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AGENCY LAW IN COMMON LAW SYSTEM

Master thesis

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INTRODUCTION

Scientific novelty of the thesis is stipulated by the fact that no comprehensive international research has been provided in respect of the determination of the elements of agency in common law system and its main categories such as agent's "authority" "unauthorized agency", which are still controversial. Court practice is usually inconsistent and many issues require theoretical and legal clarification in order to ensure the possibility of full realization of the agency relations.

The discussion of this issue may be found on scientific papers of Roderick Munday, Francis Martin Baillie Reynolds, Wolfram Müller-Freienfels, R.-J. Pothier, Danny Busch and Laura J Macgregor, Karl Larenz, Manfred Wolf, Paul Foriers[1], etc., who tried to develop an adequate definition of terms "agent" and "agency" in general. Also, scholars have looked for the legal definition of the concepts of authority and unauthorized agency that would reflect the interests of all three parties to an agency agreement and would be directed to protect their interests. Certain answers may be observed in statutory and case law.

The problem of the current research is agency law in common law system, since after the adoption of the "theory of identity" it started to develop in its own distinctive manner. The agency in common law system is based on the "uniform concept" of acting and the doctrines of undisclosed principal was born in this particular legal system, which rules appear to deny accepted legal norms. Common law terminology was adopted into the international trade due to the simplicity of its application, in comparison to the continental vision where the direct and indirect agencies are regulated separately. For this reason, it is of particular interest to the lawyer specializing in continental law, to explore the phenomenon of agency under the common law system.

The subject itself may seem confusing. To add the confusion, various conceptions of agency have been elaborated, as a result of the historical development. Plenty of theories of agency have been developed which are inherently logical and sophisticated, but still agency law appears to be an under-researched area as there is no coherent explanation or unified theory adopted. Agency terminology is used differently in various spheres: philosophical and literary studies, in economics and commercial settings. It is a common usage to call an "agent" almost

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[1] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.);
Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010.- 944 p.); Pothier R.-J. Traite sur les obligationis (Paris: Debure et Orléans, Veuve Rouzeau-Montaut, 1760. – № 8. – 672 p.); Muller-Freienfels W. The Law of Agency (American Journal of Comparative Law. – 1957, 172–173); Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.,) 197; Foriers and Jafferali, 'Le Mandat (1991 a 2004), 87; Larenz and Wolf, Allgemeiner Teil des Bürgerlichen Rechts (Aufl. 1997. Buch. XXXVI, 1022 S), para 49, no.4 et seq.

everyone who serves an intermediary function. Existing divergence of approaches towards the term “agent” has led to appearance of such phenomenon as “false agency” when it is confused with other legal constructions like: mediation, commission, surety and its terminology is applied to individuals and entities whose activities are not actually governed by the law of agency.

The relevance of the thesis is revealed in the necessity to provide suggestions for implementation of some developments of agency in common law system into the Ukrainian legislation. Current work contains references to current Ukrainian and foreign legal sources, literature reviews, case law on agency issues and structured conclusions based on the state of representation under Ukrainian civil doctrine, Since Ukrainian legislation is currently going through hard times of reformation and many aspects need improvement thus, it is essential to introduce some changes relating the problem of representation to the provisions of Civil code of Ukraine 16.01.2003[2] (hereinafter CCU). However, any fundamental changes to legislation should be based on the experience of legal and scientific achievements of most developed countries in this sphere. For this reason, it is important to provide a comprehensive investigation of the key elements of the doctrine of agency and its elements in order to get a versatile picture of the state of law in different legal systems and to include most appropriate and demanded by practice provisions into national legislation.

Inconsistency in treating independent contractors as agents within the employment relations has stipulated the need to provide a separate investigation, since the new economy has made certain adjustments to the functioning of businesses in the modern world. In order to preserve the utility of agency doctrine, unauthorized agency with its central doctrines like apparent authority, ratification and the liability of falsus procurator also need a deep analysis.

Under the Ukrainian law no comprehensive research has been provided in respect of the determination of “authority” as a specific category under the doctrine which appears to be a significant disadvantage of the current Civil Code. The doctrine was somehow developed by such domestic scholars as Y. O. Kharitonov, O. I. Kharitonova, V.L. Granin, V.V. Tsura, O.I Heletska[3] who tried to give answers to the most urgent problems, but still a lot of questions arise in court practice regarding the consequences of unauthorized agency which served a motive to conduct a research of this particular problem.

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[2] Civil Code of Ukraine of January 16, 2003 // Information from the Verkhovna Rada of Ukraine. - 2003. No. 40-44. – 356 pp. Access mode: http://zakon5.rada.gov.ua/laws/show/435-15

[3] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с.; Гелецька І. О. Правове регулювання відносин представництва у цивільному праві автореф. дис...канд. юрид. наук: 12.00.03 / НАН України; Ін-т держави і права ім. В. М. Корецького. – К., 2005. – 24 с., с.10.; Гранін В. Л. Поняття та наслідки неналежного представництва // Актуальні проблеми держави і права. – 2004. – Вип. 22. – С. 616–621, с.618.; Харитонов Є. О., Харитонова О. І., Старцев О. В. Цивільне право України: підруч. – [Вид. 3, перероб. і доп.]. – К.: Істина, 2011. – 808 с.- с.271.

The aim of the research is to reveal the essence of agency from the common law perspective with providing a comparative analysis of some aspects of continental approach to the doctrine.

Since introducing improvements in this sphere is completely essential for the normal development of commercial industry, current research is targeted to:

1. Identify the constituencies of the doctrine of agency in common law system and to analyze the category of "authority" as an essential part of the agency doctrine;
2. Reveal the divergence of approaches between the civil and common law legal systems;
3. Provide a comparative survey of unauthorized agency in common law and continental legal systems.

Research methodology in the current thesis was mainly aimed at revealing of all the significant features of the Agency doctrine in common law. The work contains such methods as **method of legal description** for revealing the today state of agency doctrine; **method of conceptual analysis** when analyzing the existing conceptual legal framework of the doctrine of agency; **method of comparative legal research** when taking into account important divergences in the legal systems concerned; **cross-disciplinary research method** was used in the work to show the penetration of agency rules into commercial and employment law. Also in the work with legal sources like Codes, Laws and Soft law instruments, **method of legal interpretation** was used.

The significance of the present work reveals in getting a deep understanding of the doctrine of agency in common law system and the possibility to identify and to compare the basic common-law developments in this sphere with the continental law achievements. For this reason, there is definitely a need for introducing certain improvements into the national legislation, and to provide a new modern understanding of the legal essence and significance of this doctrine.

So, this topic appears to be very important for developing of theoretical foundations of agency in the domestic civil law and for implementation of foreign achievements into the Ukrainian legislation. Conclusions of the study may be used as the basis for further analysis of the problems of agency, the agent's authority and the consequences of performing the actions without a due authority.

The structure of the work consists of two Chapters each of which contains three sections. The first Chapter is aimed to reveal the theoretical basis of agency in common law. Chapter analyzes the development of agency theories in common and continental law, their main provisions and followers. Also, characteristic features of the doctrine of agency are discussed

there, trying to provide a distinctive definition of agency's main categories such as "agent", "principal", "third party". Modes of agency creation are also reflected in the first Chapter.

Chapter two discusses the problem of agent's authorit, its prerequisites and types. Main attention is paid to the concept of apparent authority within the doctrine of agency, its constituencies and ways of treatment in different jurisdictions. Controversies regarding the basis of apparent authority are presented in the current research since even countries within one legal system hold different approaches toward the contract or estoppel basis of apparent authority. Since the issue of authority is problematic also in continental legal system, the Chapter provides comparative legal research of this issue.

Section 2.3 is devoted to a comprehensive analysis of the doctrine of unauthorized agency in both continental and common law systems and to provide suggestions regarding the improvement of legal regulation of representative relations by implementation of the foreign experience into the Ukrainian legislation. It reveals important issues regarding the emergence of the unauthorized agency, its continuances and the means of protection of parties in these triangular relationships.

Absence of comprehensive analytical research on agency relations its essence and main constituencies, allow us to assert the unconditional relevance and timeliness of the chosen topic, necessitates providing of a certain degree of unification of controversial categories, and the development of the theoretical foundations of the doctrine of agency. This will lead introducing certain suggestions regarding the improvement of legal regulation of agency relations by their subsequent implementation into the national legislation by providing a new modern understanding of the legal essence and significance of this doctrine.

LIST OF ABBREVIATIONS

UCC	Civil Code of Ukraine
UNIDROIT	Institut international pour l'unification du droit privé (french) UNIDROIT Principles of International Commercial Contracts
PECL	Principles of European Contract Law
DCFR	Draft Common Frame of Reference
CC	French Civil Code
BCC	Belgium Civil Code
DCC	Dutch Civil Code
BGB	German Civil Code
BGH	German Commercial Code

1. THEORETICAL BASIS OF AN AGENCY IN COMMON LAW

1.1 CONCEPTIONS OF AGENCY

An American writer has commented: “Agency has not enjoyed much fashion within the legal Academy in recent years. Many factors no doubt contribute to its unfashionable status, including its decline as a freestanding subject for school instruction[4].”

Indeed, there are not so many works that reveal the theoretical legal foundation of this subject which causes certain problems in practice as well. Even though the Law of Agency may not enjoy a high popularity in the academic environment, it cannot also be called unimportant.

During the existence of Agency (*germ. Stellvertretung fr. Représentation, ital. Rappresentazione, span. Representación, ukr. Представнитцво*)[5], it has been always under-theorized by scholars. Its basic tenets, its modus operandi, and its theoretical foundations remain mystery to lawyers, judges, and legal scholars. Current thinking about agency law relies on the principles of tort and contract law to provide a basis for the principal’s liability for agent’s contracts and torts, but those principles fail to explain the doctrine comprehensively.[6]

For many years the “doctrine of representation” was an unknown concept of Roman law that at first was opposed because contractual obligations were purely of personal character. Only in the late XVII century the mentioning about it appeared in the works of the eminent scientists-lawyers who contributed greatly to the formation of the two main agency theories – the theory of separation and the theory of identity.

The origin and development of above mentioned theories have occurred inside the common law and continental legal families. In works of prominent lawyers[7] we may find a profound understanding of issues regarding the agent’s authority among which, are such types as “*actual*” and “*apparent”*, separate analysis is dedicated to the principal’s right to control, the rights of third parties to information about the agency conditions, unauthorized agency, conflict of interest, etc.

Although we are currently living in the 21st century, the historical aspect should never be forgotten. I am utterly convinced that any fundamental changes to the legislation should be based

[4] De Mott, When is a Principal Charged with an Agent’s Knowledge? (2003) Duke J of Comp&Int’l Law 291, 318.
[5] As far as the topic of the present work if Agency law in common law system, the term “Agency” will be used mostly, but other terms as representation, representation will be also used in this work as they are regarded as synonyms.
[6] Paula J. Dalley, A Theory of Agency Law (Oklahoma City University School of Law, 2011). Access mode: : https://works.bepress.com/paula_dalley/1/
[7] Fridman G.H. The Law of Agency(London: Butterworths, 1996. – 434 p.); Powell R. The Law of Agency (London: Pitman, 1951. – 355 p.); Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.); Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010. - 944 p.); Saintier S. Commercial agency law (London; Singapore: L.L.P. 2005. – 348p); Corrias P. L’agenzia/ diretto da P.Corrias (1ed.- Bologna: Zanichelli. 2012. - 507p).

on the experience of foreign legal regulation and scientific achievements of the leading countries. For this reason, a few aspects of the origin of Agency theories should be mentioned in order to get a better understanding of the topic.

The recognition of the doctrine of agency in the field of civil law was achieved in the 17th century when German scientist Hugo Grotius in his famous work *"The Rights of War and Peace (1625)[8]"* firstly explained the idea of an independent and autonomous institute of representation where a procurator on the basis of his mandate could acquire rights directly for his principal. In his work, the scholar overcame the ancient Roman rule that recognized only the actions of the representative on his own behalf. Grotius argued that the procurator acquires rights directly in favor of the person whom he represents by the conclusion of a contract with a third party in accordance with the assignment given. So, the Roman rule was changed and enabled slaves and dependent sons to act directly on behalf of pater familias.

In France, at that time, Francois Rigaux[9], stated that the theory of his Dutch colleague was based on a fiction, the essence of which was the agent's ability to operate in a certain place; but the scientist believed that the principal is acting himself, although his will is expressed by the agent. Although F. Rigaux[10] formulated the key essence of both concepts, he brought the commission and agency closer together, and this particular approach was laid down in further codifications like Prussian Civil Code 1794 (*Allgemeine Landrecht fur die Preussischen*) - the first European codification of civil law, French Napoleonic or Civil Code of 1804, General Civil Code of Austria 1811, civil codes of Greece, Norway, Denmark, Poland, the Soviet Union, etc., where the representation was explained mainly through the concepts of authority and mandate.[11]

The idea of G. Grotius regarding representation was picked up by R. von Jhering and P. Laband in the second half of the XIX century who attempted to go further and developed a system in which the representation was distinguished from the commission in order to define representation with its characteristic features, separating it from the concept of mandate (mandatum). The theory of mandate demands each party to have certain rights and responsibilities that should be respected during the existence of agency relations.

Jhering and, especially, Laband were the first to make a distinction between the agent's power to create legal rights and obligations for his principal and the inner contractual relationship governing the personal rights and duties between principal and agent. This distinction was largely adopted by European legal systems and was codified in several countries.

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[8] Grotius H., The Rights of the War and Peace: Including the Law of Nature and of Nations (Translated by A. C. Campbell. – Washington: M. Dunne, 1901. - 423p.), 52.
[9] Rigaux F., Le statut de la representation, Etude de droit international compare (Leiden: E. J.Brill, 1963- 292 s.), 39.
[10] Ibid. p.42.
[11] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law

"The most characteristic feature of the theory of agency in the civil law is the strict conceptual separation of the mandate, i.e. the contract between the principal and agent. From the authority, that is the power of the agent to contract for the principal with the third party."[12]

Famous German scholars have done a lot for the development of the doctrine of agency that was only used in the context of relations that bind the principal and the agent.[13] Accordingly, representation was associated with relations that arose only on the basis of agent's authority.

The study of the Roman concept *"prokura"* later allowed P. Laband to develop a "separation theory" which was based on the distinction between the mandate and authority. The doctrine of separation was firstly disclosed by P. Laband in 1866 and was immediately perceived by civil laws of many states, including Switzerland, Italy, the Russian Empire.

Paul Laband, in his fundamental work defined that: "Mandate regulates the internal relations between the agent and principal, while representation is aimed at regulating the external aspects of the action performed; the relation of principal and agent in respect of third parties."[14]

Also, the differences may be defined by reference to Louisiana Civil Code which was adopted later defining that:

(1) A procuration is a unilateral juridical act, whereas a mandate is a contract, i.e., a bilateral juridical act;[15]

(2) In both acts, one person, called the "principal", confers authority on another person, called "representative";

(3) The content of the conferred authority is different. In a procuration, the authority is to "represent the principal, that is, to act in the principal's place as the principal would have acted.[16]" In a mandate, the authority is to "transact... for the principal, that is, to carry out a particular activity and accomplish a result for the benefit of the principal.[17]

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[12] Awet Hailezgi, Addisu Damtie, Authority by Virtue of Contractual Agency. Access mode: https://chilot.files.wordpress.com/2011/06/law-of-agency.pdf

[13] Jhering R. Geist des romischen Rechts auf den verschiedenen Stufen deiner Entwicklung (Leipzig: Druck und Verlag von Breitkopf unf Hartel, 1852), 357.

[14] Laband P. Die Stellvertetung beu dem Abschluss von Rechtsgesetzbuch nach dem allgemeinen deutschen Handelsgesetzbuch (Zeitschrift fur das gesammte Handelsrecht.- 1866. - №10), 183-241.

[15] Holmes, Wendell H. and Symeonides, Symeon C., "Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law" (Journal Articles, (1999), p. 26. Access mode: http://digitalcommons.law.lsu.edu/faculty_scholarship

[16] The word "represent" suggests that the representative must act in the principal's name. Indeed, in continental civil law the representative must so act. See French Civil Code art. 1984; However, this is so because these systems explicitly refuse to sanction what is known in common-law systems as the concept of undisclosed agency. The fact that the new Act expressly recognizes this concept, article 2987 suggests that the word "represent" must be understood as encompassing situations in which the representative acts on the principal 's behalf.

[17] Holmes, Wendell H. and Symeonides, Symeon C., "Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law" (Journal Articles, (1999), p. 26. Access mode: http://digitalcommons.law.lsu.edu/faculty_scholarship

J. Clarise noted in his dissertation that Laband's "*separation theory*" refers to two fundamentally different aspects of the representation, internal (between the principal and the agent) and external (agent acting in relation to third parties).[18]

Considering the term 'agent' in the common law understanding, both aspects are applicable. However, some agents may be described as agents by virtue of the internal relationship but have no external powers (incomplete agency).[19]

Also, the scientist formulated an approach by which the action of the representative has legal effect and creates legal consequences for the principal, when the representative performs actions directly informing the third parties that he operates on behalf of the principal and in his name, but not in his own. In this case, there is a so-called direct representation in which the principal becomes a party to the obligations arising from the actions of his representative.

The importance of the "separation theory" lies in the fact that the limited authority of a representative appears to be ineffective in relation to third parties and protects the rights and interests of third parties with whom the representative enters into legal relationships. In other words, mentioning in the contract certain limitation of representative's powers generally describes what he "should not do", but this is not the same as he "cannot do" and as a result does not diminish his powers[20].

The concept of "separation" fully integrated by the German law, however, it was later "mitigated" by a court practice, which excluded the responsibility of the principal to third parties acting in a bad faith when they knew or should have known that the agent acted outside the scope of authority. At the same time, this did not prevent the Laband's concept of separation to be later named the "legal discovery" of that time[21].

The modern concept of representation under German law is explained in relation to such postulates. First of all, Germany, being a jurisdiction with a dual legal system of private law, is subject to a dual regulatory effect of civilian turnover, by Civil Code (*Bürgerliches Gesetzbuch (BGB)*[22]*)* and the Code of Commerce (*Handelsgesetzbuch (HGB)*[23]*)*, and the relations of representation are governed by both named confidential acts.

Paul Laband formulated his concept being a theorist of law, and therefore, when the provisions of the theory faced the realities of commercial turnover and the variety of forms of

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[18] Clarise V.-J De la représentation : son rôle dans la création des obligations : Thesis/dissertation. – (Lille: Université de Lille, 1949), 238 p.
[19] Reynolds, F.M. B. Bowstead & Reynolds on Agency. – [18th ed.]-London: Sweet & Maxwell, 2010.- 944 pp., 9.
[20] Цюра В. В. Ґенеза дослідження інституту представництва у зарубіжній правовій доктрині (Jurnalul juridic naţional: teorie şi practică. – № 4. – 2016. – С.129–132).
[21] Muller-Freienfels W. The Law of Agency (American Journal of Comparative Law. – 1957, 172–173).
[22] Burgerliches Gesetzbuch (BGB) : Neugefasst durch Bek. v. 2.1.2002 I 42, 2909; 2003, 738; zuletzt geän dert durch Art. 16 G v. 29.6.2015 I 1042. Access mode : http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf.
[23] Händelsgesetzbuch : Ausfertigungsdatum: 10.05.1897 Access mode : http://www.gesetze-im-internet.de/hgb/BJNR002190897.html#BJ NR002190897BJNG000200300

commercial agency, there was a difficult task to adapt the provisions of concept to the existing relations. The main difficulty was that all forms of representation are abstract, with a certain degree, and the limitation of the agent's authority in some forms of representation is more obvious than in others. The solution to this problem was to analyze all forms of mediation, and to determine the limits of authority required for each of them.

For this reason, modern German law contains the most detailed and scientifically substantiated typology of various forms of mediation. Both codes contain the provisions which regulate 13 different forms of mediation. In comparison to the German civil code, the French civil code has adopted only four main types of intermediary.

To mention them:

- Commission agent (German Kommissionär, French commissionaire) accepts or sells goods for the account of his principal, but on his own behalf.
- Commercial agent negotiates and concludes contracts on his principal's behalf. He is never totally independent.
- Broker (German Mäkler, French courtier, Italian mediatore) is a business agent who is completely independent of his principal.
- Sales representative is a dependent employee who concludes contracts for the merchant outside the business establishment (*Employed agent*)[24].

German law, in contrast to common law understanding where the agency is considered by lawyers as the tripartile relations are presented (the principal - third persons, the agent - third parties, the principal – the agent), clearly differentiates the authority of the agent to perform binding actions for the principal in relation to third parties. The latter may exist in the form of agency agreement governed by §662 BGB, or proceeding from negotiorum gestio (§677 BGB), or derive from the family law provisions (§1626 BGB).[25]

Type of agency mainly depends on the ground of its occurrence. Since today private law is based on the principles of parties' equality, the autonomy of will and freedom of expression, there is no need to emphasize this once more by using the terminology, which is concerned on volitional content of certain categories. Such a position is adopted by the authors of the Draft Common Frame of Reference and the UNIDROIT Principles, which pay attention mostly on the basis of origin, rather than volitional aspect.

Regarding the modern approaches in European private law, it is concluded that representation should be divided into two types: contractual and non-contractual. Thus,

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[24] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law

[25] Цюра В. В. Ґенеза дослідження інституту представництва у зарубіжній правовій доктрині (Jurnalul juridic naţional: teorie şi practică. – № 4. – 2016. – C. 129–132).

representation based on contract is contractual, as the reason of its occurrence is the conscious and free will of parties which is objectified in contract between them. Representation based on law is non-contractual, since its occurrence does not depend on the parties' will and intentions[26].

UNIDROIT principles distinguish also direct and indirect agencies regarding the principal's disclosure. So, if an agent acts on behalf of the principal openly, then the rules of direct representation apply. It does not matter whether the principal is disclosed during the actions of the representative or should be disclosed later. If the intermediary acts on instructions and in favor of the principal, but not on his behalf, or if the third party does not know or has no reason to know that the intermediary acts as an agent, then the rules of indirect representation are applied. It should be emphasized that this classification came into the European legal tradition from the Common law where the doctrine of undisclosed agency is well-developed[27].

German civil law, for example, regulates only "direct representation", where the agent carries out transactions on behalf of the principal. At the same time, the agent is obliged to inform third parties that he performs a transaction not on his own behalf. German civil law does not recognize "indirect representation", where the agent acts on his own behalf.

Commission is a type of legal relationship that emerged on the basis of indirect representation, the essence of which is that the representative carries out the transaction not directly on behalf of the person represented, but "secretly"- on his own behalf.[28]

Hence, the civil law follows the two-contract construction when creating agency relations, which are the contract between the third party and the agent and between the agent and the principal, and these two contracts are immutable[29].

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

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[26] Цюра В. В. Інститут представництва в цивільному праві України.: дис. … канд. юрид. наук: 12.00.03/ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.177.
[27] Reynolds F. M. B. Bowstead & Reynolds on Agency ([18th ed.]. – London: Sweet & Maxwell, 2010. – 944 p).
[28] Сибіга О. М. Договір комісії за Цивільним кодексом України: дис. … канд. юрид. наук : 12.00.03 / Нац. юрид. акад. України ім. Я. Мудрого. – Х., 2009. – 198 с., с.10.
[29] F.H. Lawson, The Roman law reader, (Oceana Publications,1969),140.

Although it should also be noted that in some cases the undisclosed agency is recognized by the German courts when it happens that certain transactions are carried out in relation to commercial units "*for whom it may concern*"(situation with cash payments in shops)[30].

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

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

In comparison to civil law jurisdictions, the modern theory of agency in the context of common law is the product of many historical influences[31]. In medieval ages the common law had a primitive non-mercantile character where the principal entered in direct contractual relationship with the third party and no idea of agency was known.

The influence of mercantile law was recognized a couple of centuries later when the expression of "*agent"* came into use[32] and the concept of undisclosed principal became peculiar to common law system. It is considered that it arose from the practice of employing factors on a commission basis. Stoljar regarding this issue rightly observes:

> "This picture radically changed when at the turn of the eighteenth century trade much increased both in volume and speed. As a commission agent the factor's interest therefore was to keep the volume of sales as high as possible, and this commercial expansion would also tend to make the factor into a more independent merchant[33]".

Since the early 18th century the foundation of the theory of agency in the common law is the *"doctrine of identity"* of the principal and agent. The core principle of doctrine is usually expressed in the phrase *"qui facit per alium, est perinde ac si facit per se ipsum" ("whoever acts through another acts as if he was doing it himself"),* though such a complete identification is often regarded as inappropriate. But, at the same time this approach brings a certain degree of unity on the law applicable to situations where one party represents or acts for another. The first

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[30] Markesinis Basil S., Unberath H., Johnston An. The German Law of the Contract: a Comparative Treatise/ (Oxford: Hart Publishing, 2006. – 1040 p.), 111.
[31] Schmitthoff, Clive, Agency in International Trade, A Study in Comparative Law, 117 Rec.Cours 1970-I, 115.
[32] G. H. L. Fridman, The Law of Agency, 2nd ed. (London 1966), 5.
[33] S. J. Stoljar, The Law of Agency (1961, London, 37), n. 53.

references to this doctrine are contained in the work of Edward Coke, the prominent lawyer of the 16th century, *"Coke upon Littleton" (1628 p.)*[34] *and Holmes*[35] who regard it as the “common term”, the fundamental concept of the theory of agency in the common law[36].

The doctrine of identity constitutes the direct antithesis of Laband’s theory of separation. It assumes that the principal has the *alter ego*, the agent, who is duly authorized to act within the limits of his authority[37]. In this case, the agency is considered as a consequence of the commission and as an integral part of this contract.

Following the statement of C.M. Schmittgoff, both theories shared the common ground since in “pre-Laband” European codifications the idea had been found that *Représentation* is the consequence of mandate and inseparable from it[38]. However, after the adoption of Laband’s doctrine of separation, the development of that theory was stopped.

The prevalence of the theory of identity, in addition to cultural and historical determinants, was that it could be used as a theoretical basis of all forms of agency encountered in practice (unlike situation with German law). After all, the approach of identification of two different subjects (the principal and the agent) was more practical and brought certain legal flexibility to the law of agency, and was more justified from the standpoint of the needs of commercial relations, than the doctrinal and abstract method of separation.

Moreover, the area of conflict between theoretical and commercial reality is not so sharp in common law than in continental as far as English law attempted to link agency rules with the everyday needs of the principal–agent relationship, unlike continental European law treatment.

This can be similar to the conflict of principles frequently recognized in the law of property between security of title and security of transactions. In common law there is a predominant principle that a person does not lose his ownership except by his own voluntary act. The same is valid for contractual obligations: a person cannot be subjected to a contractual obligation through another except by his own volition. Exceptions may be provided by the statute or under the doctrine of apparent authority, which is based on estoppel[39].

The common law approach is based on the “*externalized*” theories which state that agency situations should be explained from the third party’s point of view, an apparent authority should be an application of the normal rules rather than exception accommodated by elaborate explanations. This means that common law fails to make a proper distinction between the

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[34] Coke E. Coke upon Littleton: Readable Ed. (London: Saunders and Benning Law Booksellers, 1830. – 215 p).
[35] Holmes, The History of Agency, 3 Select Essays in Anglo-American Legal History, 390.
[36] The view of Stoljar, loc. cit., 15, that this implies the concept of a "sort of automation or tool" of the agent in the hands of the principal is, it is submitted, due to a misunderstanding of Holmes' thesis.
[37] Schmitthoff C. M. Select Essays on International trade Law (Dordrecht – Boston – London: Martinus Nijhoff Publishers / Graham & Trotman. – 1988. – 807 p.), 15.
[38] Schmitthoff, Clive, Agency in International Trade, A Study in Comparative Law, 117 Rec.Cours 1970-I, 115.
[39] Factors Act 1889, Articles 83,85,87; See also Sales of Goods Act 1979, ss.24,25 (derived from the Factors Act)

internal relation between principal and agent and the external relation between the agent and third parties, but simply involves the contract of only two persons.

Undeniably, the theory of identity also has certain problems but it seeks to protect the principal's interests by adoption of the maxim that the agent's unauthorized act does not bind him. But in the perspective of commercial life, "external" approach provides some exceptions in order to protect a third party who can appear to be in a state of uncertainty whether the agent had the appropriate authority. Third parties acting in a good faith are entitled to rely on manifestations of agency, even if they suspect the agent of acting without authority[40].

German law, in its turn, contains a general provision that protects the good faith purchaser of movable property[41] but the common law follows the principle *nemo dat quod non habet* which corresponds to the difference in the law relating to this issue.

The balance of the protection of the rights of the principal and third parties was achieved by introducing the concept of "*implied authority*", which implies that empowerment may come from the behavior of the parties. This concept illustrates the presumption of the expression of the principal's will. Since without the principal's consent no representation can be established, it may be implied from the business practices or the principal's conduct which made the agent to think that he is empowered to act, even though no authority was actually conferred[42].

Various kinds of agency relationships are known to Anglo-American commercial life. The Theory of agency in the common law is classified into three types of agents:

· Agents acting for a named principal;

· Agents acting for an unnamed principal; and

· Agents acting for undisclosed principal.[43]

The core function that connects all three types is the ability to make their principals bound in contractual relations with third parties. This problem may come up when the agency contract overlaps with the general theory of contract where the contracting third party is to ascertain with whom he has contracted. Obviously, in the agency contract, rights and obligations arise primarily towards the contracting third party and the principal as the agent is acting on the latter's behalf. This problem might be somehow solved by applying the liability test, which was developed for *undisclosed (indirect)* agency.

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[40] Muller-Freienfels W. The Law of Agency (American Journal of Comparative Law. – 1957. 170–173).
[41] Bürgerliches Gesetzbuch (BGB) : Neugefasst durch Bek. v. 2.1.2002 I 42, 2909; 2003, 738; zuletzt geän dert durch Art. 16 G v. 29.6.2015 I 1042. Access mode: http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf
[42] Цюра В. В. Ґенеза дослідження інституту представництва у зарубіжній правовій доктрині (Jurnalul juridic naţional: teorie şi practică. – № 4. – 2016. – С. 129–132).
[43] Awet Hailezgi, Addisu Damtie, Authority by Virtue of Contractual Agency. Access mode: https://chilot.files.wordpress.com/2011/06/law-of-agency.pdf

Following the doctrine of identity, common law avoids the fragmentation typical in the civil law situation, and recognizes both direct and indirect agency. The essence of the indirect agency is the situation, when a duly authorized agent acts in his own name, without disclosing his principal's capacity, so the third party is unaware of the existence of the principal, nevertheless a direct contractual relation will be constituted between the principal and the third party who will become a party to the main contract and the intermediary ship of the agent who originally contracted in his own name will be disregarded.[44]

To sum up, agency varies according to legal family, where it is functioning. Two theories were developed which have led to the different interpretation of the doctrine in different jurisdictions. Both theories have their benefits and drawbacks, but the theory of the identity, being based on the"*uniform concept*" of acting, and better corresponds to the needs of the reality. Based on this concept, the doctrine of undisclosed principal was born in the common law system.[45]

Ukraine, being a continental law country, has accepted the "separation theory" approach, since it enables to cover all known forms of mediation activities based on the representation, regardless of the basis of their occurrence. However, modern commercial realm requires flexibility and practical orientation of agency relations, so, it is proposed to implement provisions of theory of identity regarding the issues of authority, indirect representation and uniformity of rules regarding the civil and commercial representation.

[44] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law
[45] Lando Principles, Section 2/art. 3.202., 3.201.

1.2 ELEMENTS OF AGENCY

"Agency is a fiduciary relationship which exists between two persons, one of whom expressly or implied manifests assent that the other should act on his behalf to affect his relations with third parties, and the other of whom similarly manifests assent or otherwise consents so to act. The one on whose behalf the act or acts are performed is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party"[46].

As far as the concept of agency is notoriously slippery and difficult to define, the above mentioned definition is hoped to provide a useful starting point to an area of law where the concepts have been "*peculiarly troublesome*"[47]. This definition is aimed to explain the phenomenon of "*common-law agency*" or "*true agency*". For this reason, all other similar relationships are excluded, even though the consequences of the one person's actions are assigned to another person.

Also, the recourse aims to specify the general worlds such as "agent" and "agency" as they frequently appear in propositions of law, particularly in statutes and other formal documents[48].

Why is it so important to define clearly the notions of "agent" and "agency"? The problem is that agency can take multiple of different forms, and the word "agent" is indiscriminately used to describe individuals and entities whose activities, in strict legal terms, are not actually governed by the law of agency. Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties—the principal, the agent, and the third party with whom the agent has to deal"[49]. For this reason, cases of so-called *"false agency*" frequently occur, when the term "agent" is applied to a variety of actors, some of whom do not even have an authority to act.

To explain the previous quotation, several examples should be given, a selling agent is more likely to be a distributor than an agent, and even an "estate agent" will not probably meet the requirements of an agency when selling properties to clients, since he will rarely be

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[46] Haringey LBC v Ahmed (2017) EWCA Civ 1861, per Lewison L.J. Access mode: https://local-government-law.11kbw.com/agency/1535
[47] Müller – Freienfels, in Civil Law in the Modern World (Yiannopoulos ed. 1965), 77 at 79.
[48] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010.- 944 p.), 1.
[49] Echeverri, D. § 1.01Agency Defined, Restatement (Third) Of Agency § 1.01 (2006), 2015 Thomson Reuters. Access mode: https://wiki.duke.edu/download/attachments/89915635/Restatement%20(Third)%20of%20Agency%20Section%201.01.pdf?api=v2

empowered to bring his principal into direct contractual relations with a third party purchaser.[50] Agency should be distinguished from other relationships, such as trustee, bailey, independent contractors (that will be discussed later), person supplying services, etc. For example, trustee holds money or property for another, whereas an agent performs actions on the other's behalf.

Thereby, the problem of distinguishing genuine cases of agency and other legal relationships is very urgent and not really new. To prove this, the observation of Lord Herschell in *Kennedy v. De Trafford*[51] may be taken into account:

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

In recent times, the law of agency has also acquired a dualistic character. A concept of "commercial agent" was introduced by the European law in 1993 under the Council Directive of December 18, 1986 alongside the traditional concept of "agent" in common law understanding. This type of agency differs from the original one in several aspects: 1) commercial agents possess their own specific regime of rights and duties to their principals, 2) and of entitlements upon termination of their agencies[52].

The term "commercial agent" under the Directive is qualified as a self-employed intermediary who has a permanent authority to negotiate the purchase or sale of goods or other agreements on behalf and in the interests of the principal. In the meaning of the Directive, an agent must be a person who is continuously and professionally engaged in intermediary activities. A natural person cannot act as a commercial agent. Also, the Directive does not apply to representative activities in the field of services. This document regulates the issue of rights and obligations of the commercial agents, their remuneration, the conclusion and termination of a contract with an agent, etc[53].

So, there may be plenty of examples when the usage of the very term "agent" may appear to be legally uninformative. But even when it is used in the correct legal sense, the rules affecting agents are not uniform as there are specific rules and customs that apply to different types of agent. Anyway, it should be noted that no one has a monopoly of the "correct" use of any particular term. There are as many definitions and understandings as many scientists are interested in any particular topic.

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[50] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.), 2.

[51] Kennedy v. De Trafford (1897) AC180 citation in Adrian McCullagh "The Validity and Limitations of Electronic Agents in Contract Formation" Access mode: https://law.uq.edu.au/files/18238/A-McCullagh_The-Validity-and-Limitations-of-Software-Agents-in-Contract-Formation.pdf

[52] Munday, R. Agency: Law and Principles (First Edition – New York: Oxford, 2010- 369p.),v.

[53] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.127.

In this work both terms “representative” and “agent” would be used, as in countries with civil and common law they basically mean the same, describing a person representing the interests of the principal in his name and possessing the powers to affect the principal’s legal position in relation to third parties. So, these terms will be considered as synonyms as far as both common and civil systems of law would be regarded further from a comparative perspective.

If not to pay much attention on details, this definition brings out the following distinctive legal features of an agency that consequently appear to be essential for its creation: 1) agent’s fiduciary duty regarding the fiduciary nature of the relationship; 2) principal’s power and the right to interim control; 3) in most instances the relationship between the principal and the agent will be consensual, very often contractual; 4) and the parties’ legal capacity to perform actions.

The very concept of representation is also debatable under Ukrainian law. But after providing the analysis of the theoretical foundation of the doctrine, it is possible to conclude that today there are three main approaches to understanding of the legal essence of representation: 1) representation as a “legal reception” (Andreev, Krupko); 2) representation as an action (Nersesov, Ryasentsev); 3) representation as a legal relationship (Nevzgodina, Ioffe)[54].

After considering all of these concepts, the most appropriate and the most commonly accepted one is the concept of “legal relationship”, since any activity becomes legal and important only when implemented through relationships regulated by law. In our case, for the representative to perform acts on behalf and in the interests of the principal, initially the relationship should be established between them, which consequently would lead to empowerment of the representative to act[55]. This approach is also presented in the art 237(1) of the CCU where agency is defined as “a complex, tripartite legal relationship where one party (representative) is obliged or has the right to act on behalf of the other party which is being represented[56]”.

The term “agency” refers to the relationship between the principal and the agent; to the function of the agent with respect to the outside world; or to the total sum of all legal relations involving principal agent and third parties arising in such situations[57].

Due to its complexity, few levels of agency relationships are distinguished by scholars. Some say that only two levels are present: internal (between the principal and the agent) and

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[54] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.137.

[55] Доманова І. Ю. Інститут добровільного представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03 /Київ. нац. ун-т ім. Т. Шевченка. – К., 2006. – 222 с., с.213.

[56] Civil Code of Ukraine of January 16, 2003 // Information from the Verkhovna Rada of Ukraine. - 2003. No. 40-44. – 356 pp. Access mode http://zakon5.rada.gov.ua/laws/show/435-15

[57] Ms N Gregg v London Borough of Redbridge and others: 3200435/2016. Access mode: https://assets.publishing.service.gov.uk/media/58dcdbede5274a06b3000067/Ms_N_Gregg_v_London_Borough_of_Redbridge_32004352016_Full.pdf

external (with the participation of third parties) relations[58]. The concept of a three-tier structure of representative legal relationship was proposed by Krasavchikov and supported by a majority of scholars. Thus, it is believed that the representation contains three types of legal relations: a) the internal relationship between the representative and the principal; b) external legal relationship - between a representative and a third person; c) and the relationship between the principal and the third party which is the result of implementation of the two abovementioned relations[59].

Agency relations have a complex structure and are divided into internal and external. The latter, in its turn, includes the legal relationship between the agent and the third party and the relationship between the principal and the third party. Therefore, we can talk about the three-tier structure of relations of representation.

The external level of relations is formed between the representative and the third party. The representative may be able to choose the third party by himself or by the principal's instructions. Also, the third party may be chosen in accordance with the law. For example, an attorney can represent his client only in certain courts or institutions[60]. By the way, since 2018, changes were introduced to Article 131-2 of the Constitution of Ukraine, by the course of which lawyers have received a monopoly for representation in the courts of second instance, regardless of the type of proceedings. However, such a "monopoly" is rather controversial, as a lot of exceptions may be found to the general rule.

Thus, according to Article 60 (2) of the Civil Procedural Code of Ukraine, in disputes arising from labor relations and in minor cases (the value of a claim does not exceed 100 minimum living wage rates for capable persons (176 200 UAH in 2018)), a representative may be not an attorney, but has to be at the age of 18 years and have civil procedural capacity. Also, a case may be recognized minor by the court due to its insignificant complexity.

Internal relations mostly represent the fiduciary side agency relationships as they are based on trust between parties. Trust must be present both in contractual and non-contractual agencies as the agent is held to a very high standard of conduct in carrying out his tasks for the principal. So, without trust agency relations are just impossible and the loss of trust may even serve as a ground for termination of the agency. Fiduciary character of relationship signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. Fiduciary duty involves the agent's relationship to property owned by the principal or confidential

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[58] Гражданское право: учеб./под общ. ред. Т. И. Илларионовой, Б. М. Гонгало и В. А. Плетнева. – М.: Норма-Инфра. – М., 1998. – 464 с.

[59] Носкова Ю. Б. Представительство в российском гражданском праве: дис. ... канд. юрид. наук: 12.00.03./ Екатеринбург, 2005. – 187 с., с. 136.

[60] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. Ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.235.

information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity[61].

However, it is a question whether the agent's way how to carry out his duties may comply with the fiduciary doctrines if that way conflicts with the principal's vision. Under Ukrainian law we may, however, find such a position that the agent's act which has been performed in the way that violates the principal's instructions is considered to be unauthorized[62].

Some answers to this problem may be found in the Restatement (Third) of Agency which notes that "*the agent shall act on the principal's behalf and under the principal's control*"[63]. This statement is better clarified in the art.7.07 (3) (a) of the Restatement, Third where an employee is defined as "*an agent whose principal controls or has the right to control the manner and means of the agent's performance of work* [64]".

This notion is of particular importance for employment law where it is an identifying characteristic of the employment relationship, and for imposing the employer's vicarious liability for an employee. However, this definition is far from ideal one as it cuts off the persons who are normally thought of as employees and are treated as such by their employers and at the same time it covers agents who act gratuitously and are not considered to be employees, as that term is commonly understood.[65]

The example of the first case may be a physician working in the hospital, as far as the hospital or the so-called employer (not itself being a doctor) lacks the authority to control the way the physician is practicing medicine[66]. The second problematic situation that this definition may be applied to a person (the agent) who agrees to help a friend (the principal) without any remuneration with a certain task and the helper accepts direction from the principal[67]. In such a case, the helper is deemed to be an "employee" under the Restatement (Third) of Agency. This

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[61] Echeverri, D. § 1.01Agency Defined, Restatement (Third) Of Agency § 1.01 (2006), 2015 Thomson Reuters. Access mode: https://wiki.duke.edu/download/attachments/89915635/Restatement%20(Third)%20of%20Agency%20Section%201.01.pdf?api=v2

[62] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.334.

[63]Restatement (Third) of Agency 2006, § 1.01.

[64] Restatement (Third) of Agency § 7.07(3)(a).

[65] Loewenstein, Mark, Agency Law and the New Economy (November 1, 2017). 72 Bus. Law. 1009 (2017); U of Colorado Law Legal Studies Research Paper No. 17-18, p.1014-1015.

[66] Restatement (Second) of Agency § 2.2.3 cmt. a (AM. LAW INST. 1958) ("The physician employed by a hospital to conduct operations is not a servant of the hospital"); Albain v. Flower Hosp., 553 N.E.2d 1038, 1043–44 (Ohio 1990) (holding that hospital lacked sufficient control over physician to justify liability under respondeat superior), overruled in part by Clark v. Southview Hosp. & Family Health Ctr., 628 N.E.2d 46 (Ohio 1994).

[67] Restatement (Third) of Agency § 1.04(3) (defining "gratuitous agent"); see also id. § 7.07 cmt. f ("The fact that an agent performs work gratuitously does not relieve a principal of vicarious liability when the principal controls or has the right to control the manner and means of the agent's performance of work.").

happens even despite the fact that the helper is uncompensated, may have no intention to enter into agency relationship, and in common parlance would never be called an employee.

From this point of view, the aforementioned definition may cause certain problems when imposing vicarious liability for the employer if the employee has negligently injured another when acting within the scope of employment. That is to say, as the hospital cannot control the way its employee/physician practices medicine, the common law does not impose vicarious liability on the hospital[68]. At the same time, according to the underlying rationale for the common-law definition of "*employee*", if that volunteer negligently injured a third person while cleaning the pool, the principal would bear vicarious liability because, by assumption, the principal could control the conduct of the agent.

To avoid such awkward situations, it makes a little sense to apply employment laws also to wholly voluntary and gratuitous relationship and to reconsider the possibility of applying those laws to a hypothetical example of hospital-employed physician.

Also, the problem usually arises when speaking about "independent contractors", since in the light of the stunning growth of the "*new economy*" (*eg. Lyft, Uber, Airbnb)*[69] multiple strategies are being introduced for achieving a competitive advantage by businesses. The establishment of "employment" relationships with independent contractors, as a rule, would not result in vicarious liability for the employer as the latter is not liable for the negligent conduct of such worker. The "employer" lacks control over such a contractor and cannot be made liable for the unauthorized act of the contractor, even if the manifestation of authority made the third party to believe that the agent is duly authorized[70].

Restatement (Second) of Agency defines an independent contractor as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking[71]". Restatement (Third) of Agency, in its turn, tends to abandon the term *"independent contractor"* but notes that it is "equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are non-agent service

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[68] Restatement (Third) of Agency 7.07 cmt. b ("An employer's ability to exercise control over its employees' work-related conduct enables the employer to take measures to reduce the incidence of tortious conduct.").
[69] The sharing economy has been described as "[a]n economic model based on sharing underutilized assets... for monetary or non-monetary benefits." Rachel Botsman, The Sharing Economy Lacks a Shared Definition, FAST CO. (Nov. 21, 2013), http://www.fastcoexist.com/3022028/thesharingeconomy-lacks-a-shared-definition.
[70] Pokhodun Y., Unauthorized agent from a comparative perspective (Часопис київського університету права.- 2017.- Вип.4), c.309.
[71] Echeverri, D. § 1.01Agency Defined, Restatement (Third) Of Agency § 1.01 (2006), 2015 Thomson Reuters. Access mode: https://wiki.duke.edu/download/attachments/89915635/Restatement%20(Third)%20of%20Agency%20Section%201.01.pdf?api=v2 , Restatement (Second) of Agency § 2(3).

providers[72]". The latter Restatement does not use the term "independent contractor," except mentioning in other materials that use such a term.

Both definitions of employee and independent contractor are concentrated on the question of control. As a result, there is a strong need to identify the characteristics of an employee whose employer lacked such control. Courts in different cases such as FedEx Ground Package Systems, Inc. ("*FedEx"),* Uber case have tried to establish certain criteria to distinguish these terms.

A comment in Restatement (Third) of Agency made an attempt to capture those characteristics:

> "[T]he principal may exercise the agreed extent of control over details of the agent's work; whether the agent is engaged in a distinct occupation or business; whether the type of work done by the agent is customarily done under a principal's direction or without supervision; the skill required in the agent's occupation; whether the agent or the principal supplies the tools and other instrumentalities required for the work and the place of performance; the length of time during which the agent is engaged by a principal; whether the agent is paid by the job or by the time worked; whether the agent's work is part of the principal's regular business; whether the principal and the agent believe that they are creating an employment relationship[73]".

During the last decade, a lot of cases appeared in courts regarding the question of exercising control over the employees by employers and the differentiating of terms "employee" and "independent contractor". The most prominent ones are FedEx and Uber litigations which resulted into numerous cases that drivers brought against their companies.

With a view to the whole range of possible problems, it should be clear that the definition of who is an employee and who is an independent contractor is intensely factual and often unpredictable. Various courts and administrative agencies have developed different tests, with the result that a person may be an employee for some, but not for other, purposes.[74] One of such tests was developed by the California Supreme Court in case S.G. Borello & Sons v. Dept. of Industrial Relations[75], the so-called "right-to-control-test" which stipulates that "[t]he principal test of an employment relationship is whether the person to whom service is rendered, has a right to control the manner and means of accomplishing the result desired…[76]".

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[72] Echeverri, D. § 1.01Agency Defined, Restatement (Third) Of Agency § 1.01 (2006), 2015 Thomson Reuters. Access mode: https://wiki.duke.edu/download/attachments/89915635/Restatement%20(Third)%20of%20Agency%20Section%201.01.pdf?api=v2

[73] Restatement (Third) of Agency § 7.07 cmt. F (2006) (listing similar factors). Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf

[74] Loewenstein, Mark, Agency Law and the New Economy (November 1, 2017). 72 Bus. Law. 1009 (2017); U of Colorado Law Legal Studies Research Paper No. 17-18, p.1025.

[75] S.G. Borello & Sons v. Dept. of Industrial Relations (1989) 48 cal.3d 341.

[76] Buchalter Nemer - Robert S. Cooper,The Concept Of Independent Contractor Is Under Assault—Especially In California, 2016. Access mode: http://ukrainianlaw.blogspot.com/2016/08/the-concept-of-independent-contractor.html

Returning to the agency in general, the problem of distinguishing "agent" and "independent contractor" plays a more limited role. Sometimes agents may be independent contractors, and their principals may be vicariously liable for them in tort, even though the amount of control exercised is much more limited than in classic employment relationships. The reason is that principals very often lack the right to control the full range of the agent's activities and the manner in which they perform such actions, so they can only give some instructions to their agents. Of course, in situations when agents are authorized only to perform specific actions, the principal's control may be realized only through the power to revoke the authority.

Regarding situation in Ukraine, the phenomenon of independent contractors is not that developed. Nevertheless, in the light of rapid growth of on-demand companies and IT industry, it is important for legislatures to clarify the law and protect these businesses, which continue to grow as the demand is high, and because many workers enjoy to work on their own schedules and outside of the traditional workplace[77].

All above mentioned might lead to a logical conclusion that control is not an essential feature of the internal relationship. Nevertheless, if the principal gives up all control of his supposed agent, the relationship is only doubtfully one of agency[78]. The idea of control may also be relevant and requires mentioning where it is contended that a company is an agent of its parent[79]. For this reason, some scientists assume that in case the central notion of agency is not required, the idea of control does not seem sufficiently important to be inserted into the formal definition[80].

Nevertheless, to my mind, the requirement that an agent has to be subject to the principal's control should not be underestimated as far as it assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. So, main justifications for the principal being accountable for the agent's acts are his ability to control the agent and to terminate the agency relationship, together with the fact that the agent has agreed to act on the principal's behalf.

For this reason, it should be always borne in mind that even though a principal and an agent stay separate legal personalities, the fact that the agent acts on behalf of another person entails the existence of limits regarding the scope of the agency relationship and the extent to which the principal is responsible for the agent's acts.

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[77] Pokhodun Y., Unauthorized agent from a comparative perspective (Часопис київського університету права.- 2017.- Вип.4), p.309.

[78]The control test is applied to advertising agency in CFTO-TV Ltd v. Mr Submarine LTD (1994) 108 D.L.R. (4th) 517, affd (1997) 151 D.L.R. (4th) 382.

[79] Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd ACN 087 011 541 [2008] FCA 1591. Access mode: http://www.unilex.info/case.cfm?id=1367&step=FullText

[80] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010.- 944 p.), 9.

Speaking about the aforementioned consent of an agent to act on the principal's behalf, many would agree that this feature lies at the root of agency since the agency arises out of either express or implied agreement between principal and agent. The majority of such agreements will be contractual, however, there may be non-contractual duties that may continue to bind the agent even after the termination of agency or when the agency is gratuitous.[81] Such relationships are consensual and require parties' consent to their association with each other.

This approach was adopted by academic literature, statutory laws and case law. However, in practice matters may differ greatly when it comes to fixing the exact nature of various parties' relationship. In contractual agencies the consideration must be present and such relations must be enforced by the agent's obligation to do what he promised and principal's obligation to pay remuneration for the agent's acts. It does not mean that gratuitous agencies have no rights and obligations or do not pay remuneration to the agent. They may have everything that contractual agencies have, even the possibility to incur liability for agent's faulty performance. The main difference is that in contractual agencies, a debt or obligation will be constituted by the act of the law, apart from any consent or intention of the parties or any privity of contract.[82]

The leading position among scholars nowadays is that consent should not be thought to lie in the heart of every agency as the latter is a legal, rather than simply factual category. If the relationship between the agent and principal is only consensual without any material evidence of their cooperation, very often it results in inability to penetrate the relations between the agent and the third party, the absence of a material witness, confused documentation, claimants who were unable to decide how to qualify the defaulting party's conduct as well as misused or misunderstood terms of "agent" or "partner" due to the difficulties in determination and objective perception[83].

Even when the parties have concluded a contract and named themselves as "agent" and "principal", there is still no guarantee that court will treat them the same way as this is not the reality of their relationship. Following Lord Pearson's words in *Garnac Grain*, "the parties will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognize it themselves[84]".

So, obviously, for the formation of agency relationships it is not necessary for the agent to manifest assent to the principal, as the court will mostly look on the previous words and conduct of parties at the time of agency creation. Later words and conduct may be taken into

[81] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.), 35.
[82] Book's Wharf and Bull Wharf Ltd v. Goodman Bros. [1937] 1 KB 534, 545.
[83] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.), 11.
[84] Garnac Grain Co Ltd v Faure & Fairclough Ltd [1967] 1 Lloyd´s Rep 495 at pp 508-509.

account by the court, but are likely to be less important[85]. Actually, when the agency relationship is imposed by law on the parties or the existing agency is extended in case of necessity to allow the agent to perform some emergency actions for protection of the principal's interests, the relationship is barely consensual. And the agent's consent is treated as a matter of fact.

One more problematic situation that is connected with the parties' consent is agency arising from the implied agreements. This question got a little explanation in case *Targe Towing Ltd v. Marine Blast Ltd* where the appropriate test was adopted for determining whether the agency agreement had arisen by implication. Lord of Justice Mance followed the approach that it is necessary to imply an agreement only "in case where one party has conducted himself towards another in such a way that it is reasonably for that other to infer the consent to the agency relationship from that conduct[86]".

This may prove the above quotation that the existence of consent should not necessarily mean the existence of the agency, but the defining factor must be the state of fact upon which the law imposes consequences which usually result from agency[87].

The fourth but not the least essential element for agency creation is the parties' legal capacity to perform certain acts. The agent's capacity to contract or do any other act is co-extensive with the principal's capacity himself to make the contract or do the act which the agent is authorized to make or do[88]. So, obviously, principal's capacity is the key element. For this reason, any person with a mental power to act can appoint a minor who would not be capable to perform the mandate himself as an agent. By the same virtue, a minor, provided that he is able to perform that act by himself, can appoint an agent to perform an act for him[89].

Earlier, there was a rule that minors cannot appoint agents. Now things are interpreted wider with a view that if the agent lacks capacity to contract on his own behalf (in cases with minors acting as principals), he acquires rights *ex hypothesi* or incurs personal liability on such contracts. So, "whenever a minor can lawfully do an act on his own behalf, to bind himself, he can appoint an agent to do it for him[90]".

A minor, of course, can have an agent to enter into agreements instead of him; however, those agreements would not bind a minor only because they were made through an adult agent. Having an agent does not mean transmitting his full legal capacity to a minor-principal; a minor

[85] Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480.
[86] Targe Towing Ltd v. Marine Blast Ltd [2004] 1 Lloyd's Rep 721, 21.
[87] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para 2-031.
[88] Ibid at [para 2-006].
[89] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.), 37.
[90] G. (A.) v. G. (T.) [1970] 2 Q.B. 643 at 652, per Lord Denning M.R. limiting earlier dicta of his own in Shephard v. Cartwright [1953] Ch. 728 at 735 (affd on another point [1955] A.C. 431).

cannot by an agent do more that he can personally do. In other words, the agent's power to act would be treated as invalid, and he would become personally liable for the acts done.

The situation differs in cases where a deed is involved. Any deed disposing of a minor's property executed by an agent appointed by means of such a power would be voidable by the minor as if he had executed it himself: "an infant cannot appoint an agent to make a disposition of his property to bind him irrevocably[91]". But where the power is executed in a deed form, it may be argued that not only the power is revocable for the future, but the deed itself is also voidable[92]. The contract between the minor and the agent should be treated as a contract of service which validity depends only on the agent's acts[93], and may bind the minor only in cases when it is for his benefit.

Speaking about the mentally disabled principals, the common law in this sphere is still undeveloped and the question about their protection is a difficult one. Things are getting more complex where agency relations are established.

In particular, third parties who choose to deal solely with an agent assume the risk whether the agent is empowered to bind the principal; the agent will usually be taken to manifest his or her authority to bind the principal, but the principal will be bound only if the agent possesses either actual or apparent authority[94]. The point is that the agent's authority must be established in every case when the principal is absent in order to protect parties in the future.

Contracts with a mentally incapacitated person are usually voidable if that person can show that he was at the time of contracting incapable of knowing what he was doing, and that the other party acted in a bad faith. This principle was established after the case *Imperial loan v. Stone*[95] which states that a contract with an incapax person is prima facie valid. Where there is a contract of agency, that contract ought to be effective if the agent did not know, or had no reason to know, of the incapacity, i.e. was acting in a good faith.

The conferral of authority and contracting are separate concepts, like the passing of title to property and contracting. It is established that a principal can terminate actual authority even when this would put in breach of contract[96]. Thus, the *Imperial Loa*n is not just a principle of contract formation; it also extends to the execution of relevant promises, such as the conveyance of property interests[97].

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[91] Meggary and Wade, Law of Real Property (7th ed., Harpum ed.), para.36-012.
[92] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para 2-008.
[93] O'Hare (1970) 3 U.Tas.L.Rev. 312.
[94] Peter Watts Contracts made by agents on behalf of Principals with latent mental incapacity: The Common law position (Cambridge Law Journal, 74(1), March 2015), 141.
[95] Imperial loan v. Stone [1892] 1 Q.B. 599.
[96] Bowstead & Reynolds on Agency, (20th ed. London 2014), Article 120.
[97] Hart v O'Connor [1985] A.C. 1000.

The degree of person's mental impairment can be only established by the court decision, having heard medical and other evidence. There has been relatively little Commonwealth case law regarding the question of principal's mental incapacity in the agent appointment but there are some cases dealing with the issue. For example, the High Court of Australia in *Gibbons v. Wright*, replicating in part a dictum in *Ball v. Mannin*, is widely cited in this respect: "the law does not prescribe any fixed standard of sanity needed for the transaction to become valid. It requires each party to have a soundness of mind and be capable of understanding the general nature of what he is doing...[98]".

Regarding the conferral of authority in non-contractual agencies, parties' intention always matters. However, in most cases it is not in the interest of both parties to establish the actual intention to delegate. So, obviously, it would often be contrary to a principal's interests if a third party could go behind appearances of a delegation to an agent and assert that there was no contract because of a lack of actual intent to delegate and that it is now too late to ratify[99].

Thus, the manifestation of a delegation plays for the agent in cases with incapax party's conferral of authority in order to avoid the liability in respect to the third party for breach of warranty of authority in the future. Also, the conferral of authority is said to turn on "a unilateral manifestation of will" by the principal[100]. So, it is not surprising that in *Freeman & Lockyer v Buckhurst Park Properties Ltd.*[101], Diplock L.J. treated the concepts of actual and apparent authority as governed by the same objective principles as applied to contracting.

In cases where the principal's mental disability is profound and self-evident, the appointment is likely to be ineffective. But where the incapacity is latent or just not self-evident, the conferral of authority would prima facie be valid. However, this works only when the agent does not know or has no reason to know about the incapacity, except the cases where agents dealt remotely with principals in circumstances where the incapacity would have become apparent had they dealt face to face[102].

When dealing with the third party it is essential to know whether the incapax party can make a contract, or at least manifest an intention to do so. Only after the sufficient representation, the third party may begin negotiations with an agent. It also has to be noted that no plead is possible in contracts where the third party knew or should have known about the principal's incapacity, whatever the agent's state of knowledge. This rule stems from the general principles of contract law.

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[98] Gibbons v. Wright (1954) 91 C.L.R. 423, 437 and Ball v. Mannin (1829) 1 D. & Cl. 380, 391, 6 E.R. 568, 572.
[99] prospect constrained, but not eliminated, by Bolton Partners v Lambert (1889) 41 Ch.D. 295.
[100] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para. 1-006.
[101] [1964] 2 Q.B. 480, 502; Restatement of the Law 3d, Agency (St Paul 2006), at §2.02, and the commentary.
[102] Peter Watts Contracts made by agents on behalf of Principals with latent mental incapacity: The Common law position (Cambridge Law Journal, 74(1), March 2015), 145.

Since the focus is placed upon the capacity of the principal, it is accepted that agent need not have full capacity to perform the acts on the principal behalf and that the main requirement is the sound mind of the agent. This is particular important for the principal to avoid the risk of inadequate representation[103]. For this reason, a minor may act as agent provided that he is able to consent to the agency and has sufficient understanding of the nature of his acts.[104] For example, a farmer sends cattle by rail but his driver cannot read and signs a consignment note that contains contractual terms. A farmer will be bound by such a note because the driver acted as an agent.[105]

Regarding the Ukrainian law, the focus is put differently and both capable and incapacitated persons can act as a principal in agency relationship as the extent of the legal capacity required varies according to the type of representation. As a consequence, there is a possibility for a so-called "dual representation" when a representative concludes a contract of commission on behalf of incapacitated person in which the latter becomes a principal.

As to the agents, it is noted that only fully capable citizens who can act as agents. The Ukrainian doctrine also explores the possibility for people with limited capacity to act as agents in respect of their minor children because of bearing certain property rights and responsibilities. For this reason, it is proposed to introduce changes to articles 37, 60 (3) CCU in order to allow people with limited capacity to act as representatives of their minor children[106].

These are the main elements of Agency that are essential for its creation and that constitute the essence of agency. It is necessary to highlight all of them because agency always suffers from inadequate definitions that are confusing and may lead to a wrong understanding of the nature of agency. It can be concluded that the agency is a non-material fiduciary legal relationship, where one person has the opportunity to affect the other person's legal position within the scope of authority granted to him in respect to third parties, with the full knowledge of the latter about the existence of representation relationship. Generally, the agent´s acts are authorized by the principal that basically means that the agent becomes an extension of the principal and is capable to affect the principal´s legal position. However, in order to perform such acts the consent of both parties and the capacity to contract (both mental and physical) are needed. Only after that the fiduciary relationships are established and the agency becomes valid.

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[103] Muller-Freienfels W. The Law of Agency (American Journal of Comparative Law. – 1957), 180-181.

[104] Restatement (Third) of Agency, § 3.05, giving an example of a child ordering books for a parent.

[105] Foreman v. G.W. Ry Co. (1878) 38 L.T. 851.

[106] Гелецька І. О. Правове регулювання відносин представництва у цивільному праві: автореф. дис.... канд. юрид. наук: 12.00.03 / НАН України; Ін-т держави і права ім. В. М. Корецького. – К., 2005. – 24 с., с.10.

1.3. MODES OF CREATION OF AGENCY RELATIONSHIPS

When all necessary prerequisites are met and the type of agency has been chosen, the relationship may be created. There are the following modes of agency creation.

Agency may arise by:

- Appointment;
- Estoppel;
- Ratification;
- Necessity.

Agency by appointment is one of the simplest ways in which the agency arises which requires an express agreement, whether contractual or not, between the principal and agent. This will constitute the relationship of principal and agent and the assent of both parties[107]. Depending on the degree of formality, this express agreement may be an oral or written. In formal cases written appointments with an attorney are made where agreements are stamped and registered. This is a usual practice for banking transactions when a customer requires a written evidence of appointment of the agent who will operate his banking business with the registered power of attorney.

Still, the general rule is that agency by appointment may be created orally and there is no formality for its creation. Agreement may be oral even in cases of appointing agents to deal with sale or purchase of immovable objects. The only one exception to this rule is where an agent is appointed to execute a deed on the principal's behalf; such an agent will be empowered by deed, which is called a power of attorney.

When the agreement is contractual, or accompanied by contract it will be regulated by the rules of contract law (offer and acceptance, mistake, illegality, misrepresentation, consideration, etc.); however, this will not apply to gratuitous agencies.

Agency by estoppel or by implied appointment usually arises by an agreement between parties where one party has conducted himself towards another in such a way that it is reasonable for that other to imply the assent to an agency relationship[108].

The legal term *'estoppel'* means that a person, who has let another person believe that a certain state of affairs exists, is not later permitted (is estopped) to deny that if the other person has acted to his detriment in reliance of that state of affairs and the denial would cause damage (usually financial loss) to that third party[109].

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[107] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para -2-028.
[108] Ibid, para -2-030.
[109] Law of Agency, access mode: https://www.casrilanka.com/casl/images/stories/EDBA/law%20of%20agency.pdf

There is no special rule peculiar to this type of agency. It is just aimed to show that agency contracts are not always expressly made, but very often may be inferred from the circumstances by the court. An implied contract differs from an express with the promise which is expressed, wholly or in part, by conduct rather than by words[110]. Thus, agency is implied from special circumstances of the case.

Regarding the doctrine of estoppel, the Restatement, Third in § 2.05 gives two types of estoppel situations in agency. The first one is that the principal, while making no manifestation of authority, by conduct intentionally or carelessly caused belief that the agent was authorized. The second is that where, having no notice of such belief, the principal did not take any reasonable steps to notify third persons about the absence of authority.[111]

First category can be regarded as an example of estoppel by representation. When the agent was negligent it will raise the initial question whether a duty of care is owed to the particular claimant. Usually the courts are willing to see an estoppel based on the breach of duty of care in the reasoning of the case but such situations are very rare in contract situations. The starting point is that individuals should often protect themselves in attempting to contract with others. The general argument would be rather dubious one, a person who chooses to act through others must take the risk of the ways in which those others act[112].

Second category explains cases where there is no manifestation of authority, but the conduct of the principal clearly indicates that there had been authority at an earlier time[113].

In agency arising by estoppel, the authority of the agent is described as apparent or ostensible but not actual, as it was not actually granted to the agent by the principal to act on the latter's behalf.

The major difference between apparent and actual authority will be discussed in the next Chapter, but what should be noted is that actual authority arises from the principal to the agent, while apparent authority flows directly to the third party from the principal. In the Restatement, Third it is stated that: "apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties who reasonably believe that the agent has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations[114]".

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[110] Mechem, Floyd R. (Floyd Russell), Outlines of Agency (Callaghan & Company, Chicago; 4th edition (1952), p.28. See also, Reynell v. Lewis (1846) 15 M. &W. 517.
[111] Restatement (Third) of Agency, § 2.05 (AM. LAW INST. 2006)
[112] Spencer Bower, The law relating to estoppel by representation (4th ed. - London : LexisNexis UK, 2004), paras II.5.23, II.5.24; See also MacAndrews & Forbes Co. v. United States 23 F 2d 667 (1928) (where a delivery order was left in a drawer in a public garage instead of delivering it to the truck driver- unauthorized agent).
[113] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para. 2-103.
[114] Restatement (Third) of Agency § 2.03 (2006). Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf

In certain circumstances, the scope of an agent's apparent authority may be equivalent to the scope of agent's actual authority, in other words, to the extent the agent reasonably believes in having the authority to act granted to him on the basis of his position or status by the principal[115]. Also, the extent of the agent's apparent authority created by estoppel largely depends upon the contents of the acts done by the principal to the third party who relies on representation.

In the Restatement, Second of Agency such "acts are to be interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality, trade or profession, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such authority, in the absence of reason to know otherwise. The content of such apparent authority has to be determined from the facts[116]".

Generally, the estoppel basis of apparent authority is highly criticized in United States and civilian countries as it causes certain problems with holding an unauthorized agent liable for the acts performed on the principal's behalf. The concept of estoppel prevents the principal from denying the existence of agency to a third party, thus only he can be held liable for the exceeding of authority by his agent. So, American law sticks to the leading view that the concept of apparent authority is based on the objective theory of agency, which is directly derived from the objective theory of contract. However, several important facts should be noted. Firstly, in all legal systems where apparent authority is based on estoppel, it works against the principal because he can only obtain an action against the third party by ratifying the unauthorized act of his agent. But where the doctrine of apparent authority is based on the objective theory of contract, the principal may sue the third party on the basis of apparent authority[117]. However, these two approaches have a little difference on practice as far as the principal can sue the third party both on the basis of apparent authority and ratification.

Agency by ratification, in its turn, arises when the agent acted without actual authority and the principal is liable to a third party if (1) the agent acts on the principal's behalf, and (2a) the principal expressly consents to the agent's act as authorized *(express ratification*), or (2b) the principal behaves in such a way which allows to presume his consent *(implied ratification)*[118]. If

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[115] Restatement (Third) of Agency § 2.03 (2006). Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf
[116] Restatement (Second) of Agency § 49 cmt. c. Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf
[117] Restatement (Third) of Agency and PECL follow the objective theory of contact.
[118] Restatement (Secondd) of Agency § 82-83, 85, 100, 143 (1958); Restatement (Third) of Agency § 4.01-4.03 (2006). Under the Second Restatement, ratification can occur only if the agent purports to act on the principal's behalf, but under the Third Restatement, ratification can occur if the agent acts or purports to act on the principal's behalf.

one of such conditions is met, the principal may ratify (approve) the act already in order to make it valid and effectual as if it had been originally done by the agent with exceeding his authority, or without authority at all[119].

Ratification seems to be a notion *sui generis.* It explains the idea that a person in certain circumstances can expressly adopt a transaction entered into by another person on his behalf on which he is not liable or entitled to become liable or entitled as if he had made it at the time of contract conclusion. It requires no consideration and novation would be also juristically different[120]. Also, the doctrine should be regarded as providing a normal case of agency, but where the intention of the parties is given effect retrospectively. Thus, under the concept of ratification the principal is held liable in the same manner as if he had actually authorized the contract at the time of its conclusion[121].

However, ratification is not valid if it would unfairly prejudice to the third party, or the latter has withdrawn from the transaction, or the circumstances have changed greatly.

For the doctrine of ratification it is completely essential that the principal at the time of ratification is fully aware of all the material facts of the original transaction[122]. For this reason, it may occur that the principal ratifies, but reserves his right to treat the agent liable for the cost of so doing[123].

Express ratification usually occurs through oral or written. Ratification may be implied from conduct or words, which are to be unequivocal[124]. Ratification can be also implied from a position taken in court litigation.

One more category, a bit similar to the previous one, is ratification by acquiescence that occurs when the principal’s inactivity is taken as the manifest of assent which constituted ratification. There is no requirement that ratification has to be communicated to the either party as it is a unilateral manifestation of will. However, in order not to place the principal into an unfair position (because silence and inactivity may also reflect the principal’s unwillingness or inability to perform the act himself[125]) it has been held that a reasonable time should be given to the principal for deliberation to pass[126]. As stated in the Restatement, Third ratification is not

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[119] Wilson v. Tunman and Fretson (1843) 6 M. & G. 236 at 242; Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para-2-050 as to the distinction between agency doctrine and use of the term “ratification” in connection with the release of directors from liability in company law.

[120] Re Portuguese Consolidated Copper Mines Ltd (1890) 45 Ch.D. 16 at 34.

[121] Restatement (Second) of Agency " 82, 100, 143 (1958); Restatement (Third) of Agency " 4.01(1), 4.02(1) (2006).

[122] Restatement (Third) of Agency, § 4.06 (AM. LAW INST. 2006).

[123] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para. 2-094.

[124] McLauchlan-Troup v. Peters [1983] V.R. 53 (receipt of rent was issued through agent whose authority was withdrawn, explicable on basis that he acted as agent for payer).

[125] Yona International Ltd v. La Réunion Francaise SA d'Assurances [1996] 2 Lloyd’s Rep. 84 at 106: ratification can be inferred from silence where the principal “allows a state of affairs to come about which is inconsistent with treating the transaction as unauthorized” per Moore-Bick J.

[126] Ing Re (UK) Ltd v. R & V Versicherung AG [2006] EWHC 1544 (Comm): [2006] 2 All E.R. (Comm) 870.

effective unless it precedes the occurrence of circumstances that would cause adverse and inequitable effect on the third parties' legal position[127]. This overlaps greatly with estoppel and restitutionary doctrine.

The person who ratifies an act must really exist and have the legal capacity to bear the consequences both at the time the act was done and at the time of ratification[128]. However, it is not necessary for the principal to know the third party at the time the act was done either personally or by name.

As ratification requires an agent to act on the principal's behalf, it is necessary to inquire the test whether the principal could have entered into such a transaction at the time the agent originally acted. It is not necessary for the agent always to name his principal but there must be at least a description of him that will amount to a reasonable designation of the person intended to be bound under the contract[129]. Thus, the agent theoretically can act for a completely unidentified principal, but a number of dicta argue that the principal must be known or ascertainable to the third party at the time of contracting[130].

The argument above was strengthened by the Second and Third Restatements of Agency that have a completely different view on this issue. Under the Second Restatement, there was no ratification by an undisclosed principal allowed. [131] In other words, in an undisclosed agency the agent purports to act on his own behalf and not on behalf of his principal.

This rule was changed by the Third Restatement and ratification by an undisclosed principal was allowed by stating that a person may ratify an act "if the actor acted or purported to act as an agent on the principal's behalf [132]". The argumentation was that even if the agent does not name the principal, he acts on the latter's behalf, and ratification by an undisclosed principal is permissible.[133] This new formulation does not distinguish among disclosed principals, unidentified principals, and undisclosed principals.

Notion about ratification also appears in European sources. UNIDROIT Principles of International Commercial Contracts[134] apply ratification rules to cases when agents act without authority or exceed it. Under ratification doctrine more rights are given to third parties: they may specify a reasonable time for the ratification if the agent is unauthorized, they may withdraw from the transaction if they did not know about the lack of agent's authority. Other sources like

[127] Restatement (Third) of Agency, § 4.05 (AM. LAW INST. 2006).
[128] Awet Hailezgi, Addisu Damtie, Authority by Virtue of Contractual Agency. Access mode: https://chilot.files.wordpress.com/2011/06/law-of-agency.pdf
[129] Watson v. Swann (1862) 11 C.B. (N.S.) 756 at 771, per Wiles J.
[130] Bowstead & Reynolds on Agency.- para -2-065.
[131] Restatement (Second) of Agency §85(1) (1958).
[132] Restatement (Third) of Agency §4.03 (2006). Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf
[133] Id. §4.03 cmt. b
[134] Vogenauer and Kleinhesterkamp (eds), Commentary on the UNIDROIT PICC (2009), Chap. 2, Section 2;

Principles of European Contract Law[135] and the Draft Common Frame of Reference[136] offer basically the same approach.

Ratification is not possible with void acts, forgeries or illegal transactions because of their nullity. A forged signature cannot be made good and valid simply by ratifying it. This is because the forger who counterfeits a signature or seal does not act as an agent, so that agency doctrines do not apply to him[137]. However, voidable acts are treated differently and may be ratified as their defects can be cured (like the contract of mentally incapable person).

Summarizing, for agency by ratification to arise, some conditions must be satisfied:

i. The agent must perform the act expressly on the principal's behalf. The third party has to be informed about the existing of agency relationships, otherwise that act cannot be ratified[138].

ii. Ratification must be based on the principal's full knowledge of the material facts of the original act in order to treat the agent as liable in case the economic loss occurs.

iii. Ratification must take place within a reasonable time.

iv. Void acts cannot be ratified.

The last but not the least way of agency creation is the ***agency arising by necessity***. It is the most debatable type of agency which caused the discussion whether it can be regarded as a type of agency creation as it usually refers to a person who is already an agent, but under this doctrine was given greater powers. However, in this work agency of necessity is treated under the heading "*Creation of Agency*" because even if the agency relations already exist, they will be modified when the agent faces with an emergency that will lead to performing acts differently from the initial.

For this reason, agency of necessity arises when a person who may have authority to act on behalf of another faced an emergency in which the property or interests of that other person are in imminent jeopardy and it becomes necessary to create an agency or increase the authority given, in order to preserve the property or interests[139].

Nowadays, agency by necessity is regarded mostly as a historical doctrine that can be retraced to the Roman-law doctrine of *negotiorum gestio,* which was concerned with rights and liabilities arising out of the unrequested management of another's affairs[140]. As this type of agency arises only when it is practically impossible for the agent to communicate with the principal before acting on behalf of the principal, this was particularly important for early

[135] PECL, Art. 3:201(1) and (3), 3:204(1) and 3:207: their inter-relation is not entirely clear.
[136] DCFR, II, 6:111.
[137] Treitel, Law of Contract (12th ed.) paras. 16-045 – 16-049.
[138] Keighley Maxsted & Co. v Durant [1901] AC 240. Cited in Law of Agency, access mode: https://www.casrilanka.com/casl/images/stories/EDBA/law%20of%20agency.pdf
[139] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), Art. 33(1).
[140] J. Kortmann, Altruism in Private law: Liability for Nonfeasence and Negotiorum Gestio (2005: Oxford University Press), 99.

mercantile and shipping law where this doctrine originated from. Such situations are difficult to imagine in modern world of advanced communication systems, for this reason agency of necessity does not frequently arise nowadays.

Analysing this type of agency, the question of authority arises. The agent usually chooses to act for the principal spontaneously, without prior authority, in order to preserve the property or protect the interests[141]. But the authority to act in case of an emergency cannot usually prevail over express instructions given by the principal. There are two groups of cases: the first one is to increase the existing agent's authority; the second one is less frequent when completely new agency relationship is created. However, the possibility exists that no agency relationship *stricto sensu* will arise at all and just the issue whether the agent is entitled to reimbursement of his expenses will be raised[142].

Agency of necessity may also arise from matrimonial law when the spouses are living apart and the wife has the right to pledge her husband's credit for necessaries and the husband will be liable for her debts, since she contracted as his agent of necessity[143].

This doctrine is confined to fairly narrow limits where five criteria are to be satisfied:

1. The agent's intervention must be necessary. In other words, there must be an emergency, making it necessary for agent to act. In *Australian Steam Navigation Company v. Morse*[144], a definition of necessity was proposed by Sir Montague Smith: "when by the force of circumstances a man has the duty to take some action for another, and under that obligation adopts the course which, to the judgment of a wise and prudent man, will be the best for the interests of the persons for whom he acts, it may properly be said of the course so taken, that it was necessary in a mercantile sense to take it"[145].
2. Principal's property has been entrusted to agent[146].
3. It must be impossible to communicate with principal to get instructions.[147]
4. Since the parties' interests are always mixed, 'the interest mainly served' may be the test in the context of agency of necessity[148].

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[141] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.),para.- 5.01.
[142] Ibid., para - 5.03.
[143] McFarlane v. McFarlane [2005] Fam 171 at [87] per Thorpe, LJ.
[144] (1872) LR 4 PC 222.
[145] Echeverri, D. § 1.01Agency Defined, Restatement (Third) Of Agency § 1.01 (2006), 2015 Thomson Reuters. Access mode: https://wiki.duke.edu/download/attachments/89915635/Restatement%20(Third)%20of%20Agency%20Section%201.01.pdf?api=v2
[146] Great Northern Railway v Swaffield [1874] LR 9 Ex 132: 'a horse was sent by rail and on its arrival at its destination there was no one to collect it. GNR incurred the expense of stabling the horse for the night. It was held that GNR was an agent of necessity and therefore had authority to incur that expense'.
[147] Springer v. Great Western Railway Co [1921] 1 KB 257, 265. 'a consignment of fruit was found by the carrier to be going bad. The carrier sold the consignment locally instead of delivering it to its destination. It was held that the carrier was not an agent of necessity because he could have obtained new instructions from the owner of the fruit. He was therefore liable in damages to the owner'.

2. AUTHORITY OF AGENT

2.1 ACTUAL AUTHORITY: EXPRESS AND IMPLIED

Most agency relationships arise from agreement of a certain form between the principal and the agent. In other words, the principal and agent have to "agree about the creation of the relationship" and to confer to the agent certain "powers to act on the principal's behalf in relations with third parties"[149]. This definition should be added with the mentioning of liability which can be created by agents in respect of their principals under tort and criminal law.

Authority in general constitutes the agent's power of a special sort to affect the principal's legal relations with third parties in such a way as if he had done the act himself. However, we should distinguish the notions of authority and power[150]. *"Authority"* carries the image of a paradigm justifying a legal result, whereas "power" is neutral and simply states the result regardless of the justification for it[151].

The issue of determining the essence of authority still remains a bit problematic under the Ukrainian civil doctrine as there is still no unified approach developed regarding the legal nature of the agent's authority. Traditionally, authority is considered to be a non-material subjective right, since no actual property right or obligation of either party to the relationship corresponds to it. This, however, does not indicate the absence of a property element in the legal relations of representation in general. The agent's right to remuneration and the corresponding principal's obligation to pay it, is an element of the relationship along with the authority, but not a part of the authority itself[152].

In Agency doctrine actual (real) and apparent authorities are usually discussed. As it was already mentioned in the sec. 1.3, the major difference between apparent and actual authority lies rather in the justification of the agent's acts in relation to the principal. In contrast to apparent authority, real authority is more than just a legal power *"looking out" (posse*) an agent, also there is a privilege *"looking in" (licere)* to the lawfulness of his conduct. The power and privilege are supported by the principal, while, in the case of apparent authority, the agent has only an external legal power to act without corresponding internal principal's justification[153].

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[148] China Pacific SA v Food Corpn of India (The Winson) [1982] AC 939.
[149] GHL Fridman, The Law of Agency, 7th ed. (Toronto: Butterworths Canada, 1996) at 11.
[150] Powell R. The Law of Agency (London: Pitman, 1951), 6.
[151] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para- 1-012.
[152] Цюра В. В. Інститут представництва в цивільному праві України. – дис. … канд. юрид. наук : 12.00.03./Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.230.
[153] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law

The term *“actual authority*” usually refers to authority the principal has granted to his agent either by express conferral by means of words or in writing *(express actual authority),* or it is regarded to be conferred upon the agent by necessary implication (*implied actual authority).*

One of the most famous definitions of actual authority was given by Diplock LJ in case *Freeman & Lockyer v. Buchhurst Park Properties (Mangal) Ltd:*

> “An “actual” authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. If the agent enters into a contract pursuant to the “actual” authority, it does create contractual rights and liabilities between the principal and the contractor[154]”.

This rule might be of particular importance for the cases dealing with “undisclosed principal” to avoid circuity of action and to guarantee an indemnification to the agent for his performance of the obligations assumed under the contract.

It is common to distinguish express actual authority from implied, depending on the mode of agency creation. Express authority arises where the principal expressly by words consents to the agent acting on his behalf in a certain way and to a certain extent and the agent, in his turn, agrees to act. Such agreements may be performed both in written and oral; letters conferring the authority are also common. The main requirement is that the conferral must be done “by express words, such as when a board of directors passes a resolution which authorizes two of their members to sign cheques[155]”.

Also, it should be stressed that primarily the court looks to the parties’ words and conduct at the time of the agency creation, and they may be taken into account as historical background. Later words and conduct may have some bearing, but are likely to be less important[156].

Since authority is an element of the agency relationship, we can assume that the grounds for its occurrence are the same as for the relationship. Typically, agency is formed in two stages: under the contract of commission or agency agreement relationships are created and the authority is granted to the agent in the power of attorney where its scope is defined. So, the emergence of agency relationships and the authority of the agent may not be simultaneous[157].

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[154] [1964] 2 Q.B. 480 at 502 Available at: http://www.casebooks.eu/contractLaw/Chapter27/excerpt.php?excerptId=4775

[155] Hely-Hutchinson v. Brayhead Ltd [1968] 1 Q.B. 549 at 583.

[156] Garnac Grain Co Ltd v Faure & Fairclough Ltd [1967] 1 Lloyd´s Rep 495 at pp 508-509; Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480.

[157] Гранін В. Л. Повноваження представника та його реалізація за цивільним законодавством України: автореф. дис. ... канд. юрид. наук : 12.00.03 / Одес. нац. юрид. акад. – О., 2005. – 20 с., с.11.

The most obvious example of express authority is the power of attorney. This usually applies to a formal grant of powers to act made by deed or contained in a deed relating also to other matters. It defines agent's powers for commission of legally significant actions on behalf of the principal, and makes it obvious to the third party. Although there is no rule that agency must be created by deed, *sec.1 of the Powers of Attorney Act 1971* requires the powers of attorney to be executed under seal. So, the powers are conferred to the agent in conformity with strict rules applicable to the construction of deeds.

The extent of authority, granted to the agent by other means that a deed, has to be determined 'by inference from the whole circumstances[158]. known to both parties, such as: the normal course of business, trade customs, etc.

Due to the rapid development of computer technology, the legislator recognizes that the electronic form of the contract is not an independent form, but a kind of written form which means that there is a direct link between the electronic and written forms of documents, in our case, the representation agreements. According to the art. 207(1) of the CCU the contract is also considered to be concluded in a written form, if the will of the parties is expressed by means of electronic or other technical means of communication. Therefore, it is believed that contracts of commission and agency may also be concluded in electronic form which will be equated to a written form of agency agreements.

Given to the lack of legal definition of "warranty of authority" in Ukrainian legislation, the new formulation of the art 244(3) is proposed:

"A warranty of authority is a written document issued by the principal to the agent in support of the latter's authority to act on the principal's behalf in respect of the third parties."

At the same time, the warranty of authority does not create for the representative any rights for the property received under the contract of commission. It is considered as law-approving document, rather than law-establishing, and the warranty of authority itself cannot be breached and lead to liability as it is always based on the agreement between the principal and agent. In this case, the warranty of authority is a law-justifying document, but not a legal fact.[159]

In practice a lot of problems arise when the powers in contract do not coincide with those identified in the warranty of authority. Scholars have different views as to what is more important: the powers stipulated in the contract, which is the basis of agency in general or the powers specified in the warranty of authority. However, since a warranty of authority is primarily addressed to third parties, and is aimed to notify them on the existence of the agency,

[158] Ashford Shire Council v. Dependable Motors Pty Ltd [1961] AC 336, by Reid LJ.
[159] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.246.

in case of conflict, the warranty of authority should enjoy the priority in resolving disputes and restoration of the violated rights.

I totally agree with this opinion, as the warranty of authority is usually issued after the conclusion of contract. So, the principal may change the powers in order to satisfy their interests and objectify them in a separate document. Moreover, this document serves the basis for the external relations installation, which are aimed at achieving the necessary result for the principal[160].

The conferral of authority may be followed by general words, which are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose[161]. Also, the conferral of authority may be given in ambiguous or uncertain terms which may be interpreted in dual way. In this case, if the act had been already done by the agent in a good faith which was reasonably expected in that situation, that act is deemed to be duly authorized by the principal. However, with modern means of communication, it is possible to obtain instant clarification, and the agent may not be considered to act reasonably if he does not do so[162]. In such cases where there is no express conferral of authority to the agent, agency is considered to be real and has to be inferred from the parties' conduct and the circumstances of the case. So, implied authority is usually inferred from the course of dealing between the parties or from the circumstances of the case[163].

The most obvious cases of implied authority arise in forms of:

1. *Incidental authority* an authority to do everything what is normal to the expressly authorized usual activity.

This type very often overlaps with the notion of apparent authority that causes the impossibility to decide whether parties rely on apparent or implied authority. Lord Denning in *Hely-Hutchinson* stated that: "apparent authority…often coincides with actual authority. Thus, when the board appoints one of their members to be managing director, they grant him not only implied authority, but also with apparent authority to do everything that falls within the usual scope of that office. All other people are entitled to assume that he possesses usual authority of a managing director[164]".

2. *Usual authority*. Type of implied authority to do all the things that fall within the usual scope agent's duties. This type of authority is usual for managerial and professional agents.

[160] Цюра В. В. Інститут представництва в цивільному праві України.: дис. … канд. юрид. наук : 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.301.
[161] Attwood v. Munnings (1827) 7 B. & C. 278 at 284.
[162] European Asian Bank AG v. Punjab and Sind Bank (No. 2) [1983] 1 W.L.R. 642 at 655, saying that the principle is "only available in very limited circumstances".
[163] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.),para.- 3.15.
[164] Hely-Hutchinson v. Brayhead Ltd [1968] 1 Q.B. 549 at 583.

When there is an appointment of a so-called *"general agent"* to a particular managerial post, he is authorized either to conduct a business or generally to act for his principal in matters of a particular nature, or to do a particular class of acts that are usual for certain type of trade or business (sign cheques and bills[165], guarantee loans made by a subsidiary of the company[166], borrow money and give security over the company's property[167], authorize the commencement of legal proceedings[168]). One would expect that most managing directors are usually authorized to enter into contracts within the company´s ordinary course of business, however, it is doubtful whether the board of directors would any longer be expected to delegate total management power to a managing director[169].

For example, the managing owner of a ship has implied authority to pledge the credit of his co-owners for all such things, including repairs that are necessary for the usual course of business but he has no authority to insure the vessel on behalf of his co-owners[170].

Professional agents may also have implied (usual) authority that arises from the nature of their natural occupation which they perform apart from this particular agency. For example, an estate agent in England has normally no authority to sell land, since his function is to solicit offers and transmit them to his principal.[171] Nevertheless, he may be authorized expressly or impliedly to sell, even though he normally has no authority to sign anything but an open contract[172]. In any case such an agent is authorized to describe the property, state its value to the potential purchaser, but not to accept a deposit, to receive payment or to warrant that the property may legally be used for a particular purpose[173].

3. *Customary authority* states that the agent has an implied authority to act in accordance with an applicable business customs and usages that apply in the market within which he operates. However, the proof of custom is notoriously difficult, so the rule has limited application.

Lord Moulton in *North Western Rubber Co. Ltd* replied: "In the mind of a layman there is often a confusion between what is custom and what is customarily done, and he wrongly imagines that the latter amounts to a legal custom[174]".

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[165] Dey v. Pullinger Engineering Co. [1921] 1 K.B. 77.
[166] Hely-Hutchinson v. Brayhead Ltd [1968] 1 Q.B. 549 at 583.
[167] Biggerstaff v. Rowatt's Wharf Ltd [1896] 2 Ch. 93.
[168] ABM Generali Holding AG v. SEB Trygg Liv, etc. [2005] EWCA Civ 1237.
[169] Rimpacific Navigation Inc. v. Daehan Shipbuilding Co Ltd [2009] EWHC 2941 (Comm). The managing director of the company has a broad authority to make decisions for the company in the ordinary course of business, however, it is doubtful whether the board of directors would any longer be expected to delegate total management power to a managing director.
[170] Robinson v. Gleadow (1835) 2 Bing. N.C. 156.
[171] Prior v. Moore (1887) 3 T.L.R.
[172] Keen v. Mear [1920] 2 Ch. 574.
[173] Sorrel v. Finch [1977] A.C. 728.
[174] North Western Rubber Co. Ltd and Huttenbach & Co. [1908] 2 K.B. 907 at 919.

In order to establish the existence of custom, certain conditions must be satisfied. The party must be able to show that such customs or usages are (i) reasonable; (ii) notorious that is universally accepted by the particular trade or profession or at the particular place; (iii) certain. This was explained in *Cunliffe-Owen v. Teather & Greenwood:*

> "'Usage' as a practice which the court will recognize is a mixed question of fact and law. To become a recognized usage, it must be *certain*, in the sense that the practice is clearly established; it must be *notorious*, in the sense that it is so well-known in the market where it exists, that those who conduct business in that market contract with the usage as an implied term; and it must be *reasonable*[175]".

Also, the custom or usage must be lawful and consistent with express and implied terms of a contract. For this reason, even if a custom is proved to exist, the court may ignore it if it is expressly or impliedly excluded. The only exception is when the custom is considered to be a part of the agreement and the latter is done in writing[176].

Reasonableness of the customs usually means that a custom is consistent with the nature of the agency contract, norms of justice and public utility. In other words, it should be based on rationality and reason. However, unreasonable transactions may also be authorized, which is completely impossible with the unlawful ones. Really, it is difficult for a principal to give assent to the use of a custom which is actually unlawful.

The burden to prove the existence of a custom usually lies on the person alleging that there was knowledge of the custom.

4. The last general category of implied authority is the *authority arising from the course of dealing between the parties and the circumstances of the case*. This type has particular connection to the implied appointment of an agent, discussed previously. It results from the general rules of interpretation and construction of contracts.

Summarizing, the question of agent's authority is the central one in the doctrine of agency. Although, there are a lot of precedents that are ready to solve many problems and to answer many questions, there are still some problems left. It is not always clear where the authority is to be interpreted by court as express or implied. Also, the problem appears when distinguishing actual implied and apparent authority which always tends to overlap and leaves a place for argument.

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[175] [1967] 1 W.L.R. 1421 at 1439 per. Ungoed-Tomas L.J.

[176] Reynolds, F.M.B. Bowstead & Reynolds on Agency ([18th ed.].-London: Sweet & Maxwell, 2010), para-3-032.

2.2. APPARENT AUTHORITY

Apparent authority describes a situation when the negotiation of an urgent issue with a principal is impossible the agent might have only the appearance of authority, but no actual authority to act on behalf of the principal. Nevertheless, the agent is still capable to bind the principal by a contract with a third party, if the latter entered into such contract with the agent in reliance on the principal's representation. Due to the extremely dynamic development of modern commerce apparent authority is an essential part of the unauthorized agency which will be discussed in detail in the next section.

Diplock L.J.in Freeman & Lockyer[177] rightly noted "…in ordinary business dealings the contractor at the time of entering into the contract can hardly ever rely on the agent's "actual" authority. Information about the authority must flow either from the principal or from the agent or from both, as only they know about the scope of the agent's actual authority. The contractor knows only what he is being told, which may or may not be true. Ultimately, he relies either upon the principal's representation (apparent authority) or upon the agent's representation (warranty of authority)".

So, the third party has to rely upon the principal's manifestation of the agent's authority, which may go beyond the authority actually communicated by the principal to the agent.[178] *Denning L.J.* correctly pointed out that: "Ostensible or apparent authority is the authority of an agent as it *appears* to others[179]".

The idea of placing the apparent authority beside actual may be easily criticized as there is a view that the doctrine of apparent authority contains no authority at all. But it would be misleading to omit it in this Chapter as this term is frequently used and worth mentioning here.

The doctrine of apparent authority is comparatively new both in common and continental law, where it was used by many European scholars, for instance, a French classicist *Robert Pothier* (1699–1772)[180]. In English law the doctrine was firstly applied by *Lord Ellenborough in Pickering v. Busk* where it was stated that "strangers can only look to the acts of the parties and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent

[177] Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480.
[178] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law
[179] Hely-Hutchinson v. Brayhead Ltd [1968] 1 Q.B. 549 at 583.
[180] Pothier R.-J. Traite sur les obligationis / R.-J. Pothier. – Paris: Debure et Orléans, Veuve Rouzeau-Montaut, 1760. – № 8. – 672 p.

right of disposing of property in the ordinary course of trade, it must be presumed that *apparent authority* is the real one[181]."

For this reason, there is no unified approach regarding it even within one legal system. English view on apparent authority differs greatly from the American-law position as the former regards the concept of estoppel as the basis[182] and the latter sticks to objective theory of agency, which is directly derived from the objective theory of contract. Also, a disparity marked the development of the doctrine within Europe itself, with the French system that to the large extent identifies authority and mandate, and the German system, which distinguishes these two ideas.[183]

A good definition of the concept of apparent authority was given by the Restatement Third of Agency as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on the principal's behalf and that belief is traceable to the principal's manifestations[184]".

An excellent description of the concept was given by the court in the *AAA Tire opinion*:

> "The concept of apparent authority only comes into play when the agent has acted beyond his actual authority and has no permission whatsoever from his principal to act in such a manner. The principal will be bound for such actions if he has put his agent in such a position or has acted in such a manner as to give an innocent third person the reasonable belief that the agent has authority to act for the principal. The facts and circumstances of each case must be examined to determine the reasonableness of the third party's belief. One must look from the viewpoint of the third person to determine whether an apparent agency has been created. In transactions between businessmen, the nature of the business and the customs and the usages within the trade can be important factors to be considered[185]".

The doctrine arises where it looks as if a person (agent) has actual authority. This happens when the principal expressly or by any other conduct makes the third party to believe that he consents to have the act performed on his behalf by the other person. If the third party with a reasonable belief relies on these manifestations and contracts with the "agent" on this ground, the principal is considered to be bound.

It is not easy to find the legal foundation of apparent authority. There is a long-standing discussion whether apparent authority is a true authority or whether it creates a liability for the

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[181] Pickering v. Busk [1812] 15 East 38 cited at: http://chestofbooks.com/business/law/Handbook-Of-The-Law-Of-Sale-Of-Goods/46-The-Factors-Acts.html

[182] W. Bowstead, F. M. B. Reynolds Bowstead & Reynolds on Agency (General editor Peter G. Watts. – [20. ed.] – London : Sweet and Maxwell, 2014), p.375.

[183] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law

[184] Restatement (Third) of Agency 2006, § 2.03. Access mode: http://www.law.uh.edu/assignments/spring2013/30114-first.pdf

[185] Holmes, Wendell H. and Symeonides, Symeon C., "Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law" (Journal Articles, 1999), p. 26. Access mode: http://digitalcommons.law.lsu.edu/faculty_scholarship/268

principal based on estoppel[186]. If it appears to be a class of authority, it becomes similar to actual authority, a power of an agent to bind his principal by the contract with the third party. In this case, both parties are bound and the principal does not have to authorize the agent's act.

On the other hand, if apparent authority is based on estoppel, there is, in fact, no contract and only the principal can be held liable as the concept itself prevents the principal from denying the existence of agency to a third party. Liability here is based on the third party's reliance and the principal's manifestations of his agent's authority. Thus, it is clear that contract and estoppel are inconsistent concepts and cannot be combined as a basis for apparent authority[187].

Controversies whether the apparent authority has a contract basis or is based on estoppel are really tough as in most cases elements of both contract and estoppel are present. Objective theory of agency, which is derived from the objective theory of contract, states that principal's liability in contract just like ordinary liability in contract is based on his voluntary representations to third parties concerning the scope of the agent's authority[188]. The principal's representations or conduct toward third parties create for the agent a power to contract excessing his actual authority. This view of apparent authority requires neither proof of misrepresentation nor of change of position in reliance thereon, and conforms to the mutuality of obligation. This was supported by the majority of American courts and the Restatement, Second of Agency but only by a minority of courts in England[189]. However, the English view may be changing.

The estoppel view is dominant in England and much of Commonwealth countries, while the objective theory view dominates in the United States[190]. Actually, in practical terms, it does not matter significantly which view is preferred, either view must contain some manifestation of authority moving from the principal. The only practical significance is that if estoppel is the basis for apparent authority, a principal who wishes to take the benefit out of its agent's unauthorized acts must always ratify, since a cause of action cannot found on an estoppel[191].

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[186] W. W. Cook, "Agency by Estoppel' (1905) Colum L Rev 536; Ewart, "Agency by Estoppel," 5 COLUM. L. REV. 354 (1905);

[187] Heskell v. Continental Express, Ltd. [1950] 1 All E.R. 1033, 1044 (Devlin, J), Canadian and Dominion Sugar Co., Ltd. v. Canadian National Steamships Ltd. [1947] A.C. 46, 56 (P.C. 1946).

[188] W. W. Cook, "Agency by Estoppel' (1905) Colum L Rev 536; M. Conant, The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership' (1968) 47 Neb L Rev 678.

[189] Conant, M, Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership, 47 Neb. L. Rev. 678 (1968) Access mode: http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=2532&context=nlr

[190] Restatement (Third) of Agency, s 2.03. If the objective theory rather than estoppel is taken as the basis for apparent authority, the absence of reliance on the part of the third party will not be fatal to an assertion of apparent authority. Nevertheless, since under US law a third party must reasonably believe that the agent has authority to act on behalf of the principal, establishing that the third party took an action as a result of the principal's manifestation may help to establish the third party's belief. See Restatement (Third) of Agency, s 2.03, comment e.

[191] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.),197.

Whichever the view is taken, it is widely accepted that the doctrine of estoppel is one of the most useful and flexible in law and that various types of estoppel are governed by a general principle, namely that when the parties to a contract proceed on the basis of an underlying assumption engendered by the other[192], neither of them will be allowed to rely on the assumption when it would be unjust or unfair to do so.

As Slade L.J. observed in *Rama Corporation Ltd v. Proved Tin and General Investments Ltd*: "Ostensible or apparent authority…is merely a form of estoppel but you cannot call in aid an estoppel unless you have three ingredients[193]":

1. *A representation* must have been made to the third party in order to show that the agent has authority to act on behalf of the principal.

Manifestations of authority are needed to show the third party that the agent is duly authorized to act on the principal's behalf. This may be made by words (oral or written) or by conduct. The representation may be also contained in a separate written document[194].

The authority may be implied either from the agent's status (spouse, employee) that under normal conditions would lead to the conferral of authority, or earlier declared authorization that was revoked later internally by the principal. Representation may also be implied from the principal's conduct, especially when the agent performs acts that fall within his 'usual authority' that is inferred from the ordinary course of business[195].

Such appearance of authority may commonly take the form of appointing the agent to the position which implies to have certain authority. Under the conclusions made in *Freeman & Lockyer v. Buckhurst Park Properties Ltd* a corporation, being a fictitious person can act only through agents[196] with actual authority[197] conferred by the corporation in order to make the representation on its behalf. Such "actual" authority may be derived from the partner's status or position as a partner, subjected to stated limits and not from communications or other manifestations of authority made by the partnership, whether to the partner, a particular third

[192] Amalgamated Investment & Property Co. Ltd v. Texas Commerce International Bank Ltd [1982] 2 QB 73 at 122, per Lord Denning MR.
[193] [1952] 2 QB 147, 149-50 per Slade J.
[194] Harrison Exp (1893) 69 LT 204. Agent had authority to apple for the shares on a particular day, however in a separate document it was stipulated that the acceptance of an offer has to be communicated to the principal. This was not done. For the reason that the contractor was unaware of the private restriction, he could rely on the document which was presented, and the principal was estopped from denying that the agent has unrestricted authority to act on his behalf.
[195] United Bank of Kuwait Ltd v. Hammoud [1988] 1 WLR 1063 per Staughton, LJ. The court of appeal held that in each case it was a matter of deciding whether the giving of the undertaking by the agent was an act for carrying on, in the usual way, business of the kind conducted by a firm of solicitors. In the ordinary course of business solicitor do not receive money or a promise from a client in order that they can give an undertaking to a third party.
[196] Id. [1964] 2 QB 480.
[197] Restatement (Third) of Agency § 2.01, "[a]n agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act."

party, or a broader audience, including manifestations made through a title assigned to the partner that is generally understood to encompass authority of a particular type and scope[198].

Consequently, in cases where the agent upon whose apparent authority the third party relies has no actual authority conferred by the corporation to act on its behalf, the contractor cannot rely upon such agent's representation at all. When apparent authority arises with companies, these representations are made through its properly authorized officers or through one of its bodies such as the board of directors. [199]

Under Ukrainian legal doctrine, the issue whether the employees can be considered as agents, acting on behalf of their employer, is still debatable. The main problem is that Ukrainian law does not have such a legal category as "apparent authority", therefore there are different opinions. Some scholars are convinced that the agent may be granted an authority by appointing to a certain position which authorizes him to perform legal acts on behalf of that enterprise or institution *ex officio* without any other documents. Such an approach implies that the employment contract is the basis for the agent's authority to arise when appointing a person to a position in enterprise, institution or organization (sellers, cashiers, etc).[200]

Others agree that employers, acting within the scope of employment cannot be considered as agents since they carry out activity of the legal entity itself, so the requirement that the agent and the principal have to be two independent subjects is not fulfilled in this case. In this context the provisions of Art. 1172 of the CCU must be considered, according to which, if the activity of the employee during the performance of his official duties caused damage to third parties, the responsibility will be borne by the legal entity (employer) as for their own actions. In this regard, an employment contract cannot be considered as the basis for the establishment of representative relations[201]. However, when the employee is authorized to carry out acts on behalf of a legal entity beyond the scope of his employment, he will become an agent of the legal entity. In this case, the employee will be granted authority and the relations of representation would arise.

Consequently, we can conclude that an employment contract cannot be considered as the basis for representation in civil law since the employee acting on behalf of the company is regarded as a part of the legal entity and under the "separation theory" accepted by Ukrainian legislator, principal and agent have to be separate legal personalities.

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[198] Deborah A. DeMott, Agency in the Alternatives: Common-law Perspectives on Binding the Firm, 2015. Access mode: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6053&context=faculty_scholarship
[199] Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 2 QB 480.
[200] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.254.
[201] Доманова І. Ю. Інститут добровільного представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03 / Київ. нац. ун-т ім. Т. Шевченка. – К., 2006. – 222 с., с.141.

Thus, in order to create an agent's "apparent" authority by permitting the agent to act in the management or conduct of the principal's business, the board of directors has to delegate an "actual" authority to the agent under the memorandum or articles of association in order to permit him or her to represent to third parties having the authority to enter on behalf of the corporation into contracts which an agent is authorized to conclude and which are permitted to do in the ordinary course of such business[202].

2. *A reliance on the representation.* This means that the causal link must be established between the representation and the third party's actions.

As Parker L.J. remarked in *Bedford Insurance Co Ltd v. Institutio de Resseguros Brasil*:

> "A person relying on ostensible authority has…to show that he relied on the representation of the principal, and none of the insured or their brokers was called to testify to this effect.The documents certainly suggest that they could very well have done so, but I am not prepared to hold that they did so. The brokers concerned were few and, with one exception, were not called. The one who was called merely confirmed his proof and this contained no relevant evidence. In the circumstances of this case, where a number of documents were clearly shown to have created, and deliberately to have created, a false impression, oral evidence was, in my judgment, required[203]".

As a result, for apparent authority to arise, it is important to establish third party's good faith when entering into a contract with the agent[204].

In contrast to the common law view on apparent authority, the continental legal systems have evolved less doctrinaire solutions to the discussed topic; however, all of them have something in common which is to protect those who in a good faith rely on the manifestation of authority. Continental courts, in their turn, go further in their understanding of apparent authority and offer to make good faith the determinative factor. Such countries as France, Belgium and the Netherlands base their doctrine on the protection of the third party's *reasonable (legitimate) belief*[205]. While assessing the legitimacy of the third party's belief, the court will look on certain circumstances of the case (such as employment, education) that would show whether the third party was more likely to fall victim to the appearance of agent's authority. Also, agent's professional status and behaviour will be assessed by the court in order to find out whether he could lead the third party to believe in the presence of authority. German law does not contain an expressly mentioned requirement of the reasonable belief, but it seems unlikely that a court

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[202] Freeman & Lockyer v Buckhurst Park Properties Ltd [1964] 2 QB 480.
[203] [1999] 2 AC 349, p.985. Cited at: http://www.uniset.ca/other/css/1985QB966.html
[204] Munday, R. Agency: Law and Principles (First Edition –New York: Oxford, 2010-369 p.), 82.
[205] Cass Ass Plen 12-12-1962, Banque Canadienne Nationale D 1963, J 277.

would allow a third party to invoke apparent authority where the belief of the third party was not reasonable.

This requirement is also present in the Article 232 of the CCU. To secure himself, the third party has to check whether the agent is duly authorized before concluding the contract. A representative may be mistaken as to the limits of his authority. In this case, he cannot be held liable for damages suffered by a third party. So, it is of particular importance for the third party to check the agent's authority, otherwise, the third party will be considered as such that had deliberately entered into a relationship with the agent, knowing that the latter acted outside the scope of his authority or beyond the scope of warranty of authority, and therefore the agreement, should be considered null.[206]

3. An alteration of third party's position resulting from such reliance.

The alteration of position may only happen when the third party enters into the contract with the principal. Sometimes, in order to rely upon the doctrine of estoppel, the courts require the evidence that the party has acted to his detriment. As Lord Robertson declared *in George Whitechurch Ltd v. Cavanagh:*

> "My Lords, the case of the respondent is one of the estoppel, and it is an essential element in such cases that the person to whom the representation was made has suffered loss by acting upon it; or, to put it in different way, has altered his position to his detriment by acting on the representation."[207]

Nevertheless, there are still many courts that require only alteration. Thus, the Diplock L.J. declares in Freeman & Lockyer that: 'the representation, *when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel*, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority when entering into the contract or not[208]".

After such statements, the question whether alteration is a separate requirement from reliance appears. Under the common law doctrine of apparent authority, a principal is considered to be bound under the contract when the bona fide third party has acted in reliance of agent's manifestation of authority.

Unless all conditions are met, there is a danger that the principal would be able to resile from an unauthorized contract entered into by his agent under no excuse how reasonable it was for the third party to assume that the agent acted with a due authority. In other words, the third party should always bear the risk that the agent acts without authority. Such a risk, however,

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[206] Шершеневич Г. Ф. Учебник русского гражданского права (1907 г.)/ М.: Фирма «СПАРК», 1995, с.97.
[207] [1902] AC 117, 135.
[208] Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480. Available at: http://www.casebooks.eu/contractLaw/Chapter27/excerpt.php?excerptId=4775

must be apportioned between the principal and the third party, with the view on every individual factor in determining who must suffer consequences in a particular case, since an agent acting without authority is not personally responsible[209]. Basically, this compromise is the subject of the doctrine of apparent authority.

Under the doctrine of apparent authority the third party is allowed to sue the principal. However, in case the principal is willing to sue the third party, he is not able to rely on apparent authority, since he must understand that his agent did not have enough powers to act. Also, the principal is unable to claim the benefit of any estoppel that arises from the principal´s own acts.

The question also arises whether and to what degree the agent’s power to bind his principal is affected by the death of the principal[210]. According to the traditional English view, this event automatically terminates the agent’s powers, irrespective of whether the agent or the third party knew or should have known about the death[211]. The origin of the rule may be found in the provision of the “fiction of identity” concept between the principal and the agent, but today the prevailing argument is that what a dead man cannot himself do, he cannot do through another, because in this case one of the essential features necessary for concluding a contract would be missed, the so-called reqirement of meeting of minds[212].

Speaking about soft law instruments in the field of private law, they provide certain regulation on this topic that tried to combine the most characteristic features of both legal families. These acts also contain certain provisions on the question of apparent authority. In general, UNIDROIT Principles accept the English law position in regard to the apparent authority where the agency is based on estoppel, whereas the European Principles try to enforce the continental approach.

Under the European Principles[213], both principal and agent are bound to each other by acts within the agent’s apparent authority as much as by acts within its actual authority.[214] Apparent authority there may be invoked by the third party only[215] in case the third party had a reasonable belief that the agent had sufficient authority.

Under the UNIDROIT Principles, if the principal wants to rely on the doctrine of apparent authority, there is a requirement to ratify the unauthorized act[216]. Under the European

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[209] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law
[210] Id. [access mode]: https://www.britannica.com/topic/agency-law
[211] Campanari v Woodburn (1854) 15 CB 400.
[212] Wolfram Müller-Freienfels// Agency.- Encyclopædia Britannica/ [access mode]: https://www.britannica.com/topic/agency-law
[213] Principles of European Contract Law, Chapter 3 (hereinafter PECL).
[214] PECL, Art. 3:202.
[215] UNIDROIT Principles of International Commercial Contracts, Art. 2.2.5(2). See also Geneva Agency Convention, Art. 14(2).
[216] UNIDROIT Principles 1999 Study L-Misc 21, para. 140-1.

Principles, ratification is confined to direct representation, since indirect agency implies the agent not acting in the name of the principal at all[217].

Also the issue of unreciprocated power to hold the other party bound to the contract has to be seen in the context of apparent authority. Under both English law and the UNIDROIT Principles, the principal is bound under the contract even in case the agent's act fell outside the scope of the actual authority, provided it was performed within the scope of his apparent authority. Under the European Principles, an act within the agent's apparent authority automatically binds both principal and third party so no question of speculation can arise[218].

The appearance of authority may take the form of appointing the agent to the position which implies to have certain authority.[219] Mixed legal systems have a unique requirement that the representation must have been of such nature that the principal could reasonably have expected it to be acted on[220]. This approach is criticized by the common law representatives as such an objective element may appear to be unjust for innocent principals. Countries with civil law order have accepted an approach that focuses rather on the agent's appearance of authority in certain circumstances. In France and Belgium, for instance, liability was historically based on tort, depending on the principal's fault based on the doctrine *l'apparence.*

Summarizing, as the law of agency cannot be limited to cases where the agent possesses an express or implied actual authority. In the light of modern commerce, agent always needs to have a certain degree of discretion which would allow him to act outside the scope of the actual authority. The essence of apparent authority is to protect the third party's interests who reasonably believed that the agent was authorized to act. Although the agent has only the appearance of authority, he is still capable to bind the principal under the contract with third party, if the latter relied on such manifestation. Under the Ukrainian civil law, doctrine of apparent authority is not developed, so employees acting within the scope of their duties are not considered to be agents. However, the requirement for the third party to check the agent's authority is still present.

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[217] PECL, Art. 3:207(1),

[218] Bennett, H., Agency in the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts (2004) (Uniform Law Review 2006), 783.

[219] Articles 54 (3) and 56 HGB (the authority of employees in stores and warehouses)

[220] Monzali v. Smith 1929 AD 382.

2.3 UNAUTHORIZED AGENT FROM A COMPARATIVE ASPECT

As it was mentioned in the sec.2.2, under the normal conditions, agency relations arise when a duly authorized agent contracts with a third party on behalf and in the interests of his principal. Such a relationship is constituted by a mutual consent given by the agent and the principal either expressly or impliedly. Where such consent is present, the agent has an actual authority to bind the principal with the third party by entering into the contracts with the latter one within the scope of his authority.

However, in the light of present day commercial relations, it would appear difficult and inconvenient for a person or legal entity to communicate every transaction with the agent, particularly where the business undertaking is a large and complex one[221]. For this reason, it is important for the law of agency, not to limit agency relations only to cases where the agent has an actual authority, as it would severely diminish the utility of agency. In other words, a certain degree of discretion a very important, even though it might lead to the agent's liability to the third party for misrepresentation or breach of the agent's authority.

This, however, does not mean that all agent's acts performed with the lack of authority, would necessarily lead to the liability, since a principal would be always able to resile from an unauthorized agreement entered into by his agent. So, there are circumstances where the law allows such acts to be authorized by the principal retroactively.[222]

After preliminary investigation, it can be traced that the doctrine of unauthorized agency consists of three more specific concepts: apparent authority, ratification and the liability of ***falsus procurator*** (in continental law) or ***the breach of warranty of authority*** (in common law and mixed systems). Within each of these broad doctrines, namely ratification, apparent authority and ***liability of falsus procurator***, the law of agency continues to strive for a proper balancing of the rights and obligations of the parties to this triangular relationship[223].

Although there is a possibility to apply these concepts to indirect agency,[224] usually unauthorized agency is associated with direct agency. For this reason, in this work we will focus rather on direct that indirect agency. Moreover, in countries with continental legal system, including Ukraine, indirect agency is usually not recognized.

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[221] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.), 186.
[222] S. J. Stoljar, the Law of Agency: Its History and Principles (London: Sweet & Maxwell, 1961), pp.29-30.
[223] Pokhodun Y., Unauthorized agent from a comparative perspective//Yuliia Pokhodun// Часопис київського університету права.-2017.- Вип.4, с. 308-311.
[224] D, Busch, Indirect Representation in European Contract Law, (The Hague: Kluwer Law International, 2005), 232-7.

As it was already mentioned, unauthorized agency is a totality of three more specific concepts they should be discussed in order to get a general view of the whole doctrine. From a comparative perspective, there is a general rule in basically all legal systems[225] that neither the principal, nor the third party is bound under the contract entered into by an unauthorized agent. Under French law, for example, the concept of representation determines that the agent acts within the limits of authority defined in the mandate and, therefore, cannot bind the principal by the acts performed beyond the described authority. This rule protects mainly the principal from being bound against his will, but the third party's interests are also protected, however, under the doctrine of apparent authority, discussed above.

Speaking about an unauthorized agent in the United States, fundamental elements of the doctrine are laid down in the Restatements of Agency. Restatements include basic concepts and doctrines in accessible manner and a number of principles that carry out predictable consequences. Restatements deal with the basic questions of actual and apparent authority, doctrines of estoppel and ratification also rules about unauthorized agency are included.

The legal nature of an unauthorized act as a legal phenomenon, has not received much attention. Only Dutch and German laws discuss this question. In Dutch law, such act is regarded as invalid, whereas in German law, it is described as *'floating',* neither void, nor enforceable, nor completely valid. Under the German solution, such an act is *'awaiting'* either ratification or refusal by the principal or revocation by the third party[226] and it cannot be placed within any of the existing categorization of void, voidable or invalid transaction[227].

Under Ukrainian law civil code also finds it hard to attribute such an act either to null or void before the definite approval or disapproval of the principal[228]. Before the approval, such an act includes features of both null and void transaction. Thus, like a null, such a transaction is invalid (for the principal) by virtue of the law at the time of its commission, but the difference is that by the court decision it can be recognized as valid. Also, an unauthorized legal act generates legal consequences for the principal in case of its subsequent approval. Unlike the void transaction, which is valid at the time of its conclusion, but can be declared to be void by virtue of the court decision, an unauthorized at the time of its performance is invalid for the principal, and becomes valid only at the moment of its approval[229].

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[225] Civilian (France, Germany, Belgium), common law (England), international codes (PECL, UNIDROIT) and mixed legal systems are regarded.

[226] Larenz and Wolf, Allgemeiner Teil des Bürgerlichen Rechts, para 49, no.4 et seq.

[227] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.),388.

[228] Харитонов Є. О., Харитонова О. І., Старцев О. В. Цивільне право України : підруч./ [Вид. 3, перероб. і доп.]. – К.: Істина, 2011. – 808 с.- с.271.

[229] Гелецька І. О. Представництво без повноважень // Науковий вісник Херсонського державного університету. – 2014. – Випуск 5. – Том 1. – С. 155–159.- с.157.

So, more likely that the description of "awaiting" act will be the most appropriate regarding the specific nature of the agency relationship which is aimed to protect the interests of all parties involved and such protection cannot be performed without giving the chance to enforce an act performed without actual authority.

After the doctrine of apparent authority, which was already discussed, ratification is the second doctrine which is worth mentioning when speaking about the unauthorized agency.

Acting without authority may lead to a loss of trust between the parties. And since relations of representation have a fiduciary character, this would constitute the key element of the legal relationship. This later may serve as a ground for agency termination which according to art.1008 (1) of the CCU may be conducted unilaterally by either party. The aim of this rule is to protect the principal's property from unauthorized interference, since any deviation from the proper exercise of authority may cause unfavourable consequences to the principal[230].

The principal is also able to revoke an agency after the destruction of a subject-matter or other substantial change; or after happening the event that appeared to be unlawful, impossible or frustrating the agency[231]. However, this is only possible where the reasonable grounds for a termination without notice are established, otherwise, such termination would amount to a breach of contract and may entitle the other party to damages and/or other relief, including an injunction[232]. Such ground may be the failure of the other party to carry out all or part of his obligations under that contract[233]; or where exceptional circumstances arise (e.g. doctrine of frustration).

Typically, unauthorized agent fails to form a contract between principal and third party, but it does not necessarily mean that the transaction contradicts the principal's interests. However, it would be unfair not to provide the principal with the possibility to enforce such a contract concluded by the agent, even in an unauthorized way. If the actions performed are acceptable or maybe even desirable for the principal the law of agency should provide a possibility to get the benefit out of such transaction. For this reason, the doctrine of ratification is deemed to preserve the utility of the law of agency because the agent who acted in a good faith but accidentally exceeded his authority will be granted the authority, albeit retrospectively[234].

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[230] Невзгодина Е. Л. Представительство по советскому гражданскому праву: монограф. / Е. Л. Невзгодина. – Томск: Изд-во Томского ун-та, 1980. – 156 с., с. 133.
[231] Reynolds, F.M.B. Bowstead & Reynolds on Agency, Article 117.
[232] In Bailey v Angove's Pty Ltd [2014] EWCA Civ 215, for example, the Court of Appeal held that an agent's authority to receive payments due from customers for goods already supplied and owed to the principal was not ended by the termination of the agency contract where ending the agent's authority was a breach of the agency contract by the principal.
[233] Commercial Agents (Council Directive) Regulations 1993 , Regulation 16.(1)
[234] Pokhodun Y., Unauthorized agent from a comparative perspective//Yuliia Pokhodun// Часопис київського університету права.-2017.- Вип.4, p.310.

Many legal systems consider ratification as the unilateral legal act that may be performed expressly or be implied from the principal's words or conduct that must unequivocally show that he has affirmed the agent's acts (e.g. started to perform obligations under the contract). Silence and inactivity will not amount to ratification, moreover in some cases that may give rise to an estoppel against the principal that will prevent him from saying that he has not ratified[235].

The same position is true for Ukrainian doctrine, as in legal literature the approval (ratification) of an unauthorized act is defined as an action aimed at the emergence of a legal result and should be expressly made in order to pay the attention of others[236]. It is a kind of confirmation of the existence of agency relationship and of the agent's authority to act on the principal's behalf[237].

The importance of such kind of protection is that by acting retrospectively, approval of the unauthorized agent's action constitutes the healing of the fault found in that particular agreement. Under the Ukrainian doctrine, the ratification is also regarded as a unilateral act requiring its perception by a third party and a representative. It expresses the will of the principal to enforce an agreement entered into by the agent in the principal's interests, but with the excess of the powers granted to him[238].

Such an approval may be written or oral or implied from the principal's conduct. Some Ukrainian scholars such as Y. O. Kharitonov, O. I. Kharitonova, O. V. Startsev state, however, approval by tacit consent is also available under the civil law provisions[239].

However, the prevailing view there is that the acquiescence itself without any further actions aimed at the execution of a contract or any other agreement entered into by the agent cannot be an independent form of approval of the unauthorized actions. This is due to the complexity, or even the impossibility to establish the real existence of such tacit consent. This also may be a source of abuse by the principal. For this reason, it is expedient to adhere to the position where the ratification must be made either by express statement, regardless of its form, that the unauthorized act is approved, or by making conclusive action that clearly indicate the principal's decision to perform this act[240].

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[235] Smith v Henniker-Major & Co, Court of Appeal - Civil Division, July 22, 2002, [2003] Ch 182,[2002] EWCA Civ 762.
[236] Цюра В. В. Інститут представництва в цивільному праві України.: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.336.
[237] Полтавський О. В. До питання про правочин, який вчиняється з перевищенням повноважень // Право і Безпека. – 2012. – № 1. – С. 272–276.. с. 272-276.
[238] Харитонов Є. О., Харитонова О. І., Старцев О. В. Цивільне право України: підруч./ [Вид. 3, перероб. і доп.]. – К.: Істина, 2011. – 808 с., р. 271.
[239] Харитонов Є. О., Харитонова О. І., Старцев О. В. Цивільне право України: підруч./ [Вид. 3, перероб. і доп.]. – К. : Істина, 2011. – 808 с., р. 271.
[240] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.337.

The validity of the ratification does not depend on communication to the third party or agent in most legal systems[241]. This, however, does not mean that the third party takes a completely passive position in the process of ratification as there is still a possibility to choose whether to consent to the ratification or to declare the withdrawal to either the principal or to the agent. Such a rule is present in BGB where the third party is also granted a right to declare demand of ratification to the principal, after which the latter has two weeks period in order to ratify the unauthorized act[242].

In most cases, however, the third party will not even be aware of the fact the agent acted without authority and the process of ratification had taken place. The communication of the act of ratification is not the requirement under the laws of most countries. The validity of the ratification does not depend on communication to the third party or agent under the French law, English law, Restatement (Third) of Agency[243].

Before any ratification, the third party is not bound by the contract entered into by the agent, except the case when the agent had apparent authority when the third party may enforce the contract against the principal. The third party is, however, granted the right to withdraw from the transaction prior to ratification. For example, the Dutch and German civil codes both provide the third party with a limited right to withdraw that must make form of declaration prior to ratification. However, only the third party who acted in a good faith can withdraw from the contract when he either knew or ought to have known that the agent acted with a lack of authority[244]. Similarly, the UNIDROIT Principles define the requirement of the third party's good faith may in order to withdraw unilaterally prior to ratification[245]. The Restatement (Third) of Agency also provides the third party with a right to withdraw prior to ratification, however, without the restriction to know about the lack of authority[246].

Unfortunately, we have not found any specific provision regarding the third party's engagement into the process of approval of an unauthorized act under the Ukrainian doctrine, but there is obviously a strong need to introduce a possibility for the third party to interact with the agent or principal. This must be made in order to provide a certain degree of protection to such innocent persons who suffered from the reliance on the agent's appearance of authority. For this reason, it is suggested to provide the third party with the limited right to withdraw with the requirement to act in a good faith. This would protect both the interests of the principal and the third party.

[241] Restatement (Third) of Agency 2006, §4.01(2).
[242] Article 177 (2) BGB.
[243] Restatement (Third) of Agency §4.01(2).
[244] Article 178 BGB; Article 3:69(3) DCC.
[245] Art. 2.2.9(3) UNIDROIT Principles
[246] Restatement (Third) of Agency §4.05

One more requirement which is particularly important for the ratification to become possible is that it must be of an entire act, not partially and with the principal's full knowledge of the circumstances of an agent's unauthorized act. By the way of explanation, allowing the principal to choose only those parts of a transaction in which he is interested and are beneficial to him may appear to be extremely unjust an unfair in respect to the agent and the third party. Comment 2 to Art. 2.2.9 of UNIDROIT Principles states that partial withdrawal of the third party from the transaction will amount to the contract modification, so most legal systems, including Ukrainian law, regard partial ratification as not possible. Also, the ratification of null, illegal act or a forgery is impossible. By contrast, in civil law systems there is no unified approach as to what types of contracts may be ratified. Ratification there can operate where the contract of agency is affected by nullity[247].

To provide ratification, the principal must have been in existence at the time when the act was done and the act must be performed on the principal's behalf. Here the problems arise when the principal is undisclosed and his existence is not known to the third party. It is still agreed that in undisclosed agency the principal cannot ratify the unauthorized act, in contrast to the case with the unnamed but ascertainable principal who can ratify[248].

However, it may seem strange that the common law allows undisclosed principal to intervene on the contract where the agent has acted within the scope of actual authority but not allow him to ratify, however it is rather well-grounded if to look deeper. This is because, the third party when entering into the contract with the agent, impliedly contracts with the agent as well as with the undisclosed principal from the outset. So, if the agent was not authorized to act, no implied contract could have arisen between the undisclosed principal and the third party. In such a contract the agent would be the sole party and to allow ratification would be inconsistent with the contract entered with the third party[249]. Ratification in this case would have the effect of modification of contract and, under the common law doctrine, would require new consideration.

At the same time, in comparison to the Restatement (Second) of Agency that completely limited ratification to situations in which the principal was disclosed or unidentified, under the formulation of the Restatement (Third) ratification by an undisclosed principal was allowed by stating that a person may ratify an act "*if the agent on the principal's behalf*". Moreover, new formulation does not distinguish among disclosed principals, unidentified principals, and undisclosed principals.

[247] Article 1338 BCC
[248] National Oilwell (UK) Ltd v. Davy Offshore Ltd [1993] 2 Lloyd's Rep 582 at 592-7.
[249] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.), 203.

Regarding the requirement of a particular time, the scope of ratification is rather wide; it covers almost all cases where the agent acted beyond the existing authority or without authority at all. Under common law systems and mixed law systems in order the ratification to become valid, it must take place within a reasonable time. Some countries state that ratification is subject only to general limitation period. For instance, in the Netherlands there is a prescribed period of twenty years, PECL and UNIDROIT Principles state the general period of three years, however in can be extended to ten years maximum in the latter act. Under English law the courts are entitled to take into consideration all the circumstances and to determine the reasonable time for every particular case. Another approach is mentioned in Belgian law where ratification is not subject to any general or specific limit[250].

The Ukrainian legislator does not specify the period for approval of the transaction, but given the general provisions of civil law, the approval of the transaction should normally be realized within the required time which is enough for the principal to learn all the circumstances of the transaction and other legal actions that were committed outside the scope of the agent's authority, and provide a response to approve or reject them. There is no particular requirement for the form of such a reply, however, replying in a written form may take time for posting and by the post reviewed by a third party and a representative[251]. In commercial relations dynamic the time is usually limited, so it is suggested to choose the quickest and time saving means of communication. Moreover, nowadays the list of such means is wide and is aimed to save both time and money[252].

The requirement of the principal's capability to provide ratification is present in most legal systems, but they do not have a unified approach to whether this requirement must apply at the time of performance of an unauthorized legal act, or at the time of ratification, or at both of these times[253]. In France, Belgium, the Netherlands the principal must have legal capacity at the time of ratification. In English law and under the Restatement (Third) of Agency the principal must be in existence and have legal capacity at the time of the unauthorized act itself[254].

Regarding the consequences of performing an unauthorized act, common law system establishes the agent's personal responsibility, which is quite logical as the principal does not recognize such an agreement at all. Basically, all modern legal systems provide the possibility

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[250] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.), 415.

[251] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.338.

[252] Pokhodun Y., Unauthorized agent from a comparative perspective (Часопис київського університету права.- 2017.- Вип.4),p.310 .

[253] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.), 417.

[254] Restatement (Third) of Agency §4.04.

for the third party to hold the unauthorized agent liable for the damage suffered but such liability arises only in case when neither the doctrine of apparent authority, nor the doctrine of ratification is applicable.

Under the Ukrainian doctrine, the general rule defined in the art. 241 of the CCU states that contracts entered into by unauthorized agents should be considered to be void only if it is established that they cannot give rise to legal consequences for the representative from the very start or the representative cannot be a party to the transaction[255].

In case, when the excess of powers was made not in regard to the whole transaction, but only to some conditions, the above mentioned conclusion may conflict with art. 217 of the CCU, according to which the invalidity of part of the transaction does not entail the invalidity of the whole transaction. It will be more correctly to assume that the principal cannot refuse to approve the part of the agreement that was concluded with a due authority unless these parts are inseparable and cannot be executed independently and the malicious agreement between the agent and the third party will not be proved. Therefore, such an agreement may be declared partly valid by the court if the principal refuses to ratify[256]. It is proposed to consolidate this conclusion in Art. 241 of the Civil Code of Ukraine.

Without subsequent approval, the third party may appear in a difficult position, as the unauthorized act may cause damages. In different legal systems an agent/representative can be held liable under the concept of liability of *falsus procurator* (in continental law) or *the breach of warranty of authority* (in common law and mixed systems). Although, the terms are different, these doctrines have similar aim, rules of application and consequences.

Under the English law the doctrine of breach of warranty of authority is well-developed and gives rise to the liability on the part of the agent who enters into a contract with the third party. Identifying the legal basis for the breach of warranty of authority is still the difficult one and does not have a unified solution. Dutch, law, English law, the Restatement (Third) of Agency and the PECL follow the English approach and base such liability on breach of contractual warranty of authority which results in payment of damages for the loss of expectation.

Under the continental view, holding the unauthorized agent liable is regarded as the measure of the last resort which can be applied only when other avenues have failed. For instance, under French law, other than ratification, the doctrine of *mandate apparent* is a possible

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[255] Цивільний кодекс України : науково-практичний коментар/ за ред. І. В. Спасибо-Фатєєвої. – Х. : Страйд, 2010. – Том 4. Об'єкти. Правочини. Представництво. Строки. – 768 с., с.525.
[256] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.340.

way to hold the principal liable for the agent's acts[257]. In Germany the third party can obtain protection under the principle of *culpa in contrahendo* which establishes general pre-contractual duty of the principal not to frustrate the third party's reliance.

Under the English law the warranty is regarded as a type of collateral contract which in case of breach holds the agent strictly liable[258]. The concept presumes that the agent warrants that he has an authority to enter into the contract but not that the principal will be able to perform the contract.

The situation is possible when the agent provides an express guarantee that the principal will ratify. This possibility is provided under French and Belgium law, when by doing this, the agent discloses to the third party that he is not authorized to act. And if the ratification does not follow the agent may be liable. Also, under French and Belgium law actions against the agent will usually be based on tort, requiring the proof of the agent's fault[259]. Most of other countries reserve the preference for a contractual basis of agent's liability as higher measure of damage is allowed on such a basis and there is no need to establish the fault.

Unfortunately, many jurisdictions, including Ukrainian law do not define adequate ways of protecting the third party's rights and interests in such situation, but the agent will become fully liable under the contract as it is considered to be concluded on behalf of and in the interests of the representative. Liability occurs even for actions which he has performed with the due authority, but which are related to actions beyond his authority and cannot be performed independently[260].

In case of breach, the injured party will be entitled to substantial damages on expectation basis followed from the lack of authority. The only exception can be found in German law where the unauthorized agent acting in a good faith can only be held liable for the reliance interest of the third party. But, it worth mentioning that if the agent is liable under the doctrine of apparent authority and his principal cannot perform the contract, the third party would just be entitled to nominal damages at best.

Also, there is a possibility for the third party to require specific performance but the importance of this type of remedy fluctuates with regard to the system analysed. In civil law jurisdictions and Scottish law, specific performance is the primary remedy available to the third party, although some argue that in Belgium the third party may request compensation *in natura*

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[257] Danny Busch and Laura J Macgregor The unauthorized agent: perspectives from European and Comparative law (Cambridge: Cambridge University Press (www.cambridge.org), 2009.- 480 pp.), 45.

[258] Collen v. Wright (1857) 8 E & B 647.

[259] Civil Code (Napoleon Ed.) : as of 21 March 1804. Access mode: http://www.napoleon-series.org/research/government/c_code.html. Art. 1997 CC.

[260] Цюра В. В. Інститут представництва в цивільному праві України: дис. … канд. юрид. наук: 12.00.03./ Київ. нац. ун-т ім. Т. Шевченка. – К., 2017. – 535с., с.341.

as the agent himself is bound by a contract concluded in the name and on behalf of the principal[261]. Common law states that specific performance is a discretionary remedy which is only available where damages cannot be regarded as an appropriate remedy.

Under the Ukrainian law without subsequent approval, the representative becomes fully liable to a third party, since in fact he himself becomes the party to the contract. The possibility for the third party to request specific performance, unfortunately, is not provided which appears to be a substantial drawback of the national legislation. Since contract rules apply to the doctrine of agency, specific performance as a contract law remedy should be also provided to protect the expectation interest of the innocent party to a contract.

Summarizing, in agency relationship, the agent is abliged act on behalf of the principal within the scope of his authority. In the event of a deviation from this requirement when a representative carries out any unauthorized act, legal consequences of such an agreement do not arise, the transaction may be declared null and void by the court decision. In addition, if a representative acts beyond the authority is intentionally misleading the third person with his powers, giving, for example, a fake warranty of authority, such person will be liable both to the third person and to the principal for the damage caused to them. However, the representative may be mistaken as to the limits of his authority which will not lead to the agent's liability for damages suffered by a third party. It is, therefore, important for the third party, before entering into a legal relationship with a representative, to verify the agent's authority. For the principal, the consequences of such an agreement will only be effective in the event of the subsequent approval (ratification) of the unauthorized act that creates legal consequences from the moment of performance of an unauthorized legal act by the agent.

[261]Foriers and Jafferali, 'Le Mandat (1991 a 2004), 87.

CONCLUSIONS

1. After providing the comprehensive research of theoretical problems of the agency in common law system, it was proven that the Institute of agency represents one of the most important guarantees of the implementation of subjective civil rights and obligations. The thesis provides a deep analysis of the essence and elements of the doctrine of agency, and makes a comparative investigation of the unauthorized agency under continental and common law families. Also, the proposals for the improvement of the civil legal regulation of agency relations under the Ukrainian civil doctrine are formulated.
2. In the late XVII century two main agency theories – the theory of separation and the theory of identity, evolved. It was established that in countries with the continental legal system the "theory of separation" prevails, which is based on the distinction between the external and internal agency relations. It enables regulation of agency relationships, regardless of the basis of their occurrence, by covering all known forms of mediation activities based on representation.
3. Common law approach is aimed at settlement of agency relations on the basis of the theory of the identity of the principal and the representative. This appears to be practical and more justified from the standpoint of the needs of commercial relations, than the abstract method of separation.
4. It can be concluded that the agency is a non-material fiduciary legal relationship, where one person has the opportunity to affect the other person's legal position within the scope of authority granted to him in respect to duly informed third parties about the existence of representation relationship. Committing of only legally significant actions aimed at realization of the principal's rights and legitimate interests may be the object of the agency relations.
5. It is concluded that an employment contract cannot be considered as the basis for representation under the Ukrainian civil approach, as the employee acting on behalf of the company is regarded as a part of the legal entity and under the "separation theory" accepted by the Ukrainian law, principal and agent have to be separate legal personalities.
6. Under Ukrainian law, unlike the common law approach, the focus is placed upon the agent's capacity and both capable and incapacitated persons can act as a principal in agency relationship. This situation leads to "dual representation" when a representative concludes a contract on behalf of incapacitated person of commission in which the latter becomes a principal.
7. The emergence of agency relationships and the agent's authority may not be simultaneous as the agency is usually formed in two stages: under the contract of commission or agency agreement relationships are created and the authority is granted to the agent under the power of attorney where its scope is defined.

8. The power of attorney is regarded to be a law-approving document, rather than law-establishing, and it cannot be breached and lead to liability itself as it is always based on the agreement between the principal and agent. In this case, the power of attorney is a law-justifying document, but not a legal fact.

9. The legal foundation of the doctrine of apparent authority is considered to be controversial. English view which was later followed by UNIDROIT Principles regards the concept of estoppel as the basis. Continental approach sticks to the leading view that the concept of apparent authority is based on the objective theory of agency, which is directly derived from the objective theory of contract, since the English position causes certain problems with holding an unauthorized agent liable for the acts performed on the principal's behalf.

10. It is determined that the doctrine of unauthorized agency consists of three more specific concepts: apparent authority, ratification and the liability of falsus procurator or the breach of warranty of authority. Within each of these broad doctrines, the law of agency continues to strive for a proper balancing of the rights and obligations of the parties to this triangular relationship.

11. The legal nature of an unauthorized act as a legal phenomenon is considered to be described as 'floating', neither void, nor enforceable, nor completely valid, since it cannot be placed within any of the existing categorization of void, voidable or invalid transaction. The same description is suggested for Ukrainian civil doctrine.

12. Ratification is regarded as a unilateral legal act that may be performed expressly or be implied from the principal's words or conduct. Silence and inactivity, in general, will not amount to ratification, moreover in some cases that may give rise to an estoppel against the principal that will prevent him from saying that he has not ratified.

12. It is established that as a consequence of the agent's unauthorized act, he is personally liable for the losses suffered latter's by the third party, since the principal does not recognize such an agreement at all. Ukrainian doctrine introduces the general rule that contracts entered into by unauthorized agents should be considered void but the court may declare it to be partly valid if the excess of powers was made not in regard to the whole transaction, but only to some conditions.

RECOMMENDATIONS

1. It is proposed to introduce changes to articles 37, 60 (3) of the Civil Code of Ukraine in order to allow people with limited capacity to act as representatives of their minor children, since they may bear certain property rights and responsibilities towards their children.

2. Given to the lack of legal definition of "warranty of authority" in Ukrainian legislation, the new formulation of the art. 244(3) is proposed:

> "A warranty of authority is a written document issued by the principal to the agent in support of the latter's authority to act on the principal's behalf in respect of the third parties."

3. It is proposed to interpret the art. 207(1) of the Civil Code of Ukraine as such that equates electronic form of concluding agency agreements to a written form. Thus, electronic form of the contract has to be regarded as a kind of written form which means that there is a direct link between the electronic and written forms of documents.

4. There is no particular requirement for the form of the principal's approval of the agent's unauthorized act under the Ukrainian law. It is considered that replying in a written form may take time for posting and by the post reviewed by a third party and a representative. In dynamic commercial relations time is usually limited, so it is suggested to choose the quickest and time saving means of communication. Moreover, nowadays the list of such means is wide and is aimed to save both time and money.

5. The interests of the third party are to be protected by the way of granting the right to the latter to withdraw from the transaction prior to ratification. Although, under Ukrainian law such possibility is not found, there is obviously a strong need to introduce a possibility for the bona fide third party to interact with the agent or principal. This would protect both the interests of the principal and the third party.

6. It is suggested to improve the art. 241 of the Civil Code of Ukraine by consolidating it with the provision of principal's inability to refuse to approve the part of the transaction that was concluded with a due authority unless those parts are inseparable and cannot be executed independently. In case of principal's refusal to ratify, such an agreement may be declared partly valid by the court unless the malicious agreement between the agent and the third party is not proved.

7. Under the Ukrainian law the possibility for the third party to request specific performance is not provided which appears to be a substantial drawback of the national legislation. Since contract rules apply to the doctrine of agency, it is suggested to provide the third party with the possibility to request specific performance as an equitable remedy in order to protect the expectation interest of the innocent party to a contract.

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ABSTRACT

The Master's thesis is devoted to the clarifying of the concept and essence of agency in common law, determination of the requirements for the agent to exercise the authority granted by the principal and to identifying of the legal problems caused by the agents who act with a lack of authority from a comparative perspective. Agency law appears to be an under-researched area and many aspects deserve attention, however the work mainly analyses the elements of the doctrine of agency in common law system and the category of "authority" as an essential part of the doctrine. The purpose of the research is to identify the key elements of the doctrine of agency in both continental and common law systems and to provide suggestions regarding the improvement of national legal regulation of agency relations by implementation of the foreign experience into the Ukrainian legislation.

Keywords: agency, common law, authority, unauthorized agency, apparent authority, ratification.

SUMMARY

The research reveals an important problem of agency relations development; particularly the question of essence and elements of agency, agent's authority and the agent acting with lack of authority are being discussed. The work is valuable for providing a comparative analysis of the doctrine of agency in different legal systems.

Analysis of the agency relations in modern international law and model acts made it possible to conclude that the state of legal relations of representation is quite undervalued in the civil law of Ukraine. Ukrainian civil law still does not possess the determination of "authority" as a specific category under the doctrine or correct understanding of an unauthorized agency. Also, no exact means of holding the unauthorized representative liable are foreseen. So, the current research is deemed to provide a comprehensive legal analysis of the elements of agency, concept of the agent's authority and the doctrine of unauthorized agency both in continental and common legal systems.

The more actuality to the research is brought by an understanding that the institute of representation has become an important inter-branch institution that "serves" the provisions of various branches of law. For this reason, the purpose of the research is to identify the key elements of the doctrine of unauthorized agency and to develop the means of its further application into the domestic civil law.

The work considers terms "representative" and "agent" as equal and interchangeable as both of them are used to describe a person representing the interests of the principal in his name and interests and possessing the powers to affect the principal's legal position in relation to third parties.

It provides a deep research of the doctrine of unauthorized agency which appears to be important in the light of modern civil and commercial relations in order to preserve the utility of agency. The difficulty with this type of agency lies in the lack of control on the part of the principal which entails certain questions of liability of either the agent or the principal. The thesis is devoted to provide a comprehensive analysis of the doctrine of unauthorized agency from a comparative perspective.

Master's thesis contains references to current Ukrainian and foreign sources, literature reviews, and structured conclusions based on the comprehensive investigation of the key elements of the doctrine of agency and its elements. Suggestions regarding the improvement of the legal regulation of agency relations by implementation of foreign experience into the Ukrainian legislation are also provided.

HONESTY DECLARATION
10/05/2018
Vilnius

I, **Yuliia Pokhodun**, student of Mykolas Romeris University and Taras Shevchenko National University of Kyiv (hereinafter referred to University), Faculty of Law, Institute of Private Law, Master's double Degree study programme, confirm that the Master thesis titled:

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