AGENCY

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I. IN GENERAL

In the international scene, the economic situations in which representation is used are innumerable and changing. Traders, manufacturers, carriers, insurers, export selling organizations, importers, governmental trade offices, et cetera, are in constant need of co-operation in foreign states or countries. Continuous and intensive business abroad is carried out by employees of the principal firm as travelers, managers or clerks of agencies or branches; by foreign subsidiaries, i.e., corporations or partnerships created under the law of the foreign country; or by arrangement with independent foreign dealers, brokers, or commission agents.

The law of the state where the agents, branches, subsidiaries or correspondents operate, has natural application in administrative respects, such as licensing for doing business, industrial supervision, labor law, taxation bookkeeping and accounting, publication of balance sheets, inspection and information. Unfortunately, these interferences are often extended beyond reason. In particular, it may be mentioned in this connection that some countries quite naïvely extend their commercial law to all contracts of a foreign company doing business therein, although such supervision should not exceed the local transactions of the representative. Even with regard to contracts made within the state, the normal rules of conflict should be respected. This is important for contracts to be performed by the principal firm.

To find the adequate conflicts rules, however, is not very difficult. Despite the variety of economic organization, the basic legal structure of transacting business through another person follows definite patterns. And in the legal construction of agency, not even the existent fundamental difference between common law and civil law needs to prevent uniform conflict rules. This difference may be illustrated by a recent decision of the Louisiana Supreme Court.[1]

When Dr. Paul Crutzinger died he left a number of shares of Minden

[1] Sentell v. Richardson (1947) 211 La. 288, 29 So. (2d) 852; *cf.* Jones, Note, 7 La. L. Rev. (1948) 409.

Sanitarium, Incorporated to his widow and heirs. The widow did not want to sell the shares to a physician who would gain thereby too much influence in the establishment. But Dr. Richardson agreed with Dr. Sentell to buy twenty-five shares as an interposed person for Dr. Sentell; he did this and received the amount of the sales price, $5000, from Dr. Sentell. Subsequently, however, he refused delivery of the documents and sold them to the president of the Sanitarium, Dr. Martin. In the suit brought by Dr. Sentell for delivery of the shares, the court stated that the power of attorney did not include the power to act in the name of the principal and therefore was not covered verbally by the text of Article 2985 of the Louisiana Civil Code. This article, substantially concordant with Article 1984 of the French Civil Code in fact requires such an authorization, since at civil law acting for the principal so as to make him a party to the transaction with the third person ("direct representation"), is the only true representation. For this purpose, the agent must act in the name of the principal or at least make it clear that he is the agent of some one (whom it may concern), the latter case corresponding with the common law category of disclosed agency for an unnamed principal. The authorization by the principal must conform to this essential. As Dr. Richardson had to conceal that he did not buy for himself, there was no representation in the meaning of the French Code.

However, the Louisiana Court was not satisfied with this result. Adopting the mentality of common law, it declared the words "in his name" in Article 2985, "not essential to the definition of a procuration or power of attorney." Hence, Dr. Richardson was authorized to act as agent for an "undisclosed principal" and acted as such, with the effect that the shares immediately became the property of the plaintiff, who won his case.

Common law and civil law differ basically in the treatment of such undisclosed agency, although the contrast has been mitigated through various modern innovations and in the future will perhaps slowly disappear, when comparative research continues to criticize both systems. For the purpose of conflicts law we may without difficulty use the term of authorization in a broad meaning which is more precisely determined by the law we hold to be applicable.

Basic Concepts

If we appreciate that three persons are involved, namely, P, the principal, A, the agent, and T, the third party (*tertius*), any sound system of substantive or conflicts law must consider three relationships: P–A, P–T, and A–T. It was harmful to conflicts law that a widespread theory of "man-

date," still not entirely dead, considered only one contract of mandate, comprising an internal relation between P and A, and an external relation between P and T, both governed by the same law. Equally wrong has been the theory pretending that the personalities of P and A "merge" in contracting with T, that they are one person, and that the principal is deemed present at the place where the agent makes a contract. As a consequence, the law governing the contract with T is applied. Both solutions are impracticable.

The three relationships, hence, are the following:

(a) P–A is the *internal or underlying relationship*, based on family law, bankruptcy law, corporation law, et cetera, or on a contract of employment, agency, partnership, et cetera.

(b) P–T is the *external relationship* caused by the power of A either to make P a party or to bring him into the position of an undisclosed principal. The authorization may be based:

(i) on law or office—for example, on law: the position in civil law of parents, husband, guardian; or on public appointment: common law guardian, administrator of estate, trustee in bankruptcy, et cetera; on corporate office: principal officers of a corporation whose powers are defined in the charter or the by-laws; or

(ii) on a private legal act, which is construed in modern theory as a unilateral act of the principal.

(c) A–T is the *main or third party* contract, or a unilateral transaction of A, such as notice of defect to T, a seller, or notice of time for payment to T, a debtor; or an act by T, such as payment to be received by A representing P, the creditor.

II. AUTHORITY

1. By Law or Office

Story and Bar have argued for the general rule that authority should be governed by the law of the domicil of the principal. But their arguments, in reality, have been concerned with such questions as what law determines the powers of a shipmaster, in case of necessary repairs or other emergency in a foreign port, to take up money and to obligate the vessel or freight or cargo. This was an important question at a time without the present rapid means of communication. Here the law prevailing at the home port should obtain everywhere. It would be unfair to the shipowner and cargo owners, to expose them to the hazards of any foreign regulation. And Bar exclaimed, "What would be the use for a stock corporation to limit the powers of a director by requiring assent of the board of directors,

or of the assembly of stockholders—if he were not so bound in contracting abroad?" These are forceful arguments and should be generalized—but not so far generalized as to include ordinary powers of attorney. Where the source of the power has a natural claim to be consulted abroad, restrictions imposed by it upon the power should be respected, indeed, everywhere; but though this is true of law or office defining the power and its limitations, it is not true of the varieties of authorization inspired by individual choice.

For instance, since it is no longer true that a president of a corporation has no privileged power except that conferred expressly by the charter or by-laws, there are now different rules in the various American jurisdictions. If the president of a New York corporation who is commonly considered as able to make ordinary business contracts for his company contracts in Massachusetts (where the old rule is more faithfully observed), the "New York Rule" is competent to define his authority, not the "Massachusetts Rule."

2. Voluntary Private Authorization

Here, the main idea is that not the law of the principal's place but the local law of the place where the agent acts, or exercises his power, can be invoked by and against third parties. The latter cannot be expected to ascertain another law. This category is different because the powers of the agent are based upon the intention declared by a foreign principal, not on a constant foreign law. Insofar as the principal has manifested his will unequivocally and brought it to the knowledge of the third party, no problem arises. On the other hand, when we find that he has not consented at all to the acting of A for him in the foreign state in question, there is no authority. But whether authority exists after all and to what extent, may in some cases depend on the law applied. He may have given the power orally or by an ambiguous statement, or relied on usual or implied restrictions unknown abroad. Chatenay, a Brazilian in Brazil, wrote a power of attorney for Broe, a London stockbroker, to purchase and sell shares in public companies. Broe sold stock belonging to Chatenay and the purchasers were registered in the books of the company. Chatenay sued them for rectification of the register because the broker exceeded the order as understood in Brazil. Lord Esher in the Court of Appeal referred to Brazilian law in construing the meaning of the Portuguese words of the document, but to English law for the scope of the authorization when carried out in England.[2]

[2] Chatenay v. Brazilian Submarine Telegraph Co., Ltd. [1891] 1 Q. B. 79.

The English courts have not often followed this wise direction, but the courts in the United States, Germany, and Switzerland have developed a substantially analogous and uniform practice. When a firm in X sends a salesman to Y to buy furs with no explicit definition of his authority to show the customers, it is for the law and customs of Y, not X, to say whether A may purchase for cash and make payment, and a sales agent may modify the printed sales conditions, e.g., insert a warranty clause, or may receive cash payments, sell on credit, receive notice of cancellation, et cetera.

If we examine more closely these lines of decision, we find variations in defining the place determining the applicable local law. Invariably it is a place in the sphere of the agent, not of the principal. But in the American practice, it is usually the place where the agent makes the contract with the third party; in the German practice, it is the place where the agent "deploys his activity," "exercises his power," or as Latin-American authors would say, where he carries out his "mandate."

What does, in the United States formula, the place of contracting of the main contract mean? It seems, once more, that the law of the place of contracting is conceived as identical with the law governing the third party contract. But this contract may be governed by any law, that of the place of performance, a stipulated law, et cetera. Take a sale of machinery to be delivered *ex* ship New Orleans; the buyer is in Louisiana, the seller in New York, the seller's agent, who sent the offer on behalf of the firm, in Chicago. The sales contract, if we adopt the right rules, should be governed by the law of Louisiana, as we have assumed in the interest of buyers. But it would go too far in accommodating the buyer, to assume that Louisiana law also decides what powers P in New York has given to A in Chicago. It makes better sense to interpret the American formula as pointing to the place where the agent consents to the third party contract, that is, Illinois.

The German and Swiss practice has centered around the case of a commercial agent firmly residing in the country of the buyers, sellers, customers with whom he deals. This makes an unambiguous conflicts rule, satisfying all legitimate interests. The powers of a traveling salesman, however, are correctly subjected to any place where he "exercizes his authority."

III. THE OTHER RELATIONSHIPS

1. Internal Relationship

Whether a law, a court decree, or a corporate constitution describes the functions of a guardian, trustee or officer, or a principal defines the powers

granted by him, it is not the authority but the underlying legal or contractual relationship that determines whether the agent ought or ought not to exercise his power. Thus, the contract of agency (mandate) includes or implies the "instructions" or directions when to act upon the authority, and controls A's duties to use diligence, disclose facts, or to notify third persons of modification or termination of his authority.

Very often, the person functioning as agent also has to do factual work. A, sales clerk in a linen store, may have to open and close the store, take care of the storage, and keep books. The relationship of which we are speaking covers both the duty of making contracts and the other obligations.

To ascertain the law determining these relationships, two groups of agents ought to be distinguished: in common law language the "servants" and the independent contractors. The old doctrine of master and servant marks very well the category of dependent services. The employer directs not only the ultimate result to which the employee's activity is destined but controls also the activity itself. In the modern organization of labor, employees are integrated in the employer's business with respect to payroll, social security, work regulations, et cetera. It is a sound rule, more or less clearly felt by the courts as natural, that the employment contract should be governed by the law of the employer's business place to which the employee is attached.

Independent persons assuming the duty of making a contract in the principal's interest—attorneys, brokers, commission agents and others—are, in their turn, subject to special laws of the state in which they are established and most frequently part of professional organizations. Their business place is the center of their activity and, therefore, of their agency contracts. The law of this place conveniently governs their rights and duties under the contract with the principal at the same time as the existence and extent of their authority. These results are congenial with most court decisions throughout the world.

2. Transaction with the Third Party

What law governs the contract or unilateral transaction made in the external relationship between A and T, depends on the nature of this transaction. If it is a sales contract, the law of the seller's place, or by exception, that of the buyer's place should govern as observed above. If the agent A with authorization by P engages a broker T for selling goods, this contract is governed by the law of the place of T, as we have just seen.

This law governing the transaction A–T decides whether representation

is allowed, or needs special authorization or a written document. This also, not the authority, is the field where the common law doctrine of undisclosed principal operates.

The English Court of Appeal has formulated this principle. When it was ascertained that authority existed under the Spanish law, then in force in Cuba, between Cuban parties, the question was whether the undisclosed principal can sue and be sued under the contract? This was decided under English law governing the contract.[3]

Example. On March 12, P in Philadelphia ordered broker A in New York to buy one hundred cases of Bordeaux wine, *Château Matigny*, vintage 1937, in France c.i.f. Philadelphia, to be shipped from Bordeaux, payment on arrival, but revoked the order on March 17. On March 13, A in his own name wired dealer T in Paris according to order. T accepted on March 15 by air-mail letter arriving on March 21 in New York. Can T sue P? Answer: (1) As to authorization, New York law decides, not Pennsylvania or French. (2) The sales contract was perfected on March 15 under American, though not under the present French, law. Therefore, authorization in the common law meaning existed. (3) The sales contract with a French shipping point is governed by the law of France, not that of Pennsylvania as place of payment (Restatement, Switzerland, Germany) or New York as domicil of the debtor of the price (Scandinavia). Hence, T cannot avail himself of the common law action against an undisclosed principal (normally granted at present also to a foreign party). He might try the French *action directe* with very doubtful chances.

IV. CONCLUSIONS

What we have observed, is a contribution and illustration of two general propositions for the establishment of conflicts rules.

On the one hand, the traditional rules stressing the law of the place of contracting or that of the place of performance are of no avail at all.

On the other hand, the policy to be followed in conflicts law is not identical with the policy of internal law. Conflicts law precisely has to decide which state's law with its particular policy is to be applied.

Is it in our case that of the place where the principal lives, or gives his order; that of the place where the agent lives, or where he is acting; or that where he makes the main contract with the third party? For the purpose of determining the law for the internal relation we distinguish servants and independent agents. With respect to the law governing authority, we dis-

[3] Maspons y Hermano v. Mildred, Goyeneche & Co. (1882) 9 Q. B. D. 530, 539.

tinguish grant of power by offices and by voluntary private authorization. We do not distinguish what law by its effect is more favorable to one or the other party. All this rests on social and economic considerations, but considerations of another kind than those used in the municipal laws. For the purpose is different. We have not to balance interests but to weigh the importance of local connections, for interstate and international life.

Agency and employment, indeed, will furnish us a good example for the policy to be followed in the development of conflicts law.