claimant to believe that his son had authority to place orders on his behalf. The claimant sued the businessman and the court found that the latter was bound by

¹⁴³ Tiberg 1997, p. 49f.

¹⁴⁴ Tiberg 1997, p. 50 and Grönfors, p. 244.

¹⁴⁵ Grönfors, p. 257.

¹⁴⁶ For instance the position of the agent or the relation between principal and agent, see further Grönfors, p. 258.

¹⁴⁷ Grönfors, p. 242f.

¹⁴⁸ NJA 1906 p. 405.

the contract with the seller since he had let his son order goods for his business on numerous occasions without objection.

In this case, as well as in more recent cases¹⁴⁹, the repetition of many similar acts was the decisive element for the principal to become bound through his passiveness. In comparison with the *ställningsfullmakt* one finds that the two authorities have much in common, although that where there is no law or custom to lean on, one may instead search for a clear element of repetition and establish authority by means of a *toleransfullmakt*.¹⁵⁰ Finally, it must be mentioned that there is yet another form of authority, which is similar to the last two, namely something called *kombinationsfullmakt*. I have chosen not to account for this type of authority thoroughly, but will settle with the unjust description that it is authority based on a combination of elements, where each element separately is not enough to establish any of the other kinds of authority.¹⁵¹

2.2.3 The commission agent

After having accounted for the most common types of *fullmäktige*, which form the essence of Swedish agency law, I will now move on to the extension of agency law. Neither the commission agent nor the *bulvan* (see *infra*) is a traditional agent and this will become clear in the following.

The Swedish *kommisionär* or commission agent acts in his own name but on someone else's behalf.¹⁵² This means that neither the identity nor the existence of the principal (*kommittenten*) must be revealed to the third party. The principal may be undisclosed and the onus is on the agent to prove that he was acting for the principal if and when a conflict arises. This kind of agency lacks the special features of "ordinary" agent and principal relationships in Swedish law, but may be referred to as "indirect agency".¹⁵³ Despite being an indirect form of agency the commission agent has much in common with the categories accounted for above. Most commercial¹⁵⁴ commission agents are used as agents to sell or buy chattels, securities, bonds etc. and therefore many rules on this form of agency concern questions of

¹⁴⁹ e.g. NJA 1943 p. 316.

¹⁵⁰ Grönfors, p. 255.

¹⁵¹ See further e.g. Grönfors, p. 259ff (especially p. 265).

¹⁵² s. 4 The Commission Agency Act.

¹⁵³ Verhagen, p. 36, and Hult, p. 3f (the notion is however not generally recognised).

¹⁵⁴ There is an important distinction between the commercial as opposed to the civil commission agent, see further Hult, p. 10ff, who finds that the latter has more in common with the ordinary *fullmäktige* in some aspects than the former.

ownership to the goods held by the agent. These rules will not be further dealt with here, insofar as their object is wider than confirming a relation between the principal and the third party.

The rules concerning the external relationship, which are the most interesting rules for the purpose of this essay, are encompassed in a special law: The Commission Agency Act¹⁵⁵. Here it is stated that the commission agent himself becomes bound in relation to the third party as the sole counter-party.¹⁵⁶ Hence, the principal has virtually no responsibilities *vis-à-vis* the third party.¹⁵⁷ Even if the third party should know the identity of the principal he has, as a main rule, no option but to sue the commission agent for performance. This is probably so because the law presupposes that the third party relied on the commission agent and his qualities only. According to the Swedish rules on contract law we can assume that the commission agent, acting in his own name, cannot bind the principal as well as himself. The general rule of agency law infers that whenever there is doubt as to whether the agent acted for himself or not, it is presumed that he did submit only himself to the contract.¹⁵⁸ Having said this it is not hard to understand that someone acting in his own name, without explicitly stating an intention to bind another, will be bound under the contract himself.

The next question to be answered must be in what way the principal will profit from this construction, assuming that he will not simply be left without any rights under the contract; a contract which he initiated. The object of this construction is that the results eventually will be transferred to the principal, who although he cannot be sued by the third party, becomes directly entitled in relation to the third party.¹⁵⁹ This may seem like an anomaly, especially since the liability based on the contract is not mutual but rather leaves the agent responsible against the third party without being entitled to invoke any rights. Consequently, the agent must ensure that the contract is fulfilled in relation to the third party, but only the principal can invoke the rights that emanate from the contract. Thus, the act of the agent does not create a binding relationship between the principal and the third

¹⁵⁵ 1914:45 The Commission Agency Act.

¹⁵⁶ s. 56 The Commission Agency Act. The exception from this rule is when the conflict relates to defects in the goods and the third party is a consumer and the principal a businessman. In such a case the consumer is considered to be the weaker party and is therefore protected to the same extent as he would be if he had acted with the principal directly.¹⁵⁶

¹⁵⁷ SOU 1988:63, p. 139f.

¹⁵⁸ Hult, p. 13f.

party, however the final result appears to be the same apart from the fact that the third party normally cannot sue the principal.

One reason for the third party not becoming entitled in relation to an unknown principal is that the agent must not be able to escape liability by finding an insolvent person who is willing to enter into the role of being the principal.¹⁶⁰ This does not mean that the principal will escape liability since the commission agent who has been sued by the third party may use recourse to sue the real counter-part, i.e. the principal. As an example of this and where it seems only natural that the third party could sue the agent I will briefly account for a Swedish case where an auctioneer was held to be a commission agent.¹⁶¹

In NJA 1975 p. 152 the principal was having a picture sold at an auction and according to customs his name did not appear when the buyer made his bid. When the buyer later on discovered that the picture was a reproduction he wished to annul the contract and therefore sued the auctioneer. The auctioneer argued that the buyer would have to sue the seller, claiming that he as an agent had dropped out of the contract. Since the auctioneer sold the picture for someone else but in his own name it was held that the agent was a commission agent. However, since the third party at an auction knows that the goods are sold on others accounts, the principal of auctioneered goods is always partially disclosed. According to the rule on commission the court then allowed the claim against the auctioneer. The owner of the picture could subsequently be held liable in damages to the auctioneer for having lied about the quality of the picture.

This case shows that Swedish law does not require that the third party must search for an unknown principal since the agent who has held the goods in commission is under a duty to guarantee the performance. It would clearly be a much more troublesome procedure were the third party not allowed to hold an auctioneer responsible in a case like this.

2.2.4 The *bulvan* with undisclosed principal

The Swedish *bulvan* can to some extent be a dishonest construction to achieve similar results to those of a commission, accounted for in the preceding passage. To use an English word, the *bulvan* could be described as a stooge, i.e. it is a person acting as his principal's puppet while keeping the construction a secret. The elements of this construction are those of commission, i.e. the *bulvan* is acting in his own name, on the principal's behalf and because the principal has put him in this position. However, there is also

¹⁵⁹ Tiberg 1997, p. 18 and p. 105.

¹⁶⁰ Tiberg, Festschrift till Grönfors, p. 416.

¹⁶¹ NJA 1975 p. 152.

the final requisition to separate the two categories: the act must be performed for an undisclosed principal.¹⁶² This is namely a situation where the principal uses an intermediary (physical person or judicial entity¹⁶³) to act on his behalf mainly because he has a self-interest in keeping his existence a secret to the third party and/or the public.¹⁶⁴ In a commission agency it is rather the agent than the principal himself, if any of them, who wishes to keep the principal's existence undisclosed.¹⁶⁵ The reason behind the use of a *bulvan* is often, but not necessarily, disloyal and may be for instance that the principal would not be able to enter into the contract legally by his own means and therefore he uses a *bulvan* as a tool.¹⁶⁶ By presenting an illusory outer picture of the real situation the principal can achieve what he wants through a semblance. The *bulvan* may for instance hold property for the principal, who is forbidden to do so, or do business in Sweden on behalf of a foreigner who lacks the permission to do so.¹⁶⁷

There are no general provisions regarding *bulvan* relations or even a generally accepted definition and there may be several different situations that fall under this vague category. There is however a law according to which the principal or the *bulvan* can be punished for criminal acts if the relationship is created with the intention to circumvent a prohibition to acquire immovable property or rights therein.¹⁶⁸ This law defines a *bulvan* relationship as a construction where the *bulvan* is put in the position of an owner of a property, or right therein, in order to hide the real principal for whom the property or right is held.¹⁶⁹ Hence, the principal is not only the one who profits from the ownership, notwithstanding that the *bulvan* is the legal owner, but he is also in a position where he possesses the ability to force the *bulvan* to bargain with the property on his behalf.¹⁷⁰ This definition is however a very specific one, as it is a complement to the prohibitions of other laws, and cannot be used in situations where there is some other object than immovable property or a right therein involved.

¹⁶² Grönfors, p. 297-299 and 305.

¹⁶³ Grönfors, p. 293 and SOU 1998:47 p. 57 (even the principal can be either a physical or a judicial person.).

¹⁶⁴ Tiberg 1997, p. 107.

¹⁶⁵ Grönfors, p. 300.

¹⁶⁶ prop. 1984:85/111 p. 7 and SOU 1998:47 p. 58.

¹⁶⁷ For the latter see NJA 1939 p. 67 and 1928 p. 427 (I and II) .

¹⁶⁸ s. 1 and 2 Bulvan Act.

¹⁶⁹ s. 1 par. 2 Bulvan Act.

¹⁷⁰ Grönfors, p. 286.

As a general rule the principal will not be bound by the acts of a *bulvan*; instead the liabilities and rights will be attributed to the *bulvan* himself.¹⁷¹ As opposed to the general rule on commission agency, the principal of a *bulvan* can however, under some circumstances, be held responsible for the fulfilment of the duties in relation to the third party.¹⁷² Making the third party bound in relation to the principal is an exception from the Swedish main rule that there can be no binding relationship or responsibilities between a party and an undisclosed other party.¹⁷³ This was the outcome of a case in Swedish High Court summarised in the following.¹⁷⁴

In NJA 1939 p. 228 Brunius, the owner of a restaurant, was held liable in debt for the products ordered by the *bulvan* Ms Andersson. The court found that Ms Andersson had basically done nothing more than to lend her name to be used in the business.¹⁷⁵ Because of this the owner's (Brunius') existence could be kept undisclosed to the third party even though he was the one profiting from the contract. Furthermore, the onus was on Brunius, the principal, to prove that Ms Andersson had bought the business and acted on her own behalf. This was, according to the court, not proven and hence it was held that she had been acting as a *bulvan* on Brunius' behalf.¹⁷⁶

This case shows that the exception to hold an undisclosed principal liable is needed whenever a construction with a *bulvan* is disloyal. It ought to be remembered however, that this breakthrough does not work both ways as in English and American agency law, i.e. it is simply an exception in order to hold the principal responsible without rendering him entitled in relation to the third party.

Another case where the principal was held liable for acts committed through a *bulvan*, is one where the object was the circumvention of the prohibition for a foreigner to do business in Sweden.¹⁷⁷

In this case the principal was a Swiss citizen who lacked permission to do business in Sweden and therefore created a Swedish company through which all acts were committed in his interest. Based on the fact that the reason behind the creation of the Swedish company was to circumvent a prohibition, the court held that the Swiss citizen (the principal) was liable for having committed the forbidden acts.¹⁷⁸

The conclusions that can be drawn from this case must however not be overestimated since there were special circumstances at hand. What can be

¹⁷¹ SOU 1998:47 p. 57.

¹⁷² Tiberg 1997, p. 108f and Grönfors, p. 308 and 314.

¹⁷³ Grönfors, p. 307f.

¹⁷⁴ NJA 1939 p. 228.

¹⁷⁵ NJA 1939 p. 228 at p. 229 and 230.

¹⁷⁶ NJA 1939 p. 228 at p. 231.

¹⁷⁷ NJA 1939 p. 67.

inferred however is that where the reason behind the construction of “bulvanship” is to evade assets from the creditors of a firm, the deceit must not succeed and the principal who holds the assets therefore cannot escape liability. The fact that the principal could be held bound in relation to the third party must still be seen as an exception to the general rule and may perhaps only be used to protect creditors or situations on an equal footing therewith. A general defence for making the principal liable under a contract made through a *bulvan* is that it is the principal who handles the financial consequences of the acts.¹⁷⁹ It would perhaps make sense to argue that a same person should be both financially and legally bound by the same act. This argument says nothing about the reverse situation, i.e. it does not necessarily make it reasonable to hold the third party liable in relation to the undisclosed principal on the same grounds.

Moving on to a possible claim coming from the third party the following question presents itself: Who is the third party supposed to sue if he later on discovers the principal behind the *bulvan*? As opposed to the rules on *fullmäktige* the general rule is that the *bulvan*, just like the commission agent, does not drop out of the contract but remains liable in relation to the third party. Hence, it seems obvious that the third party can still sue the *bulvan*, even when he discovers the principal.¹⁸⁰ The question remains whether he is also entitled to sue the principal under any circumstances. There may be liability imposed on both the principal and the *bulvan*, but no clear statement can be made as to whether this would be of an alternative character or a joint liability.¹⁸¹ If there is alternative liability, the English doctrine of election would probably apply and the third party would lose his right to sue the other party as soon as he has made a choice to sue one of the two – the principal or the *bulvan*.

2.3 The comparison

Whereas the English and American approach in agency matters is focused on what message has been presented to the agent, the Swedish approach is more concerned with what the third person has been told and has consented to. There has been an attempt to harmonise the aspect of agency through a

¹⁷⁸ NJA 1939 p 67 at p. 69.

¹⁷⁹ Grönfors, p. 313f.

¹⁸⁰ Grönfors, p. 317f.

¹⁸¹ Tiberger 1997, p. 110 and Grönfors, p. 320f (who seem to have opposite views regarding the character of the liability).

convention¹⁸² drafted by the International Institute for the Unification on Private Law (UNIDROIT), but unfortunately this convention has not gained much approval¹⁸³ and we are left to deal with the diversities present.

2.3.1 The authority aspect

The English and American aspect is that authority derives from the internal relationship. This means that the existence of authority, although it may simply consist in an oral mandate given to the agent, is the determining element for an agency relation. Although the basis of English contract law is the privity of contract, it has become a part of their agency law that parties in the external relationship are legally bound even when the third party is unaware of the principal's existence. Consequently, in English and American agency law there is no need for exceptions or separate categories when the agency is undisclosed and there may well be actual authority, which is enough to create privity of contract between the third party and the principal, without the element of holding out.¹⁸⁴ In contrast, the Swedish law speaks of a *kommissionär* / commission agent or a *bulvan* as a distinct indirect form of agency when the principal is undisclosed (and some other circumstances are at hand, see above) since the traditional rule on agency is that authority is based on what is revealed to the third party.¹⁸⁵ It seems as if the Swedish courts as a general rule put much effort in protecting the third party where he could not have known about his real counter-party. It must however be noticed that Swedish law also accepts situations where the third party knows only what the agent tells him.¹⁸⁶ This is a special situation, which is a common exception from the rule of visibility. Put in other words, the general rule in Swedish law, i.e. the visual requirement, is the exception in English / American law and vice versa.¹⁸⁷ This distinction is however not as decisive for the consequences as it may seem, since both the exception on apparent authority and that of *uppdragsfullmakt* are frequently used. Therefore, it is of less importance what is the general rule and what is the exception and it is of more value to point out that all three laws can support the same result.

¹⁸² The 1983 Geneva Convention on Agency in the International Sale of Goods.

¹⁸³ Tiberg 1991, p. 424.

¹⁸⁴ Grönfors, p. 86 and Tiberg 1991, p. 417.

¹⁸⁵ Grönfors, p. 86 and Tiberg 1991, p. 424.

¹⁸⁶ See further supra, about dependent authority and *uppdragsfullmakt* and Grönfors, p. 87.

¹⁸⁷ Tiberg 1991, p. 420.

2.3.2 Liability in contract

Whereas Swedish law presumes that a person is contracting on his own behalf when using his own name, the English and American view is that this is not enough to represent that there is not a principal. Again, this explains the doctrine of undisclosed principals in English and American law, which does not prevail in Swedish law. Whereas the Swedish law makes a distinction between direct and indirect agency, where only the former results in a mutually binding external relationship, the English and American agency laws make a distinction between the undisclosed and disclosed agency, without separating the results, i.e. a binding external relationship is created in both categories.¹⁸⁸ However, the indirect forms of agency in Swedish law contain rules to the effect that an undisclosed principal may become entitled (commission agency) or liable (principal behind the *bulvan*) in relation to the third party directly.

The conclusions that can be drawn from these observations is that where the principal has been kept a secret the liability in contract may be different depending on which law is applied. If Swedish law is applicable, the third party will not risk being sued by anyone other than the agent, unless there is a commission agency at hand in which case the principal is the only one entitled to sue him, whereas an intervention by the undisclosed principal as a general rule is allowed under English and American law. Even though there may be a parallel drawn to the Swedish rules relating to the *bulvan* it is definitely worth to stress the fact that in opposition to the use of this category of agency, the undisclosed agency in English and American law is not in any way unlawful¹⁸⁹. The Swedish rules that allow the third party to sue the undisclosed principal upon discovery, has developed as a protection for the third party when a *bulvan* is used in an disloyal manner.¹⁹⁰ Again it seems that the protection of the third party is an intrinsic part of the Swedish rules. The same protection may be argued to exist in the agency power in American law (and perhaps in English law as well), which allows third parties to rely on the agent having an inherent authority to act even when there was no actual or apparent authority.¹⁹¹

¹⁸⁸ Hult, p. 18f.

¹⁸⁹ Cheeseman, p. 686. The *bulvan* may however be illegal or legal depending on the circumstances.

¹⁹⁰ Tiberg, p. 424.

¹⁹¹ See supra 2.1.4.

3 Private International Law

The main question to be elaborated in this chapter concerns which law should govern the external relationship, i.e. how the agent can affect the legal relations of his principal by contracting with the third party. It must be remembered that this is different from the validity and scope of the internal authority as between the principal and agent, which is covered by The Rome Convention. There are several issues around the external relationship that can be involved in a conflict, such as: the scope of authority to bind the third party, whether the third party becomes bound when the agent has exceeded his authority and how revocation of authority affects the third party, only to name a few. I will focus on which law should govern the question of whether the agent had authority (actual or apparent) to bind the third party in relation to the principal and whether the principal can sue and be sued on the contract. This coincides with the main focus in the comparative part of this essay, where these rules were accounted for. Inasmuch as these rules on agency differ internationally it becomes of great importance how the conflict of laws is solved.

Before moving on to the suggested connecting factors, it should also be mentioned that there is a procedural difference in the civil law countries compared to the common law countries. The rule in most civil law countries (to which Sweden adheres) is that the courts must *ex officio* apply foreign law when it governs the contract. On the contrary, most common law countries require that the rules must be invoked by the parties themselves.¹⁹² This means that when nothing else is suggested, the English and American approach will be to judge the case in accordance with *lex fori*, i.e. the law of the country of procedure.

3.1 Suggested connecting factors

When establishing the applicable law it must be based on a suitable connecting factor; the closer the connection to a certain country is the more suitable it will seem to appoint that law to govern the relation. This is not an attempt to find one single rule that would suffice as a connecting factor in the external relationship, but rather an attempt to account for the alternatives

¹⁹² Bogdan 1976, p. 150.

at hand and the disadvantages and advantages that come along with them. Notwithstanding that there may be one rule that is more appropriate than another, at least from one point of view, it is virtually impossible to establish a rule that would work without exceptions in this area.

The key questions to be kept in mind when discussing the different connecting factors are: to what extent would a rule favour either of the parties and how easy is the consequence thereof to ascertain objectively? The aim is to find a connecting factor, or a combination of factors, which appoints a law that both parties can expect to be applicable. Since we are dealing with contractual relations the element of predictability is naturally more important to the parties than it would be in torts, and preferably this predictability should exist already when they begin to negotiate. It is specifically imperative that the applicable law is appointed with regard to the interests of the third party,¹⁹³ although it may be argued that the interests of the principal are equally in need of protection, especially when the *lex loci actus*¹⁹⁴ is considered without limitations.¹⁹⁵ The main reason that the third party must be protected is that he may not be aware of the problem of conflict of laws at all and that he “[...] should not be burdened with a duty to inquire into foreign rules relating to (actual or apparent) authority.”¹⁹⁶ As will become clear the advantages and disadvantages of each connecting factor all depend on whose interests are preserved - the third party’s or the principal’s.

3.1.1 Contract of mandate

The same law that governs the contract of mandate between the principal and the agent was suggested in the past to also govern the external relationship.¹⁹⁷ This suggestion was probably based on the false assumption that the internal and external relationships did not need to be separated in this aspect.¹⁹⁸ Instead of understanding the independence of the external relationship it was held that the same law should govern all conflicts arising from the agency. The advantage that came to mind was probably the upholding of consistency; one law to settle every dispute even remotely connected to the internal relationship indeed sounds like a straightforward and clear rule. The disadvantage with this rule is however that the principal and the agent would

¹⁹³ Bogdan 1999, p. 264.

¹⁹⁴ The law of the country where the agent performs, see further under 3.1.5.

¹⁹⁵ Bogdan 1999, p. 264.

¹⁹⁶ Verhagen, p. 121.

¹⁹⁷ Verhagen, p. 82 (it was much favoured in the 19th century).

¹⁹⁸ Verhagen, p. 68f.

then have the opportunity to make a choice of law affecting the external relationship, without any regard to the third party and even before knowing who this third party would be. This hardly seems fair and does not protect the interests of the third party at all, since he is most likely unaware of which law governs the contract of mandate.

This rule does not however, exclusively belong to the past, since there is English literature suggesting that the contract of mandate sometimes is the appropriate connecting factor.¹⁹⁹ This suggestion is not without limitations for it is considered appropriate only as far as the actual authority is concerned, i.e. the apparent authority is suggested to fall under a different rule.²⁰⁰

3.1.2 Where principal has his domicile or business

It may be suggested that the country where the principal has his domicile or business establishment should be the decisive element in determining the law applicable to the external relationship. This is most easily backed up with the argument that this is a place which is physically ascertainable and which cannot be fortuitous or unforeseeable.²⁰¹ I would like to think that this is a connecting factor that would also be difficult to change rapidly with fraudulent intentions, i.e. it cannot easily be moved to a place where the law is more convenient for the principal. Another advantage is that it favours neither the principal nor the third party, provided that the third party understands the contents of this law and knows in what country the business is established. This connecting factor may be the least extreme way to find an applicable law since the risk of this connection leading to unjust or inappropriate results is unlikely and it may often be seen that the law applicable according to this principle will coincide with the law governing the contract of mandate and the connecting factors according to the Rome Convention.

Despite the fact that this connecting factor can seem favourable it does not provide the solution to the problem of conflict of laws relating to the external agency relationship. Especially in circumstances where the principal is undisclosed to the third party, and consequently so is his place of business,

¹⁹⁹ Dicey & Morris, p. 1476.

²⁰⁰ See further *infra* under 3.1.6 (main contract as a connecting factor).

²⁰¹ Verhagen, p. 111.

this connection does not provide a foreseeable solution in the view of the third party.²⁰²

Even if this rule may not be considered the most suitable connecting factor, it has been suggested that article 8 (2) Rome Convention²⁰³ should be adopted and adjusted to apply in relation to the external relationship in situations when the principal has not consented to the conclusion of the main contract.²⁰⁴ Thus, whenever the circumstances are such that none of the other connecting factors seem reasonable to determine the effect of the agent's acts, the principal should be allowed to invoke the law of the country where he has his business, to prove that he did not consent to the acts in question.

It may also be suggested that a combination of this rule and the *lex loci actus* would best protect the interests of both the principal and the third party. This brings about that where the agent was authorised according to *lex loci actus*²⁰⁵ this will suffice only if the principal could reasonably assume that the acts would be performed there.²⁰⁶ If he could not so assume, the law of the country where the principal has his business establishment will apply. Naturally the third party must be in good faith about the authority of the agent to act in this country in order to have his interests protected according to this rule.

3.1.3 Where third party has his domicile or business

To use the country where the third party lives or has his business establishment as a connecting factor clearly protects the third party, often to the detriment of the principal. To protect the third party to such an extent seems like a good suggestion from his viewpoint but of course the effect on the principal can be unjust. If the agent's authority does not include instructions where or with whom he may act but merely what the mission is in broad terms, it will be virtually impossible for the principal to foresee the applicable law under this rule. Hence, the principal would not be able to predict whether the authority would be considered valid according to the applicable law and therefore he would have to take the risk of not knowing whether the contract would be legally binding or not. According to Verhagen, among

²⁰² The story deals with an agency relation where the principal is either undisclosed or perhaps partially disclosed.

²⁰³ Supplement B

²⁰⁴ Verhagen, p. 113.

²⁰⁵ See *infra* 3.1.5.

others, this connecting factor is not a preferable one and he points out that to his knowledge it has never been recommended.²⁰⁷

3.1.4 Where agent has his domicile or business²⁰⁸

It is obviously most favourable to the agent to use his country of domicile or business establishment as a connecting factor when determining the law applicable to his authority. This may seem irrelevant considering that he is not under normal circumstances and when acting within his authority, supposed to become a party on the contract. However, the other parties may also support this connecting factor on the ground that is fixed and cannot be subjected to manipulation. It can also be held to favour neither the principal nor the third party; hence this is a suggestion offering a compromise. This factor also accords with The Rome Convention in particular since the country where the agent is situated often is the place where the characteristic performance is carried out. This, and the fact that the qualities of the agent are related to the country of his business, may be the reason why it is gaining support internationally. It is also the connecting factor adopted in The Hague Agency Convention (HAC)²⁰⁹ as a main rule, subject to certain exceptions. This convention is a more than 20-year-old attempt to unify the conflict of laws in agency relations, but unfortunately it has not been signed by more than a few states.

Applying this rule will often lead to the same law being applicable on the external authority as well as on the internal. In consistence therewith the rule ensures that an agent treated as having authority to act within the country has the same authority to act over the borders. This is a strong argument but let us not forget about the disadvantages with this rule.

First of all, a number of specific situations are suggested to be excluded from the rule, e.g. where aircrafts, ships or auctions are involved. These will not be further discussed here but are mostly pointed out as a reminder that one rule is seldom satisfying in all situations. What may cast some doubt on the suitability of this connecting factor where most contracts are concerned is that it is hardly appropriate where the agent is authorised to act only in another country than that where he is established. Further, it seems that the

²⁰⁶ Bogdan 1999, p. 264.

²⁰⁷ Verhagen, p. 109f.

²⁰⁸ Verhagen, p. 111-115.

third party may be treated unjustly if he cannot find out where the agent is established or lives. It seems particularly inappropriate when the agent does not have a business establishment and acts in another country than that of his residence. In these cases the *lex loci actus*²¹⁰ would probably be better suited to govern the external relationship and protect the interests of the third party. This idea coincides with the HAC where the *lex loci actus* is adopted as an exception to the law of the country where the agent has his business establishment in four specially defined cases.²¹¹

To sum up, the connecting factor here discussed may work as a general presumption if set aside when the circumstances suggest that another law is more appropriate to govern the agent's authority.

3.1.5 Where the agent performs (*lex loci actus*)

If the law of the country where the agent performs is used as a connecting factor on the external relationship this entails that the appointed law is the *lex loci actus*. This is often the preferred rule in Swedish literature, at least concerning agents who are employed to operate permanently in a specific country.²¹² This coincides with the rule in s. 292 par. 2 the Restatement (Second) of Conflicts of Laws, but it must be noted that this flexible approach has not gained much support so far in the American case law.²¹³ It reads:

“The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorised the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority.”²¹⁴

Even in English literature the *lex loci actus* has been recognised to determine rights and duties between the principal and the third party due to the agent's authority. However, it is suggested by some that when the law to which the main contract has the closest connection is another, the main

²⁰⁹ The Hague Agency Convention, 14 March 1978, Chapter III, especially Art. 11, which is reproduced in supplement A (To my knowledge, only France, Argentina, Portugal and the Netherlands have ratified and signed this convention).

²¹⁰ See *infra* 3.1.5.

²¹¹ Art. 11 (2a-d), see supplement A.

²¹² Bogdan 1999, p. 264 and Bogdan 1976, p. 171f.

²¹³ Scoles & Hay, p. 716.

²¹⁴ § 292 (2) The Restatement (Second) of Conflict of Laws.

contract as a connecting factor²¹⁵ should prevail over the use of *lex loci actus*.²¹⁶

The obvious advantage with this rule is that its consequences are relatively easy for the third party to understand. If he is contracting with the agent in his own country he can be certain that the rules on authority that he is accustomed to will govern his relationship with the principal even if this principal is situated in another country. This advantage does not however need to be worth much in the case where the parties happen to contract in a country to which neither of them has any connection. There may be several reasons behind the choice of a contracting place, e.g. it may be practical for the parties to meet halfway between them in a country to which transports are easily accessible. Another important observation when it comes to the commercial practice of today is that the Internet is much used not only to communicate and negotiate but can also be used to seal a contract, e.g. by sending a message via e-mail or by paying electronically. The problem relating to this issue is that there is no natural place of performance since cyberspace is quite different from any geographical sphere. This being a very up-to-date issue, several solutions can be suggested and one is that the place where the server is located should be equal to the place of performance. There is much more that can be said in this area, but I will not further discuss these aspects herein.

What follows from the paragraph above is that the *lex loci actus* is not necessarily easier for the third party to assess compared to what the other connecting factors would entail, in particular not when the Internet is involved. Further, both the third party and the principal may well be surprised of the contents of the law on agency of a country where they by chance happened to sign the contract.²¹⁷ Even if the country of performance is not coincidental it may, if worse come to worse, be chosen fraudulently by the agent or even by the third party himself, e.g. in order to avoid intervention of an undisclosed principal.

It would be a great risk for the principal if this rule applied notwithstanding that he had not given the agent actual authority to act in the country in question. This problem has not yet been revised, at least not in English law²¹⁸, but it seems probable that the principal may be held bound if the *lex*

²¹⁵ See *infra* 3.1.6.

²¹⁶ Dicey & Morris, p. 1478.

²¹⁷ Verhagen, p. 110.

²¹⁸ Dicey & Morris, p. 1478.

loci actus acknowledges that there was apparent authority to act in the country in question. My opinion is that the principal, who is the initiator of the transactions to be performed, should be able to exclude certain laws from being applicable by inserting a clause to that effect in the contract of mandate. This clause should then negate actual authority and hopefully also apparent authority to act in a way that renders these laws applicable at least inasmuch as an element of holding out is required. The question remains if it is reasonable that the principal would have to mention every law that he wished to exclude. Perhaps it would be more efficient to stipulate that every act in a country not mentioned, must be preceded by the principal's consent.

Again, perhaps a combination of this rule and the one in chapter 3.1.2 is preferable, especially where the contract of mandate is silent as to where the agent is authorised to perform. If the principal could not have reasonably foreseen that the agent would act in the country where he did, the law to govern the external relationship would then rather than *lex loci actus* be the law where the principal has his domicile or business establishment.²¹⁹

3.1.6 Main contract

The law governing the main transaction has been suggested in English case law as well as literature, to be the most appropriate connecting factor to establish the law that governs the external relationship.²²⁰ At least it has been argued that questions of apparent authority must be judged according to the law appointed under this rule, notwithstanding that the same rule might not be appropriate when determining the scope of actual authority.²²¹ The reason that one may want to separate the problem of conflict of laws dealing with actual authority from situations with apparent authority is that the actual authority entirely depends on an act between the principal and the agent in English law.²²² Where actual authority is lawfully established in one country there should be little or no reason for the principal to worry about which law it is guaranteed under, since knowing that he will have a valid contract with the third party in most situations must be enough. Accepting this view would also entail that the principal is protected and can trust that the actual authority, which is given in accordance with the laws governing

²¹⁹ Bogdan 1999, p. 264.

²²⁰ E.g. *Maspons y Hermanos v. Mildred, Goyeneche & Co.*, infra 3.2, and Dicey & Morris, p. 1473, rule 198 (see supplement A).

²²¹ Dicey & Morris, p. 1476 and *Britannia Steamship Insurance Association Ltd. v. Ausonia Assicurazioni S.p.A* [1984] 2 Lloyd's LR 98 (CA) – discussed infra under 3.2.

²²² Dicey & Morris, p. 1476 and supra chapter 2.1.1

the mandate will be sufficient and equally effective even when the agent is concluding the main contract in another jurisdiction. Further, it makes sense that it is only when there is no actual authority, which can often be understood from the contract of mandate (and the law governing this contract), that one needs to proceed to ascertaining whether there is apparent authority held out to the third party when concluding the main contract.²²³

Unfortunately this argument is oblivious to the reverse situation where a third party would like to establish that there is not a binding contract as a result of the agent's acts. In such a case the law with which the third party is more familiar may establish that there was no authority at all, whereas the law that governs the contract of mandate might enable the principal to enforce the contract based on actual authority. It would certainly not protect the third party if the principal in this situation would be allowed to rely on the law that governs the contract of mandate.

In addition to this statement the separation of actual and apparent authority in relation to conflict of laws does not comply with the Swedish aspect of agency, unless the rule is reversed. Thus, the method could be the same if one starts with examining whether the authority is based on the exception of dependent authority, i.e. an *uppdraagsfullmakt* emanating only from the mandate. If the dependent authority is ruled out the next step could then be to focus on the main contract and the general rule that the independent authority is given by message to the third party.

Keeping the disadvantages in mind, the prevailing view in literature is, according to Verhagen, that it is inappropriate to separate the two kinds of authority when determining the applicable law, especially since the definition of actual and apparent authority is vague and varies even more internationally than it does within countries.²²⁴ Another reason for criticising this separation is that it perhaps goes too far in protecting the principal and that it may lead to arbitrary and unforeseeable results considering what has been said about the distinction not being unilaterally accepted. Having rejected the combination of the contract of mandate and the main contract as connecting factors I move on to consider solely the main contract's impact on the matter.

Choosing the law of the main contract as the connecting factor on all matters relating to the external authority protects the third party, who can rely on the

²²³ Dicey & Morris, p. 1476.

²²⁴ Verhagen, p. 307.

same law being applicable whether the problem relates to contract matters in general or specific agency matters.²²⁵ Alas, he may still have difficulties assessing the content of the relevant law. Adopting this rule would render it sufficient for the third party to investigate the contents of one law, namely the law which governs the contract he enters into with the agent, in order to identify the rules of authorisation of agents. Furthermore, this connecting factor introduces the possibility for the agent and third party to agree on a choice-of-law clause, which will affect not only the law governing the contract between them, but also the external relationship with the principal.²²⁶ To protect the principal from negative effects of an agent's unauthorised choice of law an addition to this rule should be that the choice-of-law clause, made without the consent of the principal, is valid only if both the law applicable in the absence thereof and this law would entail that the principal becomes bound and entitled on the contract.²²⁷ If the law chosen does *not* stipulate that the principal is so bound and entitled, no such protection is suggested. Hence, the principal would not be able to become bound against his will but could be deprived of the rights under the contract due to the choice of law.

To protect the third party from unwise agreements to a choice of law, one may suggest that the clause is not valid if the effects of that law would be less favourable to him than those of the law applicable according to the main contract as a connecting factor.

In favour of this connecting factor is the coherence, i.e. the fact that several issues will be dealt with under the same law, and that the law can be identified by both the principal and the third party. Further it is clearly desirable that an agent is allowed to assume that two agents of his class would have equal competence to enter into two identical contracts irrespective of where their mandate was given etc.²²⁸

The facts that negate the brilliance of this connecting factor is that the consequence is often difficult for the principal to ascertain, especially if he has given his agent a wide geographical sphere to act within. The principal is left with an even greater degree of uncertainty in a situation where the agent has concluded several main contracts with third parties in different coun-

²²⁵ Verhagen, p. 115f.

²²⁶ Verhagen, p. 117.

²²⁷ Dicey & Morris, p. 1478.

²²⁸ Dicey & Morris, p. 1475.

tries.²²⁹ The authority given to the agent might then be judged differently depending on the content of the laws applicable to the main contracts. The principal may for instance be held bound under just one contract out of several identical ones if according to the law, with which just one main contract had its closest connection, the agent had apparent authority. Another problem is that the law governing the main contract may itself not be easily ascertainable in the absence of a choice-of-law clause.²³⁰ Not every contract is blessed with a self-evident characteristic performance and the country with which the contract is most closely connected may be difficult to assess.²³¹ Hence, this solution is not without disadvantages and it must be kept in mind that it does not ensure that the law where the agent and the third party have their business establishments will apply even when they are both situated in the same country.²³²

Remaining to be accounted for hereunder are two very important observations made by Verhagen, who clearly is not favouring this as a possible connecting factor.²³³ Firstly, he is concerned that there may be a legal vacuum regarding the agent's authority if no main contract is concluded for a long time. In addition to this, it must be noted that it is important for all parties to know that there is authority, preferably already during the negotiations. Secondly, he accurately points out that one transaction with a third party is not necessarily *one* contract, but may consist in several different contracts governed by different laws. It would certainly be a menace if several, perhaps contradicting laws, governed the authority.

3.2 Conflict of laws in case law

The case law on private international law relating to the external relationship is scant, especially in the U.S.A. where the rules on agency are quite similar in the different states within the country.²³⁴ However the question has come up more frequently in cases with international relations, but clearer rules are still called for.²³⁵

²²⁹ Verhagen, p. 119f.

²³⁰ Verhagen p. 119.

²³¹ The Rome Convention, art. 4.

²³² Verhagen p. 122.

²³³ Verhagen p. 120.

²³⁴ Scoles & Hay, p. 714.

²³⁵ Scoles & Hay, p. 716.

An important English case from the 19th century shows that the connecting factor chosen to solve the conflict of laws issue can indeed be conclusive for the outcome of the case. The facts of this case will be summarised below.

In the case *Maspons y Hermanos v. Mildred*²³⁶, an English firm (hereinafter referred to as the third party) dealt with the Cuban agent company (Demestre & Co) and a sale of goods contract was entered into between them. The agent company agreed to ship the ordered tobacco in their own names, i.e. without naming the seller, and the third party agreed to arrange for the cargo to be insured in London. The insurance was made for the benefit of all parties interested. At no time was the real seller of the goods mentioned or named, except in corresponding letters where the existence of a principal was implied by reference to the “interesado”. What happened next was that the ship was lost and the third party in England received the policy-money by effecting the insurance. At this point the Cuban merchants, i.e. the unnamed / partially disclosed principal, who had sold the tobacco through the agent claimed that they were entitled to the insurance money since they were indeed an interested party under the contract.

In opposition to the legal situation under English law, a principal under Spanish law was not allowed to enforce a contract made by an agent unless the principal was disclosed as well as named. Therefore it was material in this case whether the law of Spain or the law of England was applicable on the external relationship. In favour of Spanish law would be that this was the law obtaining where the principal and the agent had their place of business, whereas the third party’s place of business and the place of performance would suggest that English law should be applicable. Further, it seems probable that the contract of mandate was governed by Spanish law, whereas the main contract was governed by English law.

The court held that English law governed the main contract entered into by the agent and the third party, and that this law should also be conclusive as to whether the principal was entitled to sue the third party on the contract.²³⁷

Hence the connecting factor in this case was the law governing the main contract, which is in accordance with recent English literature on the subject.²³⁸ However, it appears from the obiter dictum of the case that Spanish law had to be taken into account when determining “[...] the nature and extent of the authority given [...]”.²³⁹ Probably, what the court meant by this quote was that Spanish law would be applicable to a dispute concerning the

²³⁶ *Maspons y Hermanos v. Mildred Goyeneche & Co* [1882] 9QBD 530.

²³⁷ *Maspons y Hermanos v. Mildred Goyeneche & Co* [1882] 9QBD 530 at p. 539.

²³⁸ Dicey & Morris p. 1473, RULE 198 (supplement A).

²³⁹ *Maspons y Hermanos v. Mildred Goyeneche & Co* [1882] 9QBD 530 at p. 539.

extent of the authority between the *agent and the principal*, i.e. it was a comment on the matter referring to the internal relationship.

Another English case where the question of applicable law on the authority arose was *Chateney v. The Brazilian Submarine Telegraph Company, Limited*²⁴⁰.

In this case the principal was a Brazilian subject, which authorised an agent with his business establishment in London to sell and buy shares for it. After the agent had sold certain shares on the principal's behalf to the third party in England, the principal sued the third party on the ground that this sale was not included in the authorisation. The court had to determine whether the scope of authority was governed by English or Brazilian law.

In favour of applying Brazilian law was that the authority was executed in Brazil according to Brazilian law and custom and it was written in the Portuguese language. On the other hand the authority was acted on in England and the authority was interpreted as delegating to the agent power to act in all countries.²⁴¹

After having given much regard to the intention of the principal when writing the document where he delegated the power, the court held that English law governed the authority since “[...] if [...] the intention appears to be that the authority shall be acted upon in foreign countries, it follows that the extent of the authority in any country in which the authority is to be acted upon is to be taken to be according to the law of the particular country where it is acted upon.”²⁴²

The connecting factor in this case was obviously the place of performance (*lex loci actus* was the applicable law) since the court wished to protect the third party when he was reasonable to believe that the agent could sell the shares. Thus, the third party was allowed to rely on apparent authority according to English law. It would not have been fair to the third party to have Brazilian law governing the authority considering that both the agent and the third party had their business establishments in England and that the transaction was performed in England.

The third English case to be succinctly accounted for is *Britannia Steamship Ins. Ass. Ltd. v. Ausonia*²⁴³ in which case the questions of actual and apparent authority were separated in order to determine the applicable law.

²⁴⁰ [1890] 1 Q.B. 79.

²⁴¹ *Chateney v. The Brazilian Submarine Telegraph Company, Limited* [1890] 1 Q.B. 79 at p. 85.

²⁴² *Chateney v. The Brazilian Submarine Telegraph Co., Ltd.* [1890] 1 Q.B. 79 at p. 84.

²⁴³ [1984] 2 Lloyd's L.R. 98 (CA) .

In this case there were two main contracts entered into between the defendant, an Italian insurance company and the claimant, a group of English ship owners. English law governed the main contracts since they had their closest connection with England. The dispute in court was whether the two managers who had signed the contract had possessed apparent authority to do so on behalf of the insurance company. The court held that there was a binding contract between the ship owners and the insurance company based on apparent authority according to English law, notwithstanding that, according to Lord Justice Ackner “[...] actual authority is governed by Italian law.”²⁴⁴

Hence the main contract was the decisive connecting factor and appointed English law to govern the external relationship; but only as far as the apparent authority was concerned. It can be understood from the obiter of the case that the outcome depended partly on the fact that Italian law would have deprived the claimants of rights to which they were entitled under English law.²⁴⁵

An American case on agency, indeed dealing with interstate conflict of laws, is *Mercier v. John Hancock Mut. Life Ins. Co.*²⁴⁶

In short an insurance company situated in Massachusetts had issued a life insurance policy through an authorised agent, with Dennis Pignoni in Maine as a beneficiary. Shortly thereafter Pignoni died and the company contested payment upon the ground that the beneficiary or the agent on his behalf had made false representations concerning Pignoni’s physical health. The question of whether there was a contractual liability imposed on the company as a principal, had to be decided according to “ [t]he law of the state in which an agent or a partner is authorised or apparently authorised to act for the principal [...]”²⁴⁷ Considering that the agent was both licensed in Maine and acted in this state, the laws of Main were applicable.

Following this judgement the connecting factor should be the place of performance provided that the agent was authorised to act there or at least that the third party could reasonably assume that he was so authorised.

Finally a Swedish case should be mentioned under this heading although there are not many to choose between, and unfortunately this case does not deal with the conflict of laws as thoroughly as I would have hoped.

In NJA 1924 p. 4 a Norwegian company (the principal) sued a Swedish company (the third party) by using an agent (*prokurist*). This agent was not given authority to sue on behalf of the principal in writing but rather the managing director delegated the power to do so orally.

²⁴⁴ *Britannia Steamship Insurance Association Ltd and others v. Ausonia Assicurazioni S.p.A.*[1984] 2 Lloyd’s L.R. 98, at p. 100.

²⁴⁵ *Britannia Steamship Insurance Association Ltd and others v. Ausonia Assicurazioni S.p.A.*[1984] 2 Lloyd’s L.R. 98, at p. 100.

²⁴⁶ 44 A.2d. 372 (1945).

²⁴⁷ *Mercier v. John Hancock Mut. Life Ins. Co.* 44 A.2d. 372 at p. 375, c.f. Restatement (Second) Conflict of Laws § 292 (2).

The question in the Swedish High Court was whether Swedish or Norwegian law should govern the authority. The principal claimed that Norwegian law was applicable to the question of authority and without further motivation the court applied this law. Accordingly the authority was valid even though not given in writing and the agent was considered to have some kind of implied authority or power by position to act on the company's behalf.

Which connecting factor was possibly adhered to in this case is not clear. It seems that Norwegian law was chosen because Norway was the country where the principal had its business establishment as well as where the contract of mandate was entered into. It is however certain that the law of the forum, i.e. in this case the country where the agent performed the act, would have been Swedish law just as it was the law of the country where the third party had its business establishment. Considering the brief comments on the matter by the court, the private international law aspect of this case should perhaps not be given to much value.

4 Conclusions

To evaluate the practical consequences of the connecting factors in private international law I will now apply the different suggestions to the hypothetical story in the introduction (see chapter 1.1).

Starting with the contract of mandate as a connecting factor on the external relationship, we need to add a few details to the story. Let us assume that Peter assigned the power to Adam by way of a written document in English, which was sent to him. The law governing this contract must be either American or English law and according to both these laws the doctrine of undisclosed principals would apply, i.e. either Peter or Adam would then be allowed to sue Tom. No matter which one of these two laws would govern the contract of mandate both may be hard for the third party Tom to assess the content of or predict, considering he does not know about the existence of an agency. In this context we should consider whether this connecting factor would be more suitable if it only applied to actual authority. This is probably not so if we find that Adam had the actual authority to sell and that the restriction about advance payment should have been explicitly included in the authorisation to limit the scope of authority. Using the contract of mandate as the connecting factor clearly does not seem appropriate from the viewpoint of the third party in our case. However, it must be added that the result of the English or American doctrine being applicable is not always to the detriment of the third party. In the converse situation, if it was Peter who failed to perform on the contract, then Tom would have had an option

to sue either Adam or Peter (when and if the latter subsequently became disclosed).

Next, I will consider which law becomes applicable if we use the country where the principal has his business establishment as a connecting factor. Since Peter is the owner of a firm in the U.S.A. the applicable law would be American law. This is not protecting Tom in the situation where he is the defendant since he does not even know that there is a principal, let alone one from another country than England or Sweden, and he would only expect to be sued by Adam. Neither would he be able to predict that the laws of the U.S.A. would determine whether Adam from England was allowed to sell him electricity in Sweden.

The third suggested connection is the country where the third party has his business establishment, i.e. Sweden in our case. Swedish law being applicable on the external relationship should not be surprising to the principal, Peter, in this situation where he has authorised his agent to sell to a specific person in a specific country. It is also very favourable to Tom that the law of the country where he lives and acted should determine whether he could be sued on the contract. As has been stated in chapter 3.1.3. this has not been considered a suitable connecting factor and the reason that it seems reasonable in our story is that the circumstances are not very realistic. Instead, I have chosen a story where three countries are involved just to demonstrate the relevance of the conflict of laws. Further, it must be mentioned that Peter employed Adam to contract *inter alia* with Tom in Sweden and that this connecting factor therefore may lead to different laws being applicable depending on where the third parties lived or had their business establishment. The content of Swedish law being applicable would be that only Adam could sue Tom since undisclosed principals are not allowed to intervene. If the construction would be considered a *bulvanship*, e.g. if Peter was for some reason forbidden to sell his electricity in Sweden himself this would only affect the liability on contract if it was Tom who wanted to sue on the contract. However, it is also possible that Adam was a commission agent²⁴⁸, in which case the principal would be able to sue the third party despite that he, i.e. Tom, would not have had the mutual right to sue Peter (the *kommittent*).

The fourth connecting factor to be considered is the country where the agent has his business establishment. For argument's sake let us assume that

²⁴⁸ Which seems more likely if the goods to be sold was not electricity but e.g. cars.

Adam had his business in England only and that he flew to Sweden to enter into the contract with Tom. In a case like this, one cannot assume that the third party knows where the agent has his business establishment, if indeed he has one, let alone that he knows the content of the laws of every country from which the agent may have travelled. Adhering to the HAC Article 11²⁴⁹, one of the exceptions to the general rule would be applicable since the third party has his domicile in the country where the act is performed, see 11(2)(b) HAC.

Since the place where the contract was concluded, the place of performance and the domicile of the third party are the same, namely Sweden, it may seem fair that Swedish law should govern the relation between Tom and Peter. This would be the result of using the *lex loci actus*, which could hardly be fortuitous in a case where the agent is explicitly allowed to act in Sweden with a specific mission to sell the electricity there. In the hypothetical case it is also clear that there was actual authority at least to sell the electricity and probably apparent authority to sell without demanding payment in advance (assuming that the custom in Swedish did not require prepayment and that the third party never thought that a well-known American custom would apply simply because the seller could possibly be American).

Finally, the law applicable to the main contract between Tom and Adam could be the one governing the external relationship. To ascertain which law this would be, we need to assess which law is the one governing the main contract by applying the Rome Convention (see supplement B). We would then need to consider that the contract was made in the English language (could have been either British or American English), payment was due in American dollars, the electricity came from the U.S.A. (and so did the seller) and the contract was entered into and performed in Sweden. The main contract therefore has its closest connection with either the U.S.A. or Sweden. The presumption is that the country where Peter, who performs the characteristic performance, has his place of business, Art. 4 (2), will be the country with which the contract has its closest connection. In this case that country would be the U.S.A., unless Peter has other places of business elsewhere. However, this presumption can be disregarded according to Art. 4 (5) if it appears from the circumstances that another country is more closely connected with the contract. Consequently, Swedish law or American law may govern the contract, but it is difficult to assess on the presented facts which

²⁴⁹ See supplement A.

one is more plausible to do so. It follows from this that since the law applicable to the main contract is difficult to assess, using this as a connecting factor would render it equally difficult for the third party and the principal to ascertain which law governs their relationship. It would be preferable that the principal had told the agent to insert a choice-of-law-clause into the main contract with the third party; this would entail that all parties could rely on that their consent to an appointed law would render this law applicable to all disputes.

Conclusively, I hope that this story has shown that in some situations the different connections will have the same effect and in other they will lead to materially different results in the conflict of laws. Furthermore, the somewhat odd hypothetical story demonstrates that there may be circumstances when the less favoured connecting factors seem reasonable and perhaps should be considered. Often a combination where one factor is the general rule and one or two others are the exceptions, will lead to the most reasonable result and protect the interests of the third party and the principal in the best compromising manner.

Supplement A: HAC & English rule

Art. 11 HAC

As between the principal and the third party, the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by the internal law of the State in which the agent had his business establishment at the time of his relevant acts. However, the internal law of the State in which the agent has acted shall apply if –

- a. the principal has his business establishment or, if he has none, his habitual residence in that State, and the agent has acted in the name of the principal; or
- b. the third party has his business establishment or, if he has none, his habitual residence in that State; or
- c. the agent has acted at an exchange auction; or
- d. the agent has no business establishment.

Where a party has more than one business establishment, this Article refers to the establishment with which the relevant acts of the agent are most closely connected.

Rule 198²⁵⁰

RULE 198 – The rights and liabilities of the principal as regards third parties are, in general, governed by the law applicable to the contract concluded between the agent and the third party.

²⁵⁰ This quote is taken from the English authority Dicey & Morris (p. 1473) and the American rule is quoted in chapter 3.1.5 (§ 292 (2) Restatement of Conflict of laws).

Supplement B: Rome Conv.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract, which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract [...]

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraph 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Art 8 (2)

[...] a party may rely on the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

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²⁵¹ N.B. there is a 15th Ed. from 1985 that unfortunately I could not get hold of.

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