Chapter 40

Authority

As explained before, the present chapter is exclusively intended to report on the conflicts concerning the authority of agents, that is, their powers to enter into transactions with third persons on behalf or on account of a principal. For the sake of simplicity, we shall suppose that the transaction with a third person is a contract in the technical sense which we have called the main contract or the third party contract. The local connections between which the choice of law for the existence and the scope of authority must be determined are not numerous. The selection ought to be confined, roughly speaking, to two contacts, namely, the places where the principal is deemed to be situated and where the agent is deemed to act. We may call them the law of the principal and the local law.

I. The Conflicts Rules

1. Policies of Conflicts Rules

The influential theories of Story and Bar had a common merit. They emphasized the policy problem inherent in the choice of law governing the validity and effect of an agent's authority. Both eminent writers were in agreement that the protection of the principal's interest was of prevailing significance. Although they realized the difficulty for a third party to obtain full knowledge of the existence and extent of the powers of a person acting on behalf of a foreign prin-

1 Story § 286 (b), and in Pope v. Nickerson (1844) 3 Story, U. S. Circ. Ct. Reports 465.
2 2 Bar 69.
cipal, they argued nevertheless that the latter could only be made liable under the law of his domicil. In this view, the third party must inform himself concerning the facts of the agency on which he relies, or else be satisfied with what liability an unauthorized agent may incur. It was thought intolerable that one should, without having conferred the requisite power under his own law, incur liability by reason of another person's transactions. This might subject him to any law in the world!

The Restatement, in its first section on the subject, § 343, approaches this appreciation of the problem by prescribing the law of the place where the agreement constituting authority is made.

An opposite view, however, has doubtless acquired superior strength. Arguments and formulations vary, but the emphasis in all variants has shifted from the principal's place to that of the agent's activity. Lord Phillimore, in a much noticed brief remark, pointed to "the duty as well as expediency of upholding bona fide transactions with the subjects of foreign states," which he called the first principle of private international law. His many followers have concluded that security of commerce requires protection of the third party in assuming that the agent has the powers that he would have under the local law. In the case of "apparent authority," though for unknown reasons only in this case, the Restatement likewise refers to the law of the state where "reliance is placed" on the authorization (§ 344). According to another analysis, the state in which the transaction takes place is entitled to preference over the foreign law to which the principal may be subject. It is often argued that the creation of an authority is of less importance than its practical exercise by the agent in enter-

3 PHILLIMORE § 705; 2 MEILI 39; ROLIN, 3 Principes 420 ff.
4 THÖL, Handelsrecht (ed. 6, 1879) § 67 n. 3.
ing into a transaction with a third party. Accordingly, § 345 of the Restatement proclaims the law of the place where the agent is to “act for the principal or other partners,” and the German courts stress the law of the place where the authority “develops its effect.”

Both basic theories have been recently attacked for considering the protection of interests instead of being content with a simple application of the law of the place of performance. This idea, however, rests on the old, inadequate theory of mandate as containing a duty which is to be "performed."

The debate has indeed suffered from a congenital defect, namely, an unwarranted generalization of reasoning. As will appear immediately below, Story and Bar dealt with special cases in which the powers of the agent were from the beginning limited by a law deserving universal effect. In pursuance of their arguments, we may contend that the law of the principal governs the powers of a shipmaster and those conferred on certain representatives directly by law or by public appointment. On the other hand, where a principal constitutes authorization by an ordinary, private, voluntary act, intending its use in a foreign state, the law of this state is justifiably considered competent to construe the validity and effects of the authorization. In the former cases the protection of the principal, in the latter cases the protection of the third parties, obtain preference.

The two theories, thus, can be reconciled. Neither does Story’s opinion mirror the present American law, nor is it completely obsolete, nor wrong because of unilateral consideration of the risk of the principal. But it is no more

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5 See infra n. 74.
6 BATIFFOL 282 § 315.
9 2 Beale 1196.
correct to harmonize, as does Wharton, the theory of the principal’s law in *Pope v. Nickerson* and the proper law doctrine adopted in the *Chatenay Case* by the supposition that the intentions of the parties were different.

We shall first discuss the special situations of authorizations recognized everywhere as constituted under the law with which the principal is connected. The rest of this chapter will be devoted to the domain, commonly the only one envisaged, of the powers of privately constituted agents.

2. Authorizations Internationally Determined by Their Source

(a) *Shipmaster’s powers.* Story, in his treatise, discussed the common law rule that the master of a ship has a limited authority to borrow money in a foreign port and give a bottomry bond only in cases of necessary repairs and other pressing emergencies, while in some maritime countries the master has a broader authority, or at least a broader liability may attach to the vessel and the owner. Story approved the English practice restricting the master of an English ship according to the law of the domicil of the owner.

Later, in the Massachusetts federal circuit court, Story applied this view in the case of *Pope v. Nickerson* in which a Massachusetts vessel, owned by a resident of that state, on a voyage from Malaga to Philadelphia, put in to Bermuda under stress of weather and was sold by the master with the whole cargo. The liability of the owners for the acts of the master was limited by the laws of Spain and Massachusetts to the value of the vessel and her freight, but was unlimited in Pennsylvania.

10 Wharton 875 § 408a.
11 Story § 286 (b).
Story held\textsuperscript{13} that “if the ship is owned and navigated under the flag of a foreign country, the authority of the master to contract for and to bind the owners, must be measured by the laws of that country, unless he is held out to persons in other countries, as possessing a more enlarged authority. . . . If any person chooses to trust him under any circumstances, or beyond this—it is a matter of blind credulity, and at his own peril. . . . If we were to resort to a different rule—to the laws of the different countries which the ship might visit, for the interpretation of his powers, while he was in the ports of that country—we should have the most extraordinary and conflicting obligations arising. . . .”

To be sure, Story, while arguing about the force of the law of the flag, exclaimed that “No one ever imagined that in any other case of agency to be transacted in a foreign country, the principal was bound beyond the instructions or authority given to his agent. . . . The authority confided (to him) by the principal is measured by the interpretation and extent of that authority, by or according to the law of the place where it is given, by the \textit{lex loci} and not by the laws of a foreign country. . . .” However, this is an entirely mistaken obiter dictum, whereas his decision in the instant case was perfectly correct.

That a shipmaster’s authority is to be measured once and for all according to the law of the flag, may indeed be called a universally settled rule.\textsuperscript{13a} It has been adopted in England, clearly in \textit{Lloyd v. Guibert}\textsuperscript{14} and probably in constant practice.\textsuperscript{15} It appears in the resolutions of interna-

\textsuperscript{13} \textit{Id.} at 475 ff.
\textsuperscript{13a} This statement is supported by \textsc{Ficker}, “Die Bestimmung des Vollmachtstatuts in besonderen Fällen,” 24 RabelsZ. (1959) 330, 332.
\textsuperscript{14} (1863) L. R. 1 Q. B. 115; \textsc{Cheshire} (ed. 6) 220.
\textsuperscript{15} \textsc{M. Wolff}, \textit{Priv. Int. Law} (ed. 2) 435 § 416, 443 § 424.
tional congresses\textsuperscript{16} and in the \textit{Código Bustamente}.\textsuperscript{17} It prevails commonly.\textsuperscript{18} In this respect, it can be said therefore that legitimate reliance of the public may be based not on local laws but only on the law of the state to which the vessel belongs.

Story and other common law jurists have spoken of the master’s authority as interpreted under the law of the flag. On the Continent, it is often directly construed as a legal power. There is no substantial difference of meaning. The decisive consideration is the international preference enjoyed by the law of the state where the vessel is registered.

(b) \textit{Legal authority}. To refute the application of \textit{lex loci contractus} of the main contract, Bar contended that security of commerce, instead of requiring this application, on the contrary demanded the application of the law under which the authority was given.\textsuperscript{19} For illustrations, he referred to the directors of a corporation, the powers held in civil law on the ground of family relations, and those of a shipmaster. “What would be the use, for instance, for a stock corporation to limit the powers of a director by requiring assent of the board or of the assembly of stockholders, if he were not so bound in contracting abroad?”

These are forceful arguments. But they support the \textit{lex domicilii} merely in application to what are called in civil law countries \textit{legal representatives}. Such include the father, mother, guardian, or curator of an individual, inasmuch as they are granted by law supervision over persons or property

\textsuperscript{16} Congresses of Antwerp and Brussels, see 1 Revue Int. Dr. Marit. 426.
\textsuperscript{17} Art. 279.
\textsuperscript{18} With the ill-reputed exception of a German case; see KEGEL, Kom. (ed. 9) 551 n. 6; RAPE, IPR. (ed. 5) 506; FICKER, supra n. 13a, at 332.
\textsuperscript{19} For France, see citations in 3 Répert. 30 No. 45 and BATIFFOL, Traité (ed. 3) 663 § 609.
\textsuperscript{19} Denmark: LANDO, Mellemmandens kompetence i internationale kontraktforhold (1956) 11-13.
\textsuperscript{19} United States: EHRENZWEIG, Conflict 446 note 13 and accompanying text. REESE, supra Ch. 39 n. 64, at 414 n. 2, seems to disagree.
\textsuperscript{19} 2 Bar 69.
and conclude legal transactions in the name of the child or dependent person, or assist in his transactions; the organs of legal persons; receivers in bankruptcy, administrators of decedents' estates and all other agents acting with legally defined powers for estates, without being the titular owner as common law trustees are.

The principle extends to formally fixed powers which cannot be restricted with effect against third parties. Such powers are vested in many countries in the boards of corporations,\(^{20}\) in commercial managers such as *procura institoria* under Italian,\(^{21}\) or *procura* under German law,\(^{22}\) in guardians,\(^{23}\) and others. The investigation of such powers is reduced to a minimum of inquiry.

This doctrine seems to be settled at present, clearly in Germany,\(^{24}\) and also in other civil law jurisdictions.\(^{25}\) It is the only view consistent with the principle of personal law. This law determines in what respect and by whom an individual or association is represented by operation of law.\(^{26}\)

At common law, the situation is different. The category of "authority by law" is not unknown, but consists of few and doubted cases.\(^{27}\) Powers based on family relations are scarce. The personal law thus largely disappears behind

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\(^{20}\) See Vol. II (ed. 2) pp. 170 ff.

\(^{21}\) C. C. (1942) arts. 2203 ff.

\(^{22}\) BGB. §§ 49, 50; see for other commercial dependent agents, § 54.

\(^{23}\) French C. C. art. 450; German BGB. § 1793.

\(^{24}\) When I suggested this approach in 3 Z. ausl. PR. (1929) 809 ff., the doctrine seemed insecure, but it has been commonly confirmed since. KEGEL, Kom. (ed. 9) 550; RAAPE, IPR. (ed. 5) 502.

\(^{25}\) E.g., Hungary: Curia (Oct. 27, 1937) 5 Z. osteurop. R. (1938) 396; the manager of an Amsterdam shipping enterprise, a registered merchant in Vienna, had unlimited authority under Austrian law to hire there a Hungarian worker. The present Hungarian law seems to be in accord with this case; see RECZEI 179, 282 ff.


\(^{27}\) MECHEM, Agency (ed. 4) 10, 26. 2 WHARTON 868 spoke of taking charge of the affairs of another "either by voluntary act of such latter person desiring to be relieved of care, or by act of the law, as in the case of guardianships and commissions of lunacy." EHRENZWEIG, Conflict 445 speaks of "legal authority."
the law of the place of contracting, or that governing the contract.

However, in the broad domain of the law of corporations and other associations, we have found it highly advisable to recognize that the law governing the life of the organization should extend to the powers of the principal officers or managing partners. This postulate, it is true, is often neglected.

**Illustration:** An Ohio corporation owning land in West Virginia conferred on Porter, a real-estate broker (apparently in Ohio), by formal action of its board of directors a power of attorney "to sell the property." In a subsequent lawsuit, the issue depended on the authority of a subagent in West Virginia appointed by Porter. The West Virginia court applied its domestic law, laid down in two preceding decisions of the court, in order to state that the board of directors—in Ohio!—had failed to comply with the formality prescribed in West Virginia that the signature and the corporate seal be affixed. Although the law of the forum for several reasons was applicable to determine the subagent's powers, it should not have been extended to the original authorization except upon its questionable force as *lex situs*, which is not even mentioned in the report.

Finally, the powers of all persons appointed by a court or an administrative agency, whether connected with a trust relation or not, are as a rule legally defined and therefore must be expected to be subject to the law of their creation.

In all these cases, neglected in the treatises, the law under which a power is deemed to be constituted has a natural and overwhelming claim. Exceptions for protecting innocent third parties will not be justified except in rare cases. Persons dealing with the alleged principal officers of an association or court appointees, indeed, should be charged with the knowledge of the existence and extent of their

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powers. On the other hand, they may rely on the source of these powers.

3. Authorization Determined by Local Law

(a) Former views: Law of the principal. It is only in the field of authorization by private legal act that the law of the principal has been pushed into the background. For a time it was favored on the Continent. Some followers of the mandate theory supported it as the law of the place where the mandator receives acceptance. More writers have maintained the same device as a subsidiary test, as in the case of an agent sent to several countries.

(b) Local law. On the other hand, the fiction of identity was a strong factor in promoting the law of the place where the agent represents the principal. As late as 1917, the Appeal Court at the Hague applied Italian law to the authority of a Genoese broker with the justification that the Dutch principal was deemed to have traveled to Genoa.

The real grounds, of course, for preferring the law under which the agent "exercises his power"—or however else the courts express the local law—lie in the idea that third persons should be able easily to ascertain the powers of the agent. Most frequently, this consideration has been aided by presumptions concerning the intentions of the

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30 Belgium: 7 Laurent 539 § 450 (place of the principal as the party making the offer of mandate).
Germany: 9 Rohge. 150.
Italy: Fedozzi-Cereti 751 and n. 3, reserving the law of the forum protecting bona fide parties.
31 Supra Ch. 59.
32 Thus, e.g., 2 Wharton 869 § 406 (who confuses the case with that of a soliciting agent); Dierna, 2 Dir. Com. Int. 283; Valéry § 658; 2 Schnitzer (ed. 4) 672 f. And see infra at n. 59.
In Germany, the law of the principal has been recently advocated by Kegel, IPR. 199 f.; Kegel, Kom. (ed. 9) 551 f.; contrary to the prevailing opinion, he recommends the application of the local law only in cases where it is necessary to protect the good faith of third persons.
33 App. s'Gravenhage (June 8, 1917) W. 10208, applying Ital. C. C. (1865) art. 376.
parties. For, so far as the principal manifests his will unequivocally and brings it to the knowledge of the third party, no problem arises. But when he is silent or negligent or relies on internal instructions or legal restrictions relating to the power conferred by him, which are unknown or unusual in the foreign country, construction of his conduct in the light of the local law is regarded as justified. Similar problems arise with respect to the validity and termination of authority.

Other rationalizations are questionable. That modern writers should think (in Savigny's manner) of the principal as "submitting" himself to the foreign law only because he sends his agent there, resurrections an antiquated emphasis on the volition of a party. It is also objectionable that Beale terms the question one of jurisdiction. Ultimately, Beale ascribes the principal's subjection to the foreign law to the fact that he causes the use of the authority in the foreign state. Not even this justification is accurate.

Beale's main example is *Milliken v. Pratt* which we have not found to be a suitable part of agency law. Accepting its bizarre construction of the mail service as a regular agency, Beale concluded that Massachusetts law was applicable because the woman caused the postal delivery in that state. This amounts to saying that a person under a disability at his domicil, can render himself competent by directing his note to another state through the mail. Commonly, the same weird result has been reached under the law of the place where the contract is "completed."

In another case adduced by Beale, a married woman

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34 2 BEALE 1198; similarly e.g., RG. (Dec. 5, 1896) 38 RGZ. 194, whereas recent decisions stress the needs of commerce.  
35 2 BEALE 1198 § 345.2.  
36 Restatement § 345 and comment c.  
37 Supra Ch. 39 n. 43.  
38 2 BEALE 1197 § 345.2.  
signed an accommodation note in favor of her husband's firm in Alabama, supposing that it would be discounted in Alabama. The note was, however, taken to Illinois. The New York court declared that she was not liable because of incapacity under her own law. But did she not "cause" the discount in Illinois, in the sense of a *conditio sine qua non*? She did, although it may be contended that she did not *authorize* such discount. Causation is the wrong word also for the reason that it raises the idea of some compulsion on the agent whereas authorization confers merely a power, and a duty of employing it flows only from an accompanying contract.

The true reason for the application of the local law is simply objective expediency, provided that the principal has contemplated acting in the foreign country.

*England.* Among the approaches taken by the courts in various countries, the most impressive is illustrated by the English case, *Chatenay v. Brazilian Submarine Telegraph Co.* While numerous other English decisions are elusive or confusing, this Court of Appeals decision is outstanding. A Brazilian executed in Brazil in the Portuguese language a power of attorney authorizing a broker in London to buy and sell shares of stock. The court had to decide under what law the extent of the authority was to be determined. Although starting from the usual references to *lex loci contractus* and *lex loci solutionis*, the Court of Appeal passed to the twofold consideration that (1) the true meaning of the authority was to be ascertained on the ground of all circumstances of the execution of the instrument including the Brazilian law, and (2) if the meaning was that shares were to be bought and sold in England, "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 par-

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40 [1891] 1 Q. B. 79, 83 f.; *Cheshire* (ed. 6) 253 f. seems to interpret the case quite differently.
ticular country where it is acted upon." The court, thus, emphasized two distinguishable requisites of representation, one to be determined with a certain regard to Brazilian law, and the other with an exclusive view to English law.

Recent decisions follow the same line. 41

It has been said 42 that a contrary opinion was expressed in 1933. 43 An English insurance company, employed by a New York insurance broker through an English broker, insured a Canadian corporation residing in New York. The American broker cancelled the policy, and the question was whether he had authority and ground to do so. The court affirmed this question, applying New York law to determine the extent of the broker's authority. This decision was amply justified, since the power was considered conferred by the brokerage contract and therefore effective as against the insured. Lord Scrutton, it is true, invoked Dicey's Rule No. 179 and applied the law of New York as the place where the brokerage contract was made. 43a But the learned judge would scarcely have followed this theory if the brokerage contract had been concluded somewhere else. This Appeal Court decision, scantily equipped, should not be regarded as overruling former considerations. 43b

Germany. Exactly the same approach as that manifested in the Chatenay Case was developed by the German courts in an elaborate system presently to be discussed. 44

42 Note, 5 Cambr. L. J. (1934) 251; Falconbridge, Conflict of Laws (ed. 2) 437; see Schoch, 4 Giur. Comp. DIP. 290.
43a The former Rule No. 179 in Dicey's treatise is now Rule No. 170; see p. 141 supra.
43b This view is approved by Reese, supra Ch. 39 n. 64, at 415. It is questionable whether it is also approved by Ehrenzweig, Conflict 446.
44 Infra pp. 160 ff. On the Swedish views, see Michaeli 301 f.
France. The majority of French authors are led by the theory of identity of principal and agent to the application of the law of the place where the agent contracts with the third person. 45

United States. Likewise, despite Story, the American courts do not apply the law of the principal to an agent's authority. Nor is it true that they determine the validity and scope of an authority under the law of the place where the authority is constituted as has been asserted on the basis of one sole case, 46 that of Freeman's Appeal. 47 There, the Connecticut court was interested in applying the law of the forum to deny capacity to a married woman domiciled in the state, in opposition to the leading case of Milliken v. Pratt and all other cases in point. 48 The woman, in her own state of Connecticut, had signed a note of guarantee for her husband and handed it to him, and he mailed it to Illinois. The decision was based on her incapacity to authorize him as her agent in Connecticut. What such an argument is worth, is shown by the previous decision of the same court validating a married woman's blank endorsement of an insurance policy, delivered to her husband in Connecticut, on the ground that the husband filled it out in New Jersey. 49

The usual approach of the American courts is different.

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45 Laurent 544; Weiss and Valéry, see supra Ch. 38 ns. 37, 38. Directly to the same practical effect, Batiffol, Traité (ed. 3) 662 § 609 and Cass. civ. (July 2, 1946) Gaz. Pal. (Nov. 30, 1946) cited by him; and App. Paris (May 21, 1957) Revue Crit. 1958, 128, note Francescakis.


46 Thus 2 C. J. S. 1038, Agency § 8 and n. 82; Restatement § 343. However, a recent case may be added with respect to formality. See infra n. 89.

47 (1897) 68 Conn. 533, 37 Atl. 420.

48 Supra Ch. 39 n. 43.

49 Connecticut Mutual Life Ins. Co. v. Westervelt (1884) 52 Conn. 592. 2 Beale 1196 n. 3 places the case on a more convincing ground: the assignment of the policy to the beneficiary was the act authorized by the woman.
They determine the powers of an agent according to the law of the place "where the agent exercises his authority," identifying this place with the place where the contract between the agent and the third party is made. It is not certain under what theory this law, the *lex loci contractus* of the main contract, is applied. The decisions often refer to the alleged general rule of *Scudder v. Union National Bank* that the validity of a contract is governed by the law of the place of contracting. But in almost every single case some additional connection has pointed to the same law, apart from the fact that most decisions are concerned with insurance contracts made by a local agent. If as suggested before, the rule goes back to a case of 1841, its significance is that the existence and extent of authority is a mere incident of the contract with a third party, quite as form and capacity have been so often treated in this country.

What exact localization this theory furnishes if we abandon the tenet of *lex loci contractus*, will be discussed later.

**Latin America.** Despite the continued influence of the old mandate theory, Latin-American writers also seem to veer towards the law of the place where the agent "carries out his mandate." The hope is justified that authority may be given its own place in the conflicts law.

**Limitations on the local law: Types of agents.** The German doctrine applying the law of the place where the agent exercises his power, was first established in the case

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50 2 *Beale* 1195; 15 C. J. S. 886 n. 28 and Supp. 1948. This includes recent cases such as *Moore v. Burdine* (La. 1937) 174 So. 279; *Paxson v. Commissioner of Int. Revenue* (C. C. A. 3d 1944) 144 F. (2d) 772.

51 (1875) 91 U. S. 406.

52 *Carnegie v. Morrison* (1841) 2 Metcalf (43 Mass.) 381, *supra* Ch. 39 n. 3. We exclude entirely the liability of stockholders for acts of directors in a state other than that of incorporation, often categorized under the subject of agency, as by *Thomas v. Matthiessen* (1914) 232 U. S. 221 and in England by *Breslauer*, 50 Jurid. Rev. (1938) at 314. On the subject itself, see Vol. II (ed. 2) pp. 82 ff.

53 *Infra* II, 1 (a), pp. 169, 171.

54 E.g., Brazil: *Espinola*, 2 Lei Introd. 372 § 242; *Serpa Lopes*, 2 Lei Introd. 360 § 261.
of an agent having a permanent and fixed place of business. Bar, the advocate of the law of the principal, conceded an exception for foreign domiciled representatives. The German courts, in fact, for a long time emphasized the agent's domicil only under a threefold limitation: namely, (1) the agent should be an individual or organization, established at a fixed place of business in a country other than that of the principal; (2) he should have concluded contracts in that country only; moreover, (3) the suit should arise from different interpretations of the scope of authority in the countries of principal and agent.

The typical case, thus defined, presents the core of the matter and seems to be treated practically everywhere to the same effect. In the words of the Swiss Federal Tribunal, "the manifestation of the agent goes out from the territory of his law and is directed from there to the third person." The latter, as the Reichsgericht constantly states, has to rely on this law.

This unanimity may partly be explained by the fact that in outstanding cases the solution is obtainable from both ends of the controversial line of thought. The courts often stress the necessity for the third party to depend on the local law. But where the agent is a branch or agency in the exclusive service of the principal firm, his place of business may be regarded as a special domicil of the principal himself. Such reasoning has inevitably prevailed when a foreign corporation carries on business in a state. Whether or not that state prescribes that an agent with full powers must be appointed and registered, the powers of any permanent

55 Bar, in 1 Ehrenberg's Handb. 345 and n. 5; followed by Hupka, Vollmacht 252; similarly, 2 Wharton 867 § 405.
57 Switzerland: Inspired by 2 Meili 39, BG. (Dec. 22, 1916) 42 BGE. II 648, 650 (validity of "procura" of a foreign branch); accord, (Dec. 14, 1920) 46 BGE. II 490, 493 (branch manager); (March 5, 1923) 49 BGE. II 70, 74 (although concerned with agency in contracting, seems also conclusive for authority).
representative of the foreign corporation are conveniently measured by the local standard.

The same solution is to be found where the agent is a domiciled independent contractor. When a Dutch firm through its branch in Cardiff, England, employed an Italian brokerage firm domiciled in Genoa, Italy, to sell coal, the Dutch court did not hesitate to apply the Italian Code of Commerce in construing its authority.58

But, while modern followers of the law of the principal are forced to acknowledge concessions in the cases mentioned, some have insisted on their rule in the case of a traveling salesman having no fixed domicil.59 Nevertheless, the German courts which once proclaimed such a distinction,60 have enlarged their formulation of the rule in such generally expressed dicta that it is prevalingly understood to include the powers of any agent.61 In the United States, it has not been doubted that when a traveling salesman goes from state to state selling goods, "the situs of the contracts he makes is where he exercises his authority."62 The recent English decision in the Sinfra Case has recognized that

58 The Netherlands: App. Haag (June 8, 1917) W. 10208, with the argument that because authorization was given to a brokerage firm carrying on its business in Genoa, Italy, the contract constituting the authority was made in Italy. The court distinguishes sharply the contract made through the agent with the third party. Cf., e.g., Swiss BG. (July 20, 1920) 46 BGE. II 260, 263: the plaintiff, having a special agent in Switzerland, had to take into consideration that the acts of its representative are determined under Swiss law.

59 Supra n. 32.

60 RG. (June 15, 1920) 76 Seuff. Arch. 2, still followed by Nussbaum, D. IPR. 263. But the decision was confused and has no authority; see for criticism, Rabel, 3 Z. ausl. PR. (1929) 822.

61 See the authors cited in 3 Z. ausl. PR. (1929) 815 n. 1; and adde LG. Berlin I (Oct. 5, 1932) IPRspr. 1932 No. 63 with comment by Rabel, 7 Z. ausl. PR. (1933) 802. For an excellent survey on the German cases, see von Caemmerer, "Die Vollmacht für schuldrechtliche Geschäfte im deutschen internationalen Privatrecht," 24 RabelsZ. (1959) 201, based on reports by several authors, id. at 326-341; a French translation of the survey is reproduced in Conférence de la Haye, Actes et documents de la neuvième session, vol. 1, at 257.

62 Succession of Welsh (1904) 111 La. 801, 35 So. 913 (for the purpose of applying the Louisiana law of seller's privilege); Kamper v. Hunter Land Co. (1920) 146 Minn. 337, 341, 178 N. W. 747.
where a power of attorney is issued for use in several countries, the scope of a copy for use in England is determined by English law;\(^63\) the English presumption is that any authority given for several countries entitles the agent to act in each country in accordance with the laws thereof.\(^64\)

**Kinds of problems.** Since the differences of municipal rules concerning the extent of authority, and particularly of implied authority, are outstanding in judicial discussions everywhere, they appear also in the foreground of the literature from Story to the present time. But the rule that the law of the agent's act governs, nationally enlarges its own domain. Problems such as the effect of ratification and termination of authority cannot conveniently be solved in a different manner. The scope of the local law expands, and it becomes the general law governing voluntary authority. The American practice has never made a distinction among the problems.

(d) *The Restatement.* In § 343, whether an agreement constitutes "authorization" is said to be determined by the law of the place where it is made, the *lex loci actus*. However, § 344 subjects "apparent" authority to the law of the state "where reliance is placed upon such apparent authorization." Finally, § 345, under the condition that there is authority or apparent authority for acting in a state, leaves it to this state to decide "whether an act done (there by the agent) on account of the principal imposes a contractual duty upon the principal."

We know that Beale\(^65\) intended to consider the risks and rights not only of the principal, as Story did, but also of the third party, which he found protected in the cases. But we are faced once more with patently contradictory rules, since here less than anywhere else can creation and effects


\(^{64}\) Esher, M. R., in the Chatenay Case at 83, cited by DICEY (ed. 7) 875 f.

\(^{65}\) 2 BEALE 1196 § 345.1.
of the legal relationship be submitted to different laws. If § 343, for instance, says that the state where an agreement is made determines whether it constitutes an authorization, does this not include the requirement of personal capacity to appoint an agent? Yet, illustration 2 to § 345 states that a married woman's promissory note signed and handed to her husband in X is valid if the wife is responsible under the law of Y where it was to be, and was, discounted. Certainly this is the solution prevailing in the courts. But this practice clashes with the broad language of § 343. To read Beale's own comment to § 345, it seems that he endorsed the cases in many other respects. Is, then, § 343 in reality restricted to the question whether P in X sends the agent to state Y to act on his behalf (cf. § 345 comment c)? This would make sense, but does not exhaust the meaning of the section.

For comment a to § 345 of the Restatement assigns to § 343, viz., the lex loci actus, the "extent" of authority. However, illustration 3 to § 345 calls for the law of the place of acting to determine, according to § 345, implied authority.

The place of reliance (§ 344) must be something different from the place where the agent "acts" (§ 345), and the difference might reflect a diversity of opinion about the selection of convenient contacts. But what this place of reliance exactly is, why the rule is changed from § 344 to § 345, and what is meant by the agent's "act," is nowhere explained. The suspicion seems justified that the reliance rule for apparent authority intends to satisfy some scholastic need for a symmetrical contraposition of the manifestations to the third party in contrast to manifestations to the agent.

The confusion is due in the first place to the stereotyped
use of *lex loci contractus* and, in the second place, to the erroneous belief that the distinctions proposed in the Agency Restatement could support differentiated rules of conflict. Leaving these obscure riddles unsolved, we may remark with satisfaction not only, as noted before,\(^{67}\) that agency and authority are neatly distinguished but also that the local law receives a significant role with the express purpose of protecting the expectation of third parties.\(^{67a}\)

(e) *International Drafts.* The International Law Association (I. L. A.), at the Conferences of 1950 (Copenhagen) and 1952 (Lucerne), approved two Draft conventions concerning the conflict of laws in matters of agency, elaborated by a committee under the chairmanship of Algot Bagge.

The Copenhagen Draft of 1950\(^{67b}\) contains conflict rules for any kind of agency with only some general exceptions in article 1. The Lucerne Draft of 1952,\(^{67c}\) on the other hand, deals exclusively with conflict of laws regarding agency in matters of sale of goods to which the Hague Convention of 1955\(^{67d}\) is applicable. Both drafts define the agent as a person *"qui accomplit des actes pour le compte d’un autre,"*\(^{67e}\) and the Lucerne Draft expressly adds that the act may be

\(^{67}\) Ch. 39 p. 143.

\(^{67a}\) The Restatement (Second), Tent. Draft No. 6 (1960) neither contains the above criticized rules of the first Restatement nor any other conflict rules concerning authority. But the reporter in charge of the Restatement (Second) of the Conflict of Laws dealt with the subject in two articles, the position of which is virtually in agreement with the views here taken; see Reese, *supra* Ch. 39 n. 64, at 409, and Reese & Flesch, "Agency and Vicarious Liability in Conflict of Laws," 60 Col. L. Rev. (1960) 764.

\(^{67b}\) I.L.A., Report of the 44th Conference (Copenhagen 1950) 192-197; see the explanatory comments by Gutzwiller, *id.* at 183-192.

\(^{67c}\) I.L.A., Report of the 45th Conference (Lucerne 1952) 309-314; see notes *id.* at 304-308.

\(^{67d}\) See *supra* Ch. 36 n. 1.

\(^{67e}\) In the English version of the Copenhagen Draft the words "*pour le compte de*" are translated by "on behalf of," whereas the English version of the Lucerne Draft speaks more accurately of acts "for the account of" another. As to these problems of terminology, see *supra* p. 133.
done in the agent's own name as well as in the name of the principal (article 2). Thus the drafts are intended to include cases of undisclosed agency. In article 3, both drafts lay down the principle of the autonomy of the parties to determine the law governing the relationship between principal and agent; and the following articles 4 of both drafts, respectively, contain conflict rules for those cases in which the parties did not designate any law. But the law applicable according to these provisions obviously does not determine the agent's authority, i.e., his power to bind the principal by legal acts involving third parties, especially by contracts with them. This follows from article 7 of the Copenhagen Draft and from article 8 of the Lucerne Draft. Both provisions, differing from each other only as to their wording, subject the agency, as between the principal and the third party, to the law of the place where the agent has acted.

The Eighth Hague Conference on Private International Law (1956) discussed the two drafts which were submitted to it by the International Law Association. The Conference decided that the problem should be studied by a special committee. But before such committee was appointed, it became obvious that the countries participating in the Hague Conferences are not very much interested in a unification of the conflict rules concerning the relationship between principals and third parties. The main reason for their reluctance seems to be that there are only a few cases in which difficulties in this regard arose. Apart from this, certain regional groups of countries are endeavoring to elaborate uniform laws on agency; and so is the International Institute for the Unification of Private Law in Rome. For these reasons the Ninth Hague Conference

67f See Conférence de la Haye, Actes de la huitième session 223-229.
67g Id. at 356.
67h See Year-Book 329 ff.
on Private International Law (1960) decided not to take any further steps at the moment.\(^{671}\)

4. Consideration of the Principal’s Law

In applying the local law of the place where the agent “exercises” his authority, the English and German courts expressly presuppose that the principal has agreed that the agent should act for him in the specific country. With a similar intention, though less correctly, the Restatement, § 345, requires “causation” by the principal for the agent’s acts in the foreign country (\textit{supra} pp. 156 and 163). The American courts require “some conduct of the principal . . . warranting a legal presumption of agency.”\(^{68}\)

Does all this mean a preliminary conflicts rule referring to the law of the principal’s domicil or of the place where he constitutes the authority? In my own former proposal I suggested that the law of the principal’s domicil ought to determine “whether the principal has declared his assent that the agent should act for him in the specific foreign country.”\(^{69}\) The Restatement takes a similar position, as § 343 subjects the question whether an authorization to

\(^{671}\) See Conférence de la Haye, Actes et documents de la neuvième session, vol. 1 p. 283. For a discussion of the I.L.A. Drafts and of the advisability of an international convention on conflict of laws in matters of agency, see Toma\textit{si}, \textit{supra} n. 45, at 663.

\(^{68}\) Kuhn, Comp. Com. 277, cf. Hauck Clothing Co. v. Sophia Sharpe (1900) 83 Mo. App. 385. The mother in Missouri sent her note to the son in Indiana “without legal restriction and with legal authority to sell it, where and to whom he wanted,” at 392.

\(^{69}\) Rabel, 3 Z. ausl. PR. (1929) 835, cf. 7 id. (1933) 806.

\(\textit{Cf.}\) the English Sintra Case, \textit{supra} n. 63; the judge contrasts extent and revocability with “formation,” and leaves a question open as to formality and capacity.

Germany: OLG. Hamburg (March 18, 1895) 16 Hans. GZ. (1895) HBl. 139: the law of the flag decides whether the shipowner could be bound “at all” by the signing of the bill of lading, whereas the law of the port of destination under German practice governs the rest of the problems. OLG. Hamburg (March 3, 1914) 35 Hans. GZ. (1914) HBl. 131: the Italian agent was not at all authorized to contract for the Hamburg firm, hence no question of the extent of authority arose.
act in the foreign country exists, to the law of the place where the agreement is made. This is usually the domicil of the principal.

However, this reservation has been criticized as too subtle, and it would be consistent with the point of view preferred in discussing consent by silence and analogous question, here also to abandon insistence that the above formulated question should be determined by any special law. In the *Chatenay Case*, the court required the ascertain- 

ment that the Brazilian principal by his power of attorney under the circumstances prevailing in Brazil intended to authorize selling and purchasing in England. But this question was not expressly assigned to Brazilian law; the judgment may be read as applying English law in prescribing an investigation of the Portuguese language, the Brazilian usages, and the legal knowledge of the principal in order to construe his intention. This is probably how the English commentators understand the case.

An express intention of the principal to submit his authorization to the law of a certain country is extremely rare. But a tacit selection of the applicable law has sometimes been correctly assumed when the powers were given for the purpose of proceeding in the courts or government offices of a foreign country. By the same reasoning, the English rules providing for strict interpretation of powers

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70 *Batiffol* 282 n. 5; *Breslauer*, *supra* p. 149 n. 8, at 312.
71 See Vol. II (ed. 2) p. 524.
71a To the same effect, *von Caemmerer*, *supra* n. 61, at 210; whereas *Reese*, *supra* Ch. 39 n. 64, at 412-414, submits that the forum, before applying the local law, should determine (1) if there is a relationship between the principal and the agent of a sort that makes appropriate the imposition of responsibility upon one for the act of the other and (2) if the principal has a sufficient connection with the local law. But *Reese* does not suggest deciding these questions according to the principal’s law; instead, he urges the forum to “apply its own conceptions” (*id.* at 414).

72 See *Cheshire* (ed. 6) 247.

To a similar effect, probably *Raafe*, *IPR.* (ed. 5) 503, speaking of simultaneous application of the law of the principal.

of attorney, apply where a sealed deed of authorization is conferred in England.

II. THE DEFINITION OF LOCAL LAW

1. Various Views

Although the distinct trend of the courts in the United States, England, Germany, the Netherlands, and probably most other countries has veered toward the local law, no agreement has resulted in the exact definition of this law. Usually there is no reason for doubt, because a permanently established agent of a foreign principal concludes a contract with a third party in the country of his domicil. Thus, the extent of the general authority of a London ship broker to make a charter party for a foreign shipowner or charterer certainly is subject to English law. But which of the three involved connecting factors, viz., the conclusion of the contract, the domicil, or the agent's part in the conclusion, prevails if these factors do not coincide?

(a) Lex loci contractus of the main contract. The French authors and the American cases are probably to be interpreted to the effect that authority is governed entirely by the law of the place where the main contract is made.

If we do not believe in the force of the lex loci contractus, this rule may be transformed into either of two possible variants. It might be concluded that authority should be determined by whatever law governs the main contract. This agrees with an approach sometimes suggested in Europe.

74 See Bowstead, Agency 49 art. 36.
76 Kosters 769 advocates this law when it is more favorable to the third party than the law of the principal's domicil.
77 Breslauer, 50 Jurid. Rev. (1938) at 308 optimistically contends that this is the true doctrine to be drawn from the English cases.
Cassoni, "La procura nel diritto internazionale privato," 14 Dir. Int. (1960) 256, 264 f., asserts that according to Italian conflict of laws, authority is
Or the place where the agent does the act embodying his consent to the main contract might be emphasized. This would bring the American tradition into a near relation to the following attempts at localization.

(b) *Law of the agent's domicil.* Whenever the local law has been applied in view of a permanent domicil of an agent, his place has been contemplated as that where he exercised his powers or acted in the interest of the principal; the law of this place governed his transactions. In particular, the German and Swiss highest courts have constantly had such a situation in mind.\(^78\)

(c) *Law of the place of operation.* A few American decisions mention, among coincidental facts, the place where a power of attorney was to be exercised. Thus, a power of attorney to lease Mexican land was subjected to Mexican law because, among other contacts, it was "to be exercised in Mexico."\(^79\) The termination by death of an authority to sell Texas land was declared to be governed by Texas law with the justification that attempts had been made to carry out the power in the state.\(^80\) Commonly, it is true, such language seems to mean nothing else than the place where the main contract is made.\(^81\)

The German courts have constantly used the same language in the formula that the power conferred by authorization is governed by the law of the place where that power is to take effect or "deploy its force,"\(^82\) for instance, the

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\(^{78}\) All the cases *supra* ns. 56, 61, and n. 57 are conclusive on this point.


\(^{81}\) This is the impression given by 12 C. J. 451; 5 R. C. L. 934; 11 Am. Jur. 395 § 112 n. 11; Succession of Welsh (1904) 111 La. 801, 35 So. 913; Kamper v. Hunter Land Co. (1920) 146 Minn. 337, 340, 178 N. W. 747.

\(^{82}\) See in particular RG. (Dec. 5, 1911) 78 RGZ. 55; (June 14, 1923) Recht 1923, No. 1222; KG. (Dec. 14, 1933) IPRspr. 1933, No. 9; BGH. (July 30, 1954) IPRspr. 1954-55, No. 7, at 4.
place where the agent and the third party meet. It is identical with the place of "reliance" according to § 344 of the Restatement and its illustration, in the case of an agent's showing his written power of attorney to the third party. The contract may be concluded subsequently at any place. If A sends T an offer with notice that he is authorized by P to transact with him, he may be considered as using the authority at his own place, while the contract may be considered completed by the mailing of T's acceptance. It may also be said in such a case that the agent "acts" at his own place (Restatement § 345), although T places his "reliance" on the letter when he receives it. Or vice versa, the agent may visit the other party and show his authority while he subsequently writes the decisive letter from his own domicil. It is true that the other party is supposed to rely on the authority at the very moment of contracting, whether he sees a written authority at this moment or not at all; but the formulation here in question stresses the act of the agent in which he leans on the authorization.  

Also an English judge has stated that the place where an authority is "operated," determines the law.

2. Rationale

Ad (a) The proposition of applying the law governing the main contract is manifestly wrong, despite its adoption in the courts of this country. If A in London, agent of a Bombay firm P, sells to T in New York 100 bags of jute, deliverable f. o. b. Bombay, the sale is governed by the Anglo-Indian Sale of Goods Act. To determine for this

83 RG. (March 23, 1929) Leipz. Z. 1929, 1268 No. 3.
83a Reese, supra Ch. 39, n. 64, at 415, recommends somewhat vaguely, in cases of the kind mentioned, the application of the law of the state where the agent's action was centered.
reason the power of the London agent under the same law, would defy the very idea from which the argument starts. The applicable law would be that of the principal instead of that on which T may rely.

On the other hand, in *Maspons v. Mildred*, the English Court of Appeal held that the extent of an authority given and accepted in Havana, Cuba, between firms there domiciled was governed by Spanish law, then in force in Cuba. Nevertheless the main contract concluded with the third party, a firm in England, by correspondence, was declared to be under English law, probably according to the party's intentions. It would have been grotesque to determine the extent of the agent's power by English law.

Again, suppose that A, the local agent of a foreign finance corporation P, makes a loan to T and the printed loan form includes a stipulation for the law of P's home state. Does this clause extend to the question whether the agent was entitled to waive some forfeiture clause of the printed form? The courts are unanimous in subjecting this question to the local law.

*Ad (b)* In the narrower, but by far most important, case of a permanently established agent, the law of his place offers a sound compromise. The business place of a branch manager or a servant of the foreign principal, amounts to a secondary seat of the latter. If the contract is made in the jurisdiction where the agent resides, which is the regular case, no practical doubt disturbs the courts. It would be pedantic to search for another place of reliance. Indeed, the locality in which the agent shows the written power of attorney to the third party, or where the principal orally tells him that he authorizes A, is immaterial in such a situation.

*Illustration.* P of New York at a convention in Chicago tells T of Arizona that he has a new district manager A for

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85 *Supra* Ch. 39 p. 145 n. 64.
several states with headquarters in Denver, Colorado, and hopes that T will patronize him. According to § 344 of the Restatement, this "apparent authorization" would be determined by the law of Illinois. If subsequently, A makes an offer by letter to T in Arizona and T accepts by letter, according to § 345 of the Restatement, the "effect" of the authorization would be determined by the Arizona law which conflicts with § 343 and § 344, but in this case agrees with the decisions. Under the German rule for agents with fixed domicil, the Colorado law governs the acts that the agent is entitled to make. It is submitted that this agrees with the presumable intentions of all three parties.

Ad (c) The place where the agent "acts" (Restatement § 345) may be any place in the course of his activity from his assertion that he is authorized to the completion of the third party contract.

In American decisions, it is true, this exact point has never been raised. In one case,\(^{86}\) the district manager of the Firestone Corporation in Oklahoma went to Texas for the purpose of concluding a contract and at the same time made an oral promise to a third beneficiary. But since the federal court in Texas stated that "the foreign corporation sent its district manager to this state," the possibility was not considered that his implied authority might have been governed by the law of Oklahoma; under the circumstances, the agent was not functioning as district manager but as a special envoy.

Conclusion. The law of the principal has lost its claim to govern generally the conditions and effects of authority. A logical solution would always point to the place where the agent warrants his authority expressly or impliedly. But it might in some cases be doubted where this place is. Moreover, if he or the principal manifests the authorization during the negotiations, the ultimate consent by the agent to the contract is the more important event.

While such doubts challenge a single rule, judicial experience has furnished, instead of one, two rules.

If an agent, acting for a foreign principal, carries on his function from a fixed place of business, the law of this place governs.

In all other cases, the law of that place should govern, in which the agent manifests (declares or dispatches) his consent to the main transaction.

The law of the principal's domicil is not even applied when it is more favorable to the third party than that just mentioned. When a Danish city, having contracted with a domiciled agent of a German firm for the purchase of certain goods, resorted to a provision of the German Commercial Code, § 91, paragraph 2, authorizing third persons to address notice of defects and rejection of goods to the agent, the Reichsgericht refused the plea. Because security of commerce requires that persons dealing with the agent should be able easily to examine and ascertain the scope of his authority, for this purpose, they must rely on the law at the place of the agent. A larger extent of powers under the law of the principal is not necessarily more favorable to the third party. "It may be disadvantageous to him, for instance, where it is in question whether his declaration to the agent binds or obligates him. In no case should the application of any law depend on its being or not being favorable to him."87 This, in my opinion, is convincing.

III. Scope of the Local Law

1. Validity of Authority

(a) Form. Although the majority of American cases apply the lex loci contractus of the main contract,88 there is no firm rule. When a power of attorney was signed in

87 RG. (Jan. 14, 1910) 66 Seuff. Arch. No. 73. All these propositions made in Z. ausl.PR. (1929) 835 seem to me still the best.
88 2 Beale §§ 332.4, 342.1.
Italy before a vice-consul of the United States without a seal being affixed, the act was recognized as formally valid in accordance with Italian law, and hence declared sufficient to support the execution by the agent of a sealed instrument in the United States.\(^{89}\) This agrees with the first Restatement rule rather than with the traditional rule, although it is not clear why an American consul should be supposed to act under Italian rules of formalities.

Municipal laws include many formal requirements for authorizations. The rule of the common law just alluded to requires that an authority to execute a deed must also be under seal.\(^{90}\) In many states of the United States authority for an agent to contract for the sale of land\(^ {91}\) requires an instrument satisfying the statute of frauds, like the sale itself.\(^ {92}\) In a widespread doctrine, authority is generally subjected to the same formalities as the authorized contract.\(^ {98}\)

The German law has taken the contrary viewpoint; although a contract to transfer title to land requires solemnization by court or notary,\(^ {94}\) authorization to conclude such contract is formless;\(^ {95}\) however, increasing exceptions have been stated.\(^ {96}\)

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\(^{89}\) *In re* Everett Estate (1941) 112 Vt. 252, 23 Atl. (2d) 202.

\(^{90}\) BOWSTEAD, Agency 31 art. 24; Restatement of Agency and Restatement of Agency (Second) § 28. But this Restatement § 29 notes that if an oral authorization is insufficient to make a deed of conveyance effective, it suffices to maintain the deed regarded as a memorandum of a contract to convey.

\(^{91}\) Authority to transfer land or rights in immovables is another thing and always is governed by *lex situs*.

\(^{92}\) MECHM, Agency (ed. 4) 11 ff., 17; POWELL 20 f. For a recent example of a contrary West Virginia statute under which oral authorization to contract for real estate is permitted, see Gallagher v. Washington County Savings Loan and Building Co. (1943) 25 S. E. (2d) 914.

\(^{93}\) Restatement of Agency and Restatement of Agency (Second) § 26 and § 28 (1) with exceptions in § 28 (2).


*Italy*: C. C. (1942) art. 1392.

\(^{94}\) BGB. § 313.

\(^{95}\) 101 RGZ. 295, 300-302, and many other decisions.

\(^{96}\) See comments to § 313 of the BGB.
SPECIAL OBLIGATIONS

The conflicts question has scarcely been treated with special reference to authority. The repeatedly mentioned German conflicts rule, in its latest broad formulation, seems to extend to formalities the law of the place where the agent exercises his authority; this place is identical with the situs when the agent sells an immovable at the place of its location.\(^{97}\)

The American practice, on the other hand, ought to be crystallized to the effect that the law governing the third party contract should determine the form in which the power must be conferred upon the agent.\(^{97a}\) This result logically and conveniently includes the closely connected problem whether the agent needs a special authorization for the intended transaction, this being under all circumstances an incident of the main contract.\(^{98}\)

On the optional theory of \textit{locus regit actum}, finally, an authorization would also be sufficient if its form complies with the law of the place where the principal constitutes it. How far this theory may be carried, seems to deserve future investigation.\(^{98a}\)

(b) \textit{Capacity}. In the United States, this problem has been lost in the game of searching for the place where a married woman makes a contract when she sends a note through correspondence, agents, or messengers.\(^{99}\)

In civil law, the personal capacity of a principal to authorize an agent is in practice governed by the law of the former's domicil rather than his nationality.\(^{100}\)

\(^{97}\) See Zweigert, "Die Form der Vollmacht," 24 RabelsZ. (1959) 334 and cases cited by him. To the same effect, the Draft of a Uniform Law on Agency, \textit{supra} n. 67h, art. 5, requires the formality prescribed by the law of the country where the agent's act is to be accomplished.

\(^{97a}\) See Reese, \textit{supra} Ch. 39 n. 64, at 417.

\(^{98}\) \textit{Supra} Ch. 39 p. 145.

\(^{98a}\) See Zweigert, \textit{supra} n. 97, at 335.

\(^{99}\) \textit{Supra} pp. 138, 159.

\(^{100}\) On the ground of the older theory (Story and Bar, \textit{supra} ns. 1, 2) the domicil of the principal determines all of the authority. Consistently,
If we eliminate *lex loci contractus* and avoid confusion with the main contract, the problem reverts to the question of policy, whether a principal, incompetent by his domiciliary law, should be deemed capable if the law of the place where his authorization is used so provides. According to the conclusions reached in Volume One, capacity to establish obligations should be determined under their proper law, if not accorded by the personal law. The law governing authority to create obligations, therefore, should be able to grant capacity.\(^{100a}\)

(c) *Intrinsic requirements.* American as well as German courts do not hesitate to determine such questions as nullity and revocability\(^{101}\) of a power of attorney according to the local law.

2. Implied Authority

Modern laws abound in usages, customary constructions, legal presumptions, and legal rules, defining the acts which agents of certain classes or under certain circumstances are authorized or not authorized to do on account of the principal. Some codes, particularly the German Commercial and Civil Codes, have elaborated various categories of such commonly called “implied” authority, and the Restatement of Agency also distinguishes “authority,” “apparent authority,” estoppel, and unnamed other “powers.” The Conflicts Restatement, § 344, it is true, singles out “apparent” authority for applying the law of the place where the third party places “reliance” upon such authority. To the con-

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\(^{100a}\) The German doctrine seems to prefer the law of the principal's nationality; see BRAGA, “Der Anwendungsbereich des Vollmachtstatuts,” 24 RabelsZ. (1959) 337 f. Cf. also MAKAROV, “Die Vollmacht im internationalen Privatrecht,” in 2 Scritti in onore di T. Perassi (1957) 37, 43 f.

\(^{101}\) *Infra sub* (3) and (4).
trary, it has become evident in considering the case law of German courts that there can be no distinction on the international plane among constructions, presumptions, and rules, or among court interpretation, legal rules of construction, and subsidiary legal rules, as well as between statements or conduct of the principal toward the agent and toward the third party, or between directly obligating declarations and estoppel.\textsuperscript{102} They are not neatly separable even in the most elaborate municipal laws, and in fact not distinguished in many jurisdictions. They must be of equivalent significance in the conflict of laws. Neither English nor American courts, to my knowledge, have shown any inclination to classify in heterogeneous compartments what is distinguished as express and apparent authority, and in the latter category, as authority to do what is usual in a particular trade or what agrees to local usage, authority extended by statute, etc. The idea of estoppel in its broadest meaning appears to Continental observers of the English theory as present more or less in all parts of the doctrine of implied authority.\textsuperscript{103}

\textit{Illustrations.} (i) P in state X hands to A his written authorization to purchase goods on P’s account in state Y. A shows this statement to T in Y. P is bound to T according to the law of Y without respect to internally declared restrictions. The Restatement, § 344, illustration, expressly decides this case under the law of Y, because the authority is apparent and T relies on it in state Y. The substantive rule, however, is exactly the same in the German Civil Code (§ 172) which expressly says that where the principal has handed the agent a written authorization and the agent shows it to the third person, the agent is authorized in

\textsuperscript{102} I refer for details to my repeatedly cited article, 3 Z. ausl. PR. (1929) at 825 f. As to American law, Reese, \textit{supra} Ch. 39 n. 64, at 413 f., seems to be in agreement with the position here taken that there should be only one conflict rule for the various cases of apparent authority and the like.

\textsuperscript{103} Cf. Macris, \textit{supra} p. 144 n. 57, at 278 ff., 293.
relation to this person. Although thereby a true authorization is recognized, the German conflicts rule simply applies the law of Y as that of the place where the agent acts upon his authority. The right conflicts rule naturally covers this case.

(ii) Whether a traveling salesman is entitled to sell for cash and to grant deferment of payment, is a question of the extent of his power, regulated in Germany by a legal rule and in France by an implied agreement (mandat tacite). In the case of a French salesman traveling in Germany, the German Reichs Oberhandelsgericht once decided the question under the French law of the principal, whereas it would be determined at present according to the German Commercial Code (§ 55, paragraph 2). Even the authority of a commercial agent under the German Commercial Code (§ 91, paragraph 2) to accept certain statements of third persons, although considered a "legal authority," has been refused to the Danish agent of a German firm acting in Denmark. English and American courts decide to the same effect.

(iii) An agricultural producer in Silesia sent eggs for sale through an agent on the market of Berlin. The sender was to be deemed to have "submitted" to the usages of the Berlin market. As Willes, J., said in Lloyd v. Guibert, "whoso goes to Rome, must do as those at Rome do." The Reichsgericht, criticized for having ignored this rule, amended its practice immediately.

This resort to the local laws is also supported by the differences in the usual national types of agents. An English factor, operating in England, cannot be conveniently treated like a Brazilian commercial agent in Brazil. The legal presumptions and usual constructions defining what the authorized broker or clerk or traveling salesman may and may not

104 ROHG. (Dec. 4, 1872) 8 ROHGE. 150, Clunet 1874, 81.
106 (1865) 6 Best & Sm. 100, 131 Eng. Rep. 1134.
do on the account of the principal, are commonly intended merely for agents carrying on business within the state and for all such agents.

The American decisions show similar tendencies. Most of those in point, it must be noted, do not deal with our general problem but concern insurance agents, a very special matter, the local sphere of the state where the insured lives being much emphasized in constitutional and conflicts practice of the courts. With this reservation, the cases may be cited regarding the authority of local insurance agents to issue a policy, to waive conditions, or to give binding information. The law of the insured person’s residence has been applied under the theory that the contract was made, or in the case of insurance of immovables, the object was situated in that state.

No separate rule is apparent with respect to general agents. General powers are the main subject of the customary and legal definitions of implied authority. Whether, of course, the particular main contract can be made by a general agent, or whether special powers are needed for such purposes as contracts relating to land, lawsuits, compromises on litigious matters, or gifts, is a problem of the main transaction itself.

113 Contrarily to Nussbaum, D. IPR. 264, see the decisions of LG. Berlin I and KG., supra n. 97.
3. Ratification

The old conflicts literature was affected by the theoretical mistakes of doctrines which involved "ratification" and "confirmation" of contracts made by an unauthorized agent and unnecessarily bothered about distinctions between lack of and transgression of authority. The modern view is very simple; it accepts the Roman idea of ratification. Mandat et qui ratum habet means that ratification is an authorization subsequent to the main contract. Its nature is identical with a precedent authorization. This idea operated in indirect representation in the internal relationship between principal and agent, but its effect on the agent's power is confined to disclosed agency, even in the common law doctrine.

Opinions are divided only with respect to the permissibility of such belated confirmation. Thus, in the United States, three solutions depend upon whether ratification is allowable at all, or after a reasonable time, or so long as the other party does not cancel the contract.

From the nature of ratification as a true authorization, it follows that its effect is retroactive, and this, too, is commonly settled. Hence, there is no reason why the law of the place where the agent acts should not extend to this incident. No fiction of "submission" of the principal to the foreign law is needed.

115 See, e.g., 7 Laurent 546 § 457.
116 The latter is meant in Casaregis, Discursus 179 §§ 20, 64, 76, 89 and his followers including 3 Fiore § 1151.
117 Hunter, "What is the Effect of a Ratification of an Agent's Unauthorized Contract?" 5 La. L. Rev. (1944) 308.
118a Reese, supra Ch. 39 n. 64, at 416, takes the view that the forum "should use its own conceptions" in order to decide whether the principal's conduct could fairly be thought to amount to a ratification. About such an additional test, see supra pp. 167 f. and n. 71 a.
SPECIAL OBLIGATIONS

(a) Normal rule. The rule, therefore, is that the law of the place where the agent acts as a representative governs the validity and effect of a manifestation of the principal allegedly consenting to the agent’s transaction.\textsuperscript{119} The Restatement, § 331 (1), accedes to this rule saying, as is habitual, that this place is “the place of contracting.”\textsuperscript{120}

Since there is no material difference between acting without any authorization, and acting beyond authorization,\textsuperscript{121} it does not matter, contrary to certain older doctrines, whether principal and agent before the ratification were bound by contract or whether the agent acted as a negotiorum gestor. This result was reached by Story, speaking for the Supreme Court of the United States, in 1832, although he operated with an imaginary lex loci solutionis.\textsuperscript{122}

(b) Soliciting agent. It is well settled that when an agent, sent out to solicit orders, transmits an order to his principal and the latter declares his consent to the customer, the contract is made by the principal himself.\textsuperscript{123} The reason, however, is not as is sometimes confusedly assumed, that the agent has no authority to contract. Whether he has or


See also art. 8, as it appears in the two drafts of the I.L.A., supra ns. 67b and 67c.

\textsuperscript{120} Is the objection to this rule by STUMBERG (ed. 2) 230 not influenced by the theory of the last act of completing a contract, of which he himself is rather critical?

\textsuperscript{121} Restatement § 331 says: “beyond or contrary to his instructions,” which confuses the relationships.

\textsuperscript{122} Boyle v. Zacharie (1832) 6 Pet. S. C. 635, 8 L. Ed. 527. The consignee of a cargo in New Orleans furnished suretyship and paid when the ship was attached there. The shipowner recognized the intervention, and Story localized his duty in Louisiana, because if he had contracted with the defendant (Story says: “authorized” him) to advance money there on his account, this contract would have been performable there and the lex loci solutionis would be applicable.

\textsuperscript{123} GOODRICH 264 n. 24; 7 LAURENT § 456 in fine; 1 FIORE § 133; 2 RESTREPO HERNÁNDEZ § 1297.
not, the material point is that he does not purport to conclude the contract. The place of the agent is immaterial in this case, as also his powers are. The result, that the principal makes the contract, is recognized by the American courts also for the purpose of ascertaining in what state a corporation does business by such a contract; \(^{124}\) whether Louisiana's privilege of the vendor applies; \(^{125}\) and under what law title is reserved, incidentally to the contract. \(^{126}\)

But the main contract, in reality, has its own law, according to its nature and this law governs offer and acceptance.

(c) \textit{Abnormal solution}. Suppose that in the case of a liquor sale a soliciting agent in Iowa (where the sale would have been invalid) went beyond his authority and made a sale as if he were empowered to conclude the contract without reserving the approval of his principal in Illinois (where the sale would have been valid). But he sent the order to the principal who confirmed it to the buyer. According to the normal rule, since the agent sold the liquor in Iowa, the contract, as governed by the law of Iowa, would be invalid and not subject to approval by the principal, although the latter, of course, might have made a new offer. This self-evident result seems to agree with the two decisions of the Iowa Supreme Court\(^ {127}\) which have subsequently


\(^{125}\) Claflin v. Mayer (1889) 41 La. Ann. 1048, 7 So. 139.

\(^{126}\) Barrett v. Kelley (1894) 66 Vt. 515, 29 Atl. 809.

\(^{127}\) In Tegler v. Shipman (1871) 33 Iowa 194, 200, the court stated as the general rule, that, "if the agent simply took an order from defendant upon his principals in Rock Island, which they might fill or refuse at their option, it was a Rock Island contract, and the plaintiff can recover unless it is shown that they sold the liquors with intent to enable the defendant to violate the provisions of the act. . . ." The decision in Taylor v. Pickett (1879) 52 Iowa 467, 3 N. W. 514, concerning the territorial scope of a license to sell, upheld instructions to the jury saying that "it would be a sale at the house," if the agent took orders subject to final acceptance by the principal, whereas the sale would be illegal if orders were taken "not subject to approval."
been invoked for a contrary view by a federal circuit court. This court decided in Shuenfeldt v. Junkerman, an Iowa case, that although the contract was concluded in Iowa by an unauthorized agent, the confirmation by the principal, the firm in Chicago, constituted an acceptance of the order and completed the contract in Illinois, hence validly. When the validity of the contract is in question, as in liquor and Sunday contracts, the court considered "the very time and place where and when the act was done that gave life to the contract."\(^{128}\) Incautious commentators have tentatively extracted the recognition of a ratification having no retroactive effect.\(^{129}\) The Restatement finally takes from this isolated decision the impulse for an astonishing general rule.\(^{130}\) The individual decision in the Shuenfeldt Case may be condoned as an instance of extraordinary favor extended by the courts to interstate contracts affected by the crude sanctions of Sunday and liquor laws. Moreover, as usual, the belief in lex loci contractus promoted extravagancies. But it is a grave mistake to disturb the international function of the normal rules by such arbitrary exceptions.

**Illustration.** Suppose an ammunition manufacturer in Illinois sends a soliciting agent to Bolivia, who, pretending to be authorized to sell, accepts an order from an unlicensed dealer for delivery in a Bolivian port. While the buyer, violating Bolivian laws, must know that the contract is void, American courts, according to the Restatement, should argue that the manufacturer supplementing his authorization concludes the contract under American law and therefore makes a valid contract. Every part of this argumenta-

\(^{129}\) 11 Am. Jur. 394 § 112.
\(^{130}\) § 331 (2): "If by the law of the place where the agent acted, there is no contract as a result of the ratification, the ratification is regarded in the state where it is made as the acceptance of an offer made to the agent and transmitted by him and if the acceptance completes a contract, the contract is there made."
tion is wrong. A unilateral confirmation of a void agreement is ineffectual. That the traditional theory of illegality at the place of performance is defied, would not matter so much as that the contract is really governed by Bolivian law, because of all the circumstances.

The liquor cases could have been approached differently. Shuenfeldt, by the order, had delivered the goods at a railway station in Chicago, his own city. The sale, for this reason, and for this alone, could have been governed by Illinois law. Equally, in the hypothetical case of an armaments sale in Bolivia, if the goods were to be delivered f. o. b. New York, the buyer would be rightly supposed to comply with the laws of the United States, when sued in an American court; the decision would depend on the court's conception of international policy.

4. Termination

Death of the principal and revocation of authorization have been controversial matters in the municipal laws. From the old point of view of a merely two-sided relationship, rights and obligations between master and servant, mandator and mandatary, naturally ended with such events, and the powers of the agent, too, were automatically ended. But the Roman praetor granted actions against a master during a year after he withdrew the peculium from a slave.\footnote{Actio annalis de peculio, LENEL, Edictum Perpetuum 277, 282 ff.} A shop manager had the powers of an institor so long as his name was not canceled in the shop.\footnote{ULPIAN, D. 14.3.11 § 3.} Modern systems have prolonged either the underlying contract, or at least the authority, beyond its original termination, in the interest of third persons, or even of an innocent agent.

(a) \textit{Death of principal}. A general power of attorney conferred in California for sale of land in Texas was ended
under Texan law by the death of the issuer, although it would have been valid until notice to the agent under California law. The court in Texas based this decision on the attempt to carry out the powers in Texas.\(^{133}\)

This represents the universally prevailing and recommendable conflicts rule,\(^{134}\) alone consistent with the application of the local law to apparent authority. That the continuation of the power should require the consent of two laws, or even three,\(^{135}\) is strictly objectionable.

(b) Revocation. An irrevocable general power of attorney was signed by an American in New York for any transaction on his behalf regarding his German assets. Under the law of New York, this authorization, not coupled with an interest of the agent, was revocable. German courts, under a questionable rule, have treated irrevocable general authorizations as void, at least for the purpose of transactions contemplating transfers of rights in immovables. This German rule was applied to the case on the theory that authority is subject to the law where it is exercised.\(^{136}\) If, conversely, a German authorization were used in New York, its revocability would doubtless have to be determined under New York law.

The identical solution has been recently followed in an English case,\(^{137}\) and may also be advocated as a universal rule.


\(^{134}\) Thus, against Story § 286 d: 4 PHILLIMORE 571 § 705; 3 Fiore § 1154; ALCORTA, 3 Der. Int. Priv. 116; cf. 2 WHARTON 871.

\(^{135}\) Thus, 2 RESTREPO HERNÁNDEZ § 1306.

\(^{136}\) LG. Berlin (Oct. 5, 1932) IPRspr. 1932, No. 63, discussed as to the questionable municipal rule and the pioneering conflicts rule in my article, 7 Z. ausl. PR. (1933) 797, evidently unknown to BATIFFOL 282 n. 6. To the same effect, KG. (Dec. 14, 1933) IPRspr. 1933, No. 9.