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INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS ON AGENCY AND

COMMISSION ON SALE OR PURCHASE OF GOODS

PROSPECTS ON THE UNIFICATION OF THE LAW RELATING TO THE ACTIVITY OF INTERMEDIARIES IN COMMERCIAL MATTERS

Rome, May 1970

1. UNIDROIT, upon completing the studies it undertook to make as far back as 1935, published, in 1961, two draft uniform laws on certain aspects of the intermediaries' activity in international transactions.

The former, concerning agency in private law relations of an international character (UDP 1961 - Et/XIX, Doc. 43), purposes to regulate in a uniform manner all cases of "représentation directe", but is nevertheless confined to considering relationships between principal and third parties; and the latter dealing with the contract of commission on the international sale of goods (UDP 1961 - Et/XXIV, Doc. 28) principally refers to internal relationships between principal and commission agent but also includes certain provisions regarding relationships between principal and third parties.

Quite recently, a further two draft uniform laws, restricted to internal relationships between principal and agent, were published on the subject: the draft of "Internationale Liga für Handelsvertreter und Handelsreisende" and the draft of the "International Union of Commercial Agents and Brokers", January 1966.

The Austrian Government, for its own part, submitted to the Legal Co-Operation Committee of the Council of Europe a draft code on international commercial agency ("Projet de code international de la représentation commerciale") which is no other than the afore-mentioned draft of the "Internationale Liga für Handelsvertreter und Handelsreisende").

The two UNIDROIT drafts were sent to the participating Governments for submission of their comments. A number of these Governments conveyed their observations and comments to the knowledge of the Institute (analysed in Doc. UDP 1970 - Etudes XIX et XXIV ns. 44 et 29).

The most fundamental criticism on these two drafts was made by the Government of the United Kingdom. This Government in fact stressed

that the whole system originating from the two UNIDROIT drafts is inconsistent with the rules regulating the institution of "agency" within the Common Law system. The Government of the United Kingdom had nevertheless foreseen the possibility of a unification taking shape and suggested that a new draft be prepared restricted to the intermediaries in international sales, but which should also regulate both disclosed and undisclosed agency. Such a draft should deal both with the principal-agent internal relationship and the relationships between the agent (and the principal), and third parties.

The differences of conceptions appearing through the variety of the drafts proposed, as well as the criticism to UNIDROIT texts, disclose the existence of very considerable difficulties. An explanation for these difficulties may be found in the different legal concepts about the idea of intermediary, under the various systems of municipal laws.

It seems to be advisable to analise these concepts and to compare them with the two UNIDROIT drafts in order to find out the sphere within which unification would appear to be realizable.

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2. An author (1) quite rightly remarked that the notion of agency necessarily involves the fact that the agent is vested with the power to act on behalf of someone else; but that on the other hand, the fact of acting in some one else's name is in no way indispensable to the concept of agency. The possibility for an agent to bind the person on behalf of whom he acts shall not necessarily depend on the disclosure of the latter's name. It is quite conceivable, from a logical standpoint, that a legal system should acknowledge the effects produced on the principal by the acts of the agent, by giving consideration only to the relationship existing between these two. Under this conception, where a distinction between

(1) FLUME, Allg. Teil des Burgerl. Rechts, BD, II, Das Rechtsgeschäft, Berlin-Heidelberg-New York, 1965, p. 763.

"disclosed agency" and "undisclosed agency" has no more meaning, all relationships should be envisaged as a whole within the sphere of agency, including relationships between agent and third parties and between principal and these third parties and, all the more so, relationships between agent and principal.

Conversely, another concept is to be found in the legal systems according to which agency implies that the transaction has to be entered into in the name of the principal. This case is clearly separate and distinct from the hypotheses where a person acts on behalf of another, without disclosing this latter person's name, and cannot, therefore, bind him directly. From the standpoint of these systems agency stricto sensu is conceived in a general and abstract manner, indipendent from particular relationships which in each case bind the agent and the principal.Emphasis is conversdy laid merely on relationships between principal and third parties. On the other hand, the cases where the agent did not disclose his quality to third parties and appeared as if he were acting on his own behalf are only envisaged through particular relationships which, in every case in point, may exist between the agent and the person on whose behalf he acts.

3. Of the modern systems under which agency implies that the agent shall act in the name of principal, two categories may be specified.

The former - which is the less recent one - does not wholly disregard, or set aside, the relationships existing between agent and principal which it regulates as well as it regulates relationships between principal and third parties, within the framework of the institution of agency. It is the concept of the French Civil Code which conceives agency under the scheme of "mandat" defined in article 1984 as an "act under which one person confers upon another the power of doing something on behalf of principal and in his name ". This contract of "mandat", concluded between the agent and the principal, is regulated by articles 1991 et seq. A like

concept exists in the legislations of the Argentines, of Brazil, of Chili, of Spain etc., as well as in the Austrian ABGB (paragraph 1002 seq.).

The latter category is represented in the first place by the German BGB, which considers agency ("Vollmacht") only within the framework of legal transactions, as a mere technical mechanism to facilitate their conclusion. Thence, the only matter of interest are the conditions of its existence (conferment of powers on agent) and its effects (direct relationships between principal and third parties) regardless of the internal relationships between agent and principal. The line followed by BGB would appear to be quite clear, if one were to consider, for instance, the opening paragraph of Article 164: "Any such declaration of intent as may be made by anyone within the limits of his agency powers, in the name of principal, shall produce a direct effect on principal".

This concept which is to be found in other modern legislations (for instance, in: Switzerland, Scandinavian Countries, Italy, Greece, Poland), reflects certain principles which were expressed during the past century by JEHRING(2) and LABAND(3) who have elaborated the abstract notion of agency.

4. The Common Law legal system starts out from a widely different concept of the institution of "agency", which, in practice, gives rise to effects which are very similar to those known to the systems cited above. The Common Law only considers, for purposes of establishing the mechanism of agency, relationships between principal and agent. It is of no consequence whether the latter, in dealing with third parties, states

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(2) Jherings Jahrb. 2, 131 (1858).

(3) ZHR, Io, 183 (1866).

or does not state that he is acting in someone else's name; only the ties binding him in his capacity of "agent" to his master, the principal, bring agency into being (4).

The difference existing in this connection between the Common Law and the Civil Law systems, appears first from the causal nature of the "authority", that is to say the power conferred upon the agent to bind the "principal" and third parties. This does not mean that the Common Law makes no distinction, at the theoretical level, between the various relationships that are established within the sphere of "agency":it certainly takes in separate account, the manner in which such "authority" is conferred on the "agent" by the "principal", as well as the relationship established between third parties and the "principal" by the agent using his authority. But these "external" relationships, which in the codified law systems are considered as independent, separate from any special relationships between principal and agent, are on the contrary embodied by Common Law in the single sphere of agency including all relationships between the various parties concerned - free thereafter to establish certain differences by making a distinction between certain particular types of agency, still exclusively characterized by the nature of the relationship established between principal and agent.

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(4) Examples of definitions of "Agency" :

"Agency is the relationship that exists between two persons one of whom, the principal, expressly or impliedly consents that the other, the agent, similarly consenting, should represent him or act on his behalf." (Bowstead on Agency, 12nd ed. 1959, p. 1).

"Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act". (Restatement of the Law, Agency, 2nd, § 1).

The difference in which "agency" is viewed by the Common Law and "représentation" by the civil law system becomes again apparent, at the practical level, from the difficulties arising in connection with the "undisclosed principal" - the case where the agent does not disclose the name of his principal to third parties - or even his capacity of agent. In such a case, the Common Law, unlike Civil Law, finds no difficulty in having the intermediary disappear from the scene and to admitting the existence of direct relationships between the principal and third parties when the former discloses his existence to the latter, or the latter discover his identity. The only condition, naturally, being that the agent acted within the limits of the authority which was conferred on him under the special relationship binding him to his principal (5).

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5. The UNIDROIT draft on agency took the concept of the Civil Law systems as a basis, according to which agency presumes that the agent acts not only on behalf but also in the name of someone else (article 3 of the draft). The result is that the draft is restricted to envisaging the establishment of agency powers (art. 5-8), their extent (art. 9-11), their extinction (art. 17-26) and, quite obviously, relationships between principal and third parties. The institution of agency thus conceived corresponds to the concepts familiar to the Civil Law countries and these can admit without any difficulty that the draft does not deal with relationships between principal and agent.

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(5) Cf. ANSON, Principles of the English Law of Contract, 22nd ed., Oxford 1964, p. 542. Bowstead on Agency, op. cit., p. 175 ssq.; Restatement of the Law, Agency, 2nd, §§ 144, 186.

For the Common Law jurists, conversely, the UNIDROIT draft is scarcely consistent with the very notion of agency which can hardly subsist if the case of the "undisclosed principal" and the relationships between agent and principal are disregarded.

Beyond the difficulty of terminology, the difference between the concepts of "représentation" on the one hand and of "agency" on the other reveals that the UNIDROIT draft, which has opted in favour of the notion of "representation", appears on the whole to be consistent for the Civil Law countries, but that from the Common Law standpoint, the same draft, viewed within the concept of "agency", appears to contain some very serious gaps.

6. The situation is a shade different in the UNIDROIT draft dealing with the contract of commission on the international sale of goods.

The main difficulty here seems to arise from the very existence in the Civil Law systems, of a duality of categories explaining the duality of the drafts. The "commission agent", who is described as an intermediary acting in his own name (Art. 5) is distinguished from the agent who acts in someone else's name (draft on agency). It is obvious that, bearing in mind that which has been said above, this distinction practically does not make any sense in Common Law.

On the other hand, the structure of the draft on commission and the fundamental rules embodies therein, have met with far less objections on the part of the Common Law countries than those which were met by the draft on agency. Contrarily to the former, it deals primarily with the "internal relationships" of agency and devotes a full chapter to the relationships between principal and commission agent.

Further and above all, Chapter III, dealing with relationships between principal and third parties, deliberately deviates from the logic

of the Civil Law systems - which is nevertheless at the basis of the fundamental distinction between "représentation" and "commission" - and comes very a close to the Common Law concept.

Articles 19 and 20 give the possibility of direct action between the principal and third parties "if it appears from the contract of purchase or of sale or from the circumstances at the moment of the conclusion thereof that the purchaser or seller has acted in his capacity as a commission agent .... ". Thus, in this case, even though the commission agent acts in his own name and does not appear as a representative-agent within the meaning of Article 3 of the draft on agency, any such acts as may be accomplished by him may nevertheless establish direct relationships between his principal and third parties, thus giving rise to the characteristic effects on agency. The draft admits, like the Common Law, that such effects originate from the relationships existing between principal and commission agent and do not arise out of the fact that the commission agent acts in someone else's name.

It is hence essentially the impossibility of conceiving the category constituted by the commission agents and the difference in the agents themselves within the institution of agency, that represents the greatest hindrance confronting the draft in the Common Law systems which could, on the other hand, accept the spirit of the fundamental rules it contains.

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7. The difference in concept between Civil Law and Common Law appears to be so vast within the sphere with which we are dealing that the UNIDROIT draft on matters of agency in general does not appear to be fit to lead to the desired unification, at least in its present text.

It seems that, bearing in mind the existing fundamental differences of opinion on the principles, any such attempts at unification as may be made at the level of such principles have little or no chance of success for the time being.

It was therefore suggested to investigate what would be the chances of success of an unification directed in a more practical manner at the currently existing categories of intermediaries for the conclusion of contracts of international sales. There is here involved a sphere within which the requirement for uniform rules is felt more than in any other, as it has been stressed by the Governments who, in their observations on the UNIDROIT draft, expressed a desire that such an orientation be followed (6).

The function of intermediary in the international sale of goods is regulated, under the different laws, under various denominations, according to the particular relationships existing between the agent and the person on whose behalf he acts, and also according as to whether the agent is to act or not in his own name in respect to third parties.

According to the first criterion there appear to be two categories: the independent intermediary who may nevertheless be bound to the party by co-operation relationships of a certain duration, and the dependent intermediary who, unlike the former, acts under a link of subordination for the party who is his employer. This second category does not give rise to specific questions in international business relations.

Amongst the independent agents it is further possible to make a distinction between the brokers acting on behalf of the two parties they are to cause to get in touch with each another for the purpose of concluding

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(6) The Federal Republic of Germany, Austria, Belgium, Israel, the United Kingdom.

a specific contract, and the agents who act on behalf of only one of the parties, that is either the seller or the purchaser.

Only in the Common Law countries this latter category of agents is conceived in a unitary manner although under various denomination (7).

In the Civil Law countries, a distinction is generally made on the one hand, between the agents acting in someone else's name (French "agents commerciaux", December 23, 1958; Italian "agenti", Articles 1742 et seq. of the Code Civil; the German Handelsvertreter § 84 et seq. d. HGB; the Swiss "agent", Articles 418 et seq. of the Code des obligations; the Belgian "représentant de commerce", July 30, 1963; the Dutch "Handelsagenten", Art. 750 of the Civil Code) generally described as being in charge of promoting and concluding contracts in someone else's name and behalf (8), and on the other hand the agents acting in their own name (French "commissionnaires", Art. 94 et seq. of the Code de Commerce; the Italian "commissionari", Art. 1731 et seq. of the "Codice Civile"; the German "Kommissionäre" § 383 et seq. HGB; the Belgian "commissionnaires", May 5, 1872; the Swiss "commissionnaires", art. 425 of the Code des obligations, etc.) generally described as those who purchase and sell goods in their ow name but on behalf of a principal.

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(7) In the United Kingdom it is a matter of "factors" or "mercantile agents" or, further, "brokers", all of them subject to the regulation enacted by the "Factor Act", 1889, which, in Section 1 restricts its sphere of application to "any mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

(8) See the two afore-mentioned draft uniform laws on "Handelsvertreter" and on "commercial agents".

The logical consequence of this distinction is that, in theory, the agents belonging to the former category, remain personally outside of the contract, in the conclusion whereof they have participated, while the agents belonging to the second category, namely the "commission agents", become themselves a party to the contract.

A more careful examination of the legal reality will nevertheless show that in spite of these clear cut general principles, certain derogations have been established with respect to this structure. On the one hand, there are cases where even within the structure of the civil law "représentation" the indication of the name of the principal is not considered as necessary to produce its tipical effect; on the other hand there are cases where certain typical effects of "représentation" originate even from the intervention of an intermediary of the "commissionnaire" type necessarely acting in his name.

Regarding the former category, Article 32 of the Swiss Code des Obligations could be cited, according to which in cases where the agent does not disclose the name of the principal and does not intimate that he is acting on the latter's behalf, direct links are nevertheless established between aforesaid principal and the third parties if circumstances were such as to normally lead one to believe in the existence of an agency, or any way, if the person of the contracting party was indifferent to the third parties.

Likewise, in German law, the theory of "Handeln für den, den es angeht"(9) admits, in its most forward concept, that the effects of agency may in certain cases arise when the agent has not disclosed the name of his principal and even in cases where he did not reveal his capacity of agent, if it does not matter for the third party to conclude the contract with such person or such another.

(9) Initially worded by COHN, "Das rechtsgeshaftliche Handeln für donjenigen, den es zangeht, 1931; see also LUBTOV, ZHR 112; 227 et seq.; see COING-STAUDINGER, Verbem. 44 et seq. to §§ 164 et seq.; contra: FLUME? op.cit. p. 766 et seq.

Regarding the latter category of derogations, attributing certain effect of "représentation" to the acts of the "commissionnaires", Articles 392, paragraph 2 of the German HGB could be cited, under which any such claim as may arise out of a contract concluded by a commission agent, shall be considered in the relationships between principal and commission agent or his creditors as a claim belonging to the principal even though it was not yet transferred. Likewise, Article 401 of the Swiss Code des Obligations provides for an automatic transfer to the principal of the claims acquired by the agent in his own name; it further gives to the principal, in case of bankrupcy of the agent, the right to subtract from his assets, any property as may have been acquired by the agent in his own name but on behalf of the principal. Furthermore, Articles 1705 para. 2, 1706 para. 1, and 1707 of the Italian Civil Code should be cited, which, according to the prevailing opinion(10), establish an automatic and direct transfer to the benefit of the principal, on whose behalf the contract was performed, of any claims and certain rights acquired by an agent acting in his own name.

It would hence appear that in spite of the distinctly clear differences in principle existing between "commissionnaire" and "représentant", certain considerations of a practical nature tend, particularly in matter of sales, to draw these two categories of intermediairies close together, thus leading one to foresee the possibility of attaining a unitarian concept of the intermediary in matters of purchase and sale such as that existing in the Common Law system.

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(10) PUGLIATTI, Rilevanza del rapporto interno nella rappresentanza indiretta, Riv.trim.dir.proc.civ. 1958, 801 et seq.; MINERVINI, Il Mandato, la Commissione, la Spedizione, 1952, p. 103; BETTI, Teoria gen. del negozio giur., 1955, p. 565 et seq.

It might be fitting here to recall that also in the Common Law system the consequences of the basic principles are not invariably inferred in a strict manner and that any such exceptions and arrangements as would appear to be of avail are accepted in certain particular spheres. Thus, the establishment of direct links between the third parties and the "undisclosed principal" is abandoned in cases where the "agent" acts and concludes the contract as if he were himself the sole party in interest, or, further, in cases where because of the very nature of the contract the person of the contracting party assumes a particular importance(11).

Furthermore, in the British system of the 'undisclosed principal", the third party may act at his own choice either against the "agent" or against the "principal". In the American system, the aforesaid third party may act against the "agent", and, upon the "principal" being disclosed, also against the latter.

Hence, the general principle according to which "agency" only depends on the relationship between "principal" and "agent", does not lead to the automatic substitution of the "agent" by the "principal" upon the appearance of the latter.

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9. The UNIDROIT draft on commission agents is a praiseworthy piece of work in that it has done away the inflexibility of the opposite theories and represents an attempt to fulfilling the requirements for a practical regulation of the agency activity, within the sphere under consideration, and within the meaning of the more progressive solutions envisaged by both Civil Law and Common Law which are tending to agree on this point.

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(11) ANSON, op.cit., p. 547-548.

It nevertheless appears that as uniform regulation was limited to "commissionnaires" only, that is to say to intermediaries contracting in their own name, on someone else's behalf, it raises very considerable hindrances to the Common Law system and in the final analysis constitutes an obstacle.

In view of the fact that one is ready to admit that the establishment of direct relationships between the "principal", in a broad sense, and third parties is not necessarily subordinate to the fact that the intermediary contracts in someone else's name, the traditional distinction made under the Civil Law systems between "mandataire" and "commissionnaire" loses a great deal of its importance.

Furthermore, in commercial practice - especially within the sphere of the purchase and the sale of goods - there are various types of intermediaries who, under various denominations and regardless of the fact as to whether or not they act in their own name, are confronted with the same problems as far as their relationships with third parties are concerned(12).

A uniform international regulation of the main issues arising in connection with relationships established by intermediaries in the purchase and the sale of goods could thus, be envisaged, including such topics as for example, the rights and obligations of the parties, the intermediary's security with respect to the person on whose behalf he acts, in connection with the agreements concluded with third parties, the respective responsibilities of the intermediary and the person on

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(12) This point is stressed in the observations made by Norway who recalls the existence of the two afore-mentioned drafts, concerning "Handelsvertreter" and the "commercial agents".

whose behalf he acts, towards third parties, the revokation of an agency contract or its extinction, and even the sole agency and non-competition clauses(13).

One should further specify the categories of intermediaries and any such relationships as may thus be subject to a common regulation. It was suggested in this connection that only intermediary relationships within the sphere of the purchase and the sale of goods should be envisaged. This is in fact a matter which, at the international trade level, is of a very considerable pratical interest - and in which unification has some chances of being confronted with minor obstacles.

Furthermore, such a regulation, even though remaining wholly independent, could represent a useful addition to the uniform law on the international sale of goods (The Hague Convention of 1964) for any such States as may wish to adopt a body of international rules in the matter.

It should, however, be possible to provide for an extension of the uniform rules at a further stage, to other matters that the sale thus delimitated. The Convention itself could, for instance, include a clause permitting the contracting States to extend the initial spheres of application in the event that such a measure would, in practice, appear to be advisable.

It in any event seems, in the final analysis, that a distinction based on the criterion of the intermediary acting on someone else's behalf, as opposed to the person acting in his own name represents a hindrance to unification. It might be necessary to look for new solutions.

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(13) Regarding internal relationships between the agent and the person on whose behalf he is acting, the uniform regulation should be conceived in a general manner at the level of the principles so as to avoid to become specific regulation for a particular professional category.