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WORKING GROUP FOR THE PREPARATION OF  
PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

Chapter [...]

AUTHORITY OF AGENTS

(Draft and Explanatory Notes prepared by Professor M.J. Bonell on the basis of  
1983 Geneva Convention on Agency in the International Sale of Goods)

Rome, December 1998

## General Remarks

On the occasion of its first meeting in March 1998 the Working Group for the preparation of a second enlarged edition of the UNIDROIT Principles of International Commercial Contracts decided to include in that edition a chapter on agency. It was also agreed to base the envisaged chapter on the 1983 Geneva Convention on Agency in the International Sale of Goods (hereinafter: GenevaC) which, although not yet in force, has been ratified by a number of countries, such as France, Italy, Mexico, The Netherlands and South Africa, and is the result of many years' work carried out under the auspices of UNIDROIT.

Pursuant to this decision, the present draft Chapter follows as closely as possible the structure and wording of the GenevaC, the text of which appears in APPENDIX I.

Changes have been introduced first of all on account of the fact that the UNIDROIT Principles are not a binding instrument and that their scope is not limited to sales contracts. Thus in Article 1 the reference to contracts of sale of goods has been replaced by that to contracts in general; moreover all provisions which are peculiar to a convention such as those concerning the territorial scope of application (Article 2 GenevaC) and the final provisions (Article 21 *et seq.* GenevaC) have been deleted.

Some provisions, in particular Articles 5, 6, 7, 8, 10, 11 and 13(7) GenevaC, have been omitted because they address issues already dealt with in a wider context in the present edition of the UNIDROIT Principles. Other provisions of the GenevaC have been placed in square brackets as they may be considered to be too detailed for inclusion in the UNIDROIT Principles.

Articles 3 and 4 GenevaC have been deleted and replaced by a more succinct provision which now appears in the present draft Chapter as paragraph 5 of Article 1. The new provision is intended to reproduce basically the content of the two above-mentioned provisions of the GenevaC. The only change of substance is that it is no longer stated, as it was in Article 4(a) GenevaC, that an organ, officer or partner of a corporation, partnership or other entity, when acting by virtue of an authority conferred by law or by the constitutive documents, shall not be regarded as agent of that entity. As a consequence, the rules laid down in this draft Chapter may be applied even with respect to contracts entered into with a corporation, partnership or other entity, provided that they do not conflict with the special rules governing the authority of the latter's organs, officers or partners (cf. Comment 4 to Article 1 of this draft).

Two new articles have been added, namely Article 7 on conflict of interests and Article 8 on subagency. Neither of these topics have been dealt with in the GenevaC as they were considered to affect the internal relationship between the principal and the agent. For this reason Articles 7 and 8, which have been literally taken from the "Principles of European Contract Law" (hereinafter: PECL) (see APPENDIX II), are placed in square brackets.

New are also the titles given to the individual articles. Finally, the title of the

Chapter itself has been changed from “Agency” to “Authority of agents” in order more accurately to reflect the fact that the proposed rules focus on the so-called external relations between the principal or the agent on the one hand and the third party on the other, and are not concerned with the so-called internal relations between the principal and the agent. The same change appears in the relevant chapter of the PECL.

## CHAPTER [...]

## AUTHORITY OF AGENTS

## Article 1

*(Scope of the chapter)*

**(1) This chapter governs the authority of an agent to bind its principal in relation to a contract with a third party.**

**[(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by it for the purpose of concluding that contract or in relation to its performance.]**

**(3) It is concerned only with the relations between the principal or the agent on the one hand, and the third party on the other.**

**[(4) It applies irrespective of whether the agent acts in its own name or in that of the principal.]**

**(5) It does not govern an agent's authority bestowed by law or the authority of an agent appointed by a public or judicial authority.**

*References:*

Art. 1 and 3 GenevaC

Art. 3.101 PECL

## COMMENTS

**1. Scope of the Chapter**

This Chapter deals with the authority of an agent to bind its principal in relation to a contract with a third party. In other words it focuses on the external relations between the principal or the agent on the one hand and the third party on the other, and is not concerned with the internal relations between the principal and the agent. Even those provisions which deal with matters affecting the relationship between principal and agent (see, for example, Articles 2 and 10 on the establishment and termination of the

agent's authority, Article 7 on conflict of interests and Article 8 on subagency), consider them primarily in relation to their effect on the third party.

The rights and duties as between principal and agent are governed by their agreement and the applicable law which, with respect to specific types of agency relationships such as those concerning so-called commercial agents, may provide mandatory rules for the protection of the agent.

## **2. Authority to conclude a contract**

This Chapter deals only with agents having authority to conclude contracts on behalf of their principals. In such cases it applies also to any act undertaken by the agent for the purpose of concluding a contract and in relation to the performance of it. On the contrary, agents entrusted with the negotiation of contracts but without authority to conclude them are outside the scope of this Chapter.

## **3. Consensual relationship between principal and agent**

A further condition for the application of this Chapter is the consensual nature of the relationship between principal and agent. Cases where the agent's authority is conferred by law (e.g. in the field of family law, matrimonial property and succession) or arises from judicial authorisation (e.g. to act for a person without capacity to act) are outside the scope of this Chapter.

## **4. Agents of companies**

The authority of organs, officers or partners of a corporation, partnership or other entity, whether or not possessing legal personality, is traditionally governed by special rules, sometimes even of a mandatory character, which by virtue of their specific scope necessarily prevail over the rules on the authority of agents in general as laid down in this Chapter. It follows, for instance, that if under the special rules governing the authority of its organs or officers a corporation is prevented from invoking against third parties any limitation to their authority, it may not rely on Article 5(1) of this Chapter to claim that it is not bound by an act of its organs or officers which falls outside the scope of their authority.

On the other hand, as long as the general rules laid down in this Chapter do not conflict with the above-mentioned special rules on the authority of organs, officers or partners, they may well be applied in lieu of the latter. Thus, a third party seeking to establish that the contract it has concluded with an officer of a corporation binds the latter, may invoke either the special rules governing the authority of that corporation's organs or officers or, as the case may be, the general rules on apparent authority as laid down in Article 5 (2) of this Chapter.

### *Illustration 1*

A, President of the English Company B, has under the company's articles authority to carry out all transactions falling within the course of

B's ordinary business. A enters into a contract with Third Party C which clearly falls outside the scope of B's ordinary business. According to section 35A of the English Companies Act "[i]n favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under the company's constitution" and "[...] a person shall not be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution [...]". B is bound by the contract between A and C even if C knew or ought to have known the limitations to A's authority, and B may not rely on Article 5(1) of this Chapter to claim the contrary.

*Illustration 2*

A, Managing Director of the English Company B, has been given by the Board of Directors the authority to carry out all transactions falling within the course of the company's ordinary business except the hiring and dismissal of employees. A hires C as the new accountant of B's branch in foreign country X. B refuses to be bound by this appointment on account of A's lack of authority to hire employees. C may overcome B's objection by invoking section 35A of the English Companies Act. Yet C, who as a foreigner may not be familiar with that special rule of English company law, may equally rely on the general rule on apparent authority as laid down in Article 5(2) of this Chapter and claim that, in view of A's position as Managing Director of B, it was reasonable for C to believe that A had the authority to hire employees.

Article 2

*(Establishment and scope of the authority of the agent)*

**(1) The principal's grant of authority to an agent may be express or implied.**

**(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.**

*References:*

Art. 9 GenevaC

Art. 3.201(1)(2) PECL

## COMMENTS

**1. Express or implied grant of authority**

Paragraph 1 makes it clear that the granting of the agent's authority by the principal is not subject to any particular requirements of form and that it may be either express or implied.

The most common case of an express authority is a power of attorney, but the principal may also confer the authority on the agent in an oral statement or written communication or, in the case of a corporate entity, in a resolution by its board of directors. The granting of an express authority in writing has the obvious advantage of providing clear evidence to all parties concerned (principal, agent and third parties) of the existence and precise scope of the agent's authority.

An implied authority exists whenever the principal's intention to confer the authority on an agent can be inferred from the terms of the express authority or the principal's conduct (e.g. the conferment on the agent of a particular task) or other circumstances of the case (e.g. the terms of an express authority; a particular course of dealing between the two parties or a general trade usage). As to the distinction between implied authority and apparent authority see Comment X on Article 5.

*Illustration 1*

B authorises its lawyer A to agree with C to submit a dispute between B and C to arbitration with a sole arbitrator acting as *amiable compositeur*. In the course of negotiations between A and C, C proposes a settlement. A has implied authority to accept on behalf of B.

**2. Scope of the authority**

The broader the mandate conferred on the agent, the wider the scope of its authority. Accordingly, paragraph 2 makes it clear that the agent's authority is not limited to its express terms but extends to all acts necessary in the circumstances to achieve the purposes for which the authority was granted.

*Illustration 2*

Owner B consigns to Shipmaster A a cargo to be transported to Country X within 10 days. With 3 days of navigation remaining, the ship is damaged and must stop in the nearest port for repairs. A has implied authority to unload the cargo and consign it to another shipmaster to be transported to destination on another ship.

### Article 3

*(Agent's act directly binding principal and third party)*

**Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the act of the agent shall directly bind the principal and the third party to each other unless it follows from the circumstances of the case [for example by a reference to a contract of commission] that the agent undertakes to bind itself only.**

*References:*

Art. 12 GenevaC

Arts. 3.202 and 3.203 PECL

#### COMMENTS

##### **1. Disclosed agency**

In the context of agency a distinction may be made between two basic situations: one in which the agent acts on behalf of a principal and the third party knows or ought to know that the agent is acting as an agent and another in which the agent acts on behalf of a principal but the third party neither knows nor ought to know that the agent is acting as an agent. The first situation, which is clearly the norm, may be defined as “disclosed agency” and is dealt with in this Article.

##### **2. Direct relationship between principal and third party**

The basic feature of disclosed agency is that the agent's act directly affects the principal's legal position. In other words the contract, even though entered into by the agent, directly binds the principal and the third party.

*Illustration 1*

A, Sales Representative for Computer Manufacturer B, accepts the order placed by University C for the purchase of a certain number of computers. The sales contract directly binds B vis-à-vis C with the result that it is B, and not A, who is under the obligation to deliver the goods to C and who is entitled to payment by C.



### **3. Acting in the principal's name not necessary**

For the establishment of a direct relationship between the principal and the third party it is sufficient that the agent acts within the scope of its authority and that the third party knows or ought to know that the latter acts on behalf of another person. By contrast, it is as a rule not necessary for the agent to act in the principal's name. In practice however there might be cases where it is in the agent's own interest to indicate expressly the identity of the person on whose behalf it is acting: thus, whenever the contract requires the parties' signature, the agent is well advised not simply to sign in its own name, but to add language such as "for and on behalf of (followed by the principal's name)", so as to avoid any risk of being held personally liable under the contract.

#### *Illustration 2*

The facts are the same as in Illustration 1. For the sales contract directly binding B vis-à-vis C it is irrelevant whether A, when accepting C's order over the telephone, acts in its own name or expressly states that it is accepting in the name of B.

#### *Illustration 3*

Computer Specialist A is contacted by Research Center C with a view to creating a computer programme for a special database on international case law. A, when signing the contract in its capacity as employee of Software Company B, should expressly state that it is acting on behalf of B. If A merely signs the contract without indicating B, A may be held personally liable under the contract by C.

### **4. Agent undertaking to bind itself only**

An agent, though acting on behalf of a principal, may nevertheless undertake to bind itself only vis-à-vis the third party. This is the case, in particular, where the principal, who wants to remain anonymous, instructs the agent to act as a so-called commission agent, i.e. to deal with the third party in its own name without establishing any direct relation between the principal and the third party. This is also the case where the third party makes it clear that it does not intend to contract with anyone other than the agent. In these cases Article 3 does not apply and the effects of the agent's act are governed by Article 4.

#### *Illustration 4*

Dealer B, expecting a substantial increase in the price of wheat, decides to purchase a large quantity of wheat. B, wishing to remain anonymous, entrusts Commission Agent A with this task. Even though Supplier C knows that A is purchasing on behalf of a principal, the purchase contract does not directly affect B's legal position. The effects of A's acting on behalf of B are determined by Article 4.

*Illustration 5*

Confirming House A, acting on behalf of Overseas Buyer B, places an order with Supplier C for the purchase of certain goods. Since C, who does not know B, insists on A's confirmation of B's order, A accepts to be held itself liable vis-à-vis C. Even though C knows that A is purchasing on behalf of B, the purchase contract does not directly affect B's legal position. The effects of A's acting on behalf of B are determined by Article 4.

## Article 4

*(Agent's act not directly binding principal and third party)*

**(1) Where the agent acts on behalf of a principal within the scope of its authority, its acts shall bind only the agent and the third part if:**

- (a) the third party neither knew nor ought to have known that the agent was acting as an agent, or**
- (b) it follows from the circumstances of the case [for example by a reference to a contract of commission] that the agent under-takes to bind itself only.**

**(2) Nevertheless**

- (a) where the agent [whether by reason of the third party's failure of performance or for any other reason] fails to fulfil [or is not in a position to fulfil] its obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;**
- (b) where the agent fails to fulfil [or is not in a position to fulfil] its obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.**

**(3) In the cases referred to in paragraph 2, the agent shall on demand communicate the name of the principal to the third party, or the name of the third party to the principal, as the case may be.**

**(4) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, it may no longer free itself from its obligations by dealing with the agent.**

**[(5) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.]**

*References:*

Art. 13 (1)(2)(3)(4)(5) GenevaC

Art. 3.301, 3.302, 3.303 and 3.304 PECL

COMMENTS

**1. Undisclosed agency**

This article deals primarily with what may be defined as “undisclosed agency”, i.e. the situation in which the agent acts on behalf of a principal but the third party neither knows nor ought to know that the agent is acting as an agent. Equivalent to this situation, as to the effects, is the situation already referred to in Article 3 where it is known that the agent acts on behalf of a principal but it follows from the circumstances of the case that it undertakes to bind itself only (see Comment 4 to Article 3).

**2. Direct relationship between agent and third party**

Paragraph 1 provides that in the situation of an undisclosed agency, as well as where it follows from the circumstances of the case that the agent undertakes to bind itself only, the agent's act as a rule affects only the agent's legal position and not that of the principal. In other words, the contract binds only the agent and the third party and, subject to the exceptions set out in paragraph 2, and does not give rise to a direct relationship between the principal and the third party.

*Illustration 1*

Art Dealer A, purchases a painting from Artist C. When entering into the contract A does not disclose the fact that it is acting on behalf of Client B, nor has C any reason to believe that A is not acting on its own behalf. The contract is binding on A and C only and, subject to the exceptions set out in Article 4(2), does not give rise to a direct relationship between Client B and Artist C.

**3. Principal's right of action against third party and third party's right of action against principal**

Notwithstanding the rule laid down in paragraph 1, there are cases where the principal and the third party have a right of direct action against each other. More

precisely, paragraph 2 provides that where the agent fails to fulfil its obligations to the principal or to the third party, as the case may be, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, and the third party may exercise against the principal the rights which the third party has against the agent. The agent's failure to perform its obligations to the principal or the third party may be due either to the failure by the third party or the principal, as the case may be, to perform their obligations to the agent, or to the agent's own fault.

*Illustration 2*

The facts are the same as in Illustration 1, the difference being that Art Dealer A fails to deliver the painting to Client B due to Artist C's refusal to deliver it to A. B may sue directly C for the delivery of the painting.

*Illustration 3*

The facts are the same as in Illustration 1, the difference being that Art Dealer A fails to pay Artist C for the painting due to Client B's failure to pay A. C may sue directly B for the payment of the price.

*Illustration 4*

The facts are the same as in Illustration 1, the difference being that Art Dealer A fails to deliver the painting to Client B due to its own failure to take delivery of the painting from Artist C. B may sue directly C for delivery of the painting.

*Illustration 5*

The facts are the same as in Illustration 1, the difference being that Art Dealer A fails to pay Artist C for the painting due to its having become insolvent. C may sue directly Client B for the payment of the price.

#### **4. Preservation of defences**

While the right of direct action by the principal against the third party and vice versa is clearly to the advantage of the plaintiff, there is no reason why the defendant should be placed in a worse position than it would have been had the right of direct action not been available to the plaintiff. As a consequence it is expressly stated that the third party may raise against the principal the defences it could have raised against the agent, and that the principal may raise against the third party not only the defences the agent could have raised against the third party but also the defences the principal itself could have raised against the agent.

*Illustration 6*

The facts are the same as in Illustration 2, the difference being that Artist C refuses to deliver the painting to Art Dealer A because A has an outstanding debt with C. C may set up the same defence against Client B.

*Illustration 7*

The facts are the same as in Illustration 3, the difference being that Client B has a right to set off a claim against Art Dealer A's claim for payment of the price. B may set up the same defence against Artist C.

**5. Agent's duty to disclose the principal's and third party's names**

If the principal intends to exercise its right of action against the third party, or the third party intends to exercise its right of action against the principal, the agent is obliged to disclose, on the principal's request, the name of the third party and, on the third party's request, the name of the principal.

**6. Notice requirement**

If the principal intends to exercise its right of action against the third party, or the third party intends to exercise its right of action against the principal, the principal or the third party, respectively, shall give notice of their intention to the agent and the third party or the principal, as the case may be. Upon receipt of the notice the third party or the principal may no longer make performance to the agent.

## Article 5

*(Agent acting without or outside its authority)*

**(1) Where an agent acts without authority or outside the scope of its authority, its acts do not bind the principal and the third party to each other.**

**(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.**

*References:*

Art. 14 GenevaC

Art. 3.204(1) and 3.201(3) PECL

## COMMENTS

### 1. Lack of authority

Paragraph 1 expressly states that where an agent acts without authority, its acts do not bind the principal and the third party to each other. The same applies to the case where the agent has been granted authority of limited scope and acts outside the scope of that authority.

Whether or not the acts of the false agent bind the false agent to the third party depends on how the false agent has presented itself to the third party. While there will normally be no contractual relationship between them, whenever the false agent openly acts on behalf of the principal according to Article 3, the false agent will be bound by the contract it concluded with the third party in the cases referred to in Article 4(1), i.e. in case of undisclosed agency or where it followed from the circumstances of the case that the false agent undertook to bind itself only.

#### *Illustration 1*

Principal B authorises Agent A to buy on its behalf a specific quantity of grain with a price limit. A, openly acting on B's behalf, enters into a contract with Seller C for the purchase of a greater quantity of grain and at a higher price than authorised by B. On account of A's lack of authority, the contract between A and C does not bind B, nor does it become effective between A and C.

#### *Illustration 2*

The facts are the same as in Illustration 1, the difference being that when entering into the contract with A, C does not know that A is acting as an agent for B, or A acts as a commission agent. The contract binds A and C, and the only consequence of A's lack of authority is that B and C have no right of direct action against each other in accordance with Article 4(2).

### 2. Apparent authority

There are two cases in which an agent, though acting without authority or outside the scope of its authority, may bind the principal vis-à-vis the third party. The first occurs whenever the principal ratifies the agent's act and is dealt with in Article 9. The second is that of so-called apparent authority and is dealt with in paragraph 2 of the present article. According to this provision a principal, whose conduct leads a third party reasonably to believe that the agent has authority to act on its behalf, is prevented from invoking against the third party the lack of authority of the agent and is therefore bound by the latter's act.

Apparent authority, which is an application of the general principle of good faith and of the prohibition of *venire contra factum proprium*, is especially important where the principal is not an individual but an organisation. In dealing with a corporation, partnership or other business association a third party may find it difficult to determine whether the persons acting for the organisation have actual authority to do so and may

therefore prefer, whenever possible, to rely on their apparent authority. For this purpose the third party only has to demonstrate it was reasonable for it to believe that the person purporting to represent the organisation was authorised to do so, and that the appearance of authority had been the result of statements made by, or the conduct of, those actually authorised to represent the organisation (board of directors; executive officers; partners; etc.). Whether or not the third party's belief was reasonable will depend on the circumstances of the case (position occupied by the apparent agent in the organisation's hierarchy; type of transaction involved; acquiescence of the organisation's representatives in the past; etc.).

*Illustration 1*

A, Manager of one of Company B's branch offices, though lacking actual authority to do so, engages Construction Company C to renovate the branch's premises. In view of the fact that a branch manager normally would have authority to enter into such a contract, B is bound by the contract with C since it was reasonable for C to believe that A had actual authority to enter into the contract.

*Illustration 2*

A, Chief Financial Officer of Company B, though lacking actual authority to do so, with the acquiescence of the Board of Directors repeatedly entered on behalf of B into financial transactions with Bank C. On the occasion of a new transaction which proves to be disadvantageous to B, B's Board of Directors raises vis-à-vis C the objection of A's lack of authority. C may defeat this objection by claiming that B is bound by A's apparent authority to enter into the financial transaction for B.

Article 6

*(Liability of agent acting without or outside its authority)*

**(1) An agent who acts without authority or outside the scope of its authority shall, failing ratification by the principal according to Article 9, be liable to pay the third party such compensation as will place the third party in the same position as it would have been in if the agent had acted with authority.**

**(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of its authority.**

*References:*

Art. 16 GenevaC

Art. 3.204(2) PECL

## COMMENTS

**1. Liability of false agent**

It is generally recognised that an agent acting without authority or outside the scope of its authority shall, failing ratification by the principal, be liable for damages to the third party. Paragraph 1, in stating that the false agent shall be liable to pay the third party such compensation as will place the third party in the same position as it would have been in if the agent had acted with authority, makes it clear that the liability of the false agent is not limited to the so-called reliance or negative interest, but extends to the so-called expectation or positive interest. In other words, the third party may not only ask for compensation for the losses incurred in the negotiations with the false agent and for the lost opportunities, but it may also recover the profit which would have resulted if the contract concluded with the false agent had been a valid one.

*Illustration 1*

Agent A, without being authorised by Principal B, enters into a contract with Third Party C for the sale of a cargo of oil belonging to B. Failing B's ratification of the contract, C may recover from A not only the expenses incurred in the negotiation of the contract but also the difference between the contract price and the current market price.

**2. Third party's knowledge of agent's lack of authority**

The false agent is liable to the third party only to the extent that the third party, when entering into the contract with the false agent, neither knew nor ought to have known that the latter was acting without authority or outside the scope of its authority.

*Illustration 2*

A, Senior Employee of Company B, without actual authority to do so, engages Construction Company C to renovate B's premises. B refuses to ratify the contract. Nevertheless C may not request damages from A since it should have known that an employee of A's rank normally has no authority to enter into such a contract.

[Article 7]  
(*Conflict of interests*)

**[(1) If a contract concluded by an agent involves the agent in a conflict of interests of which the third party knew or could not**



have been unaware, the principal may avoid the contract according to the provisions of Articles 3.12 and 3.14 to 3.16.

- (2) There is presumed to be a conflict of interests where
  - (a) the agent also acted as agent for the third party; or
  - (b) the contract was with itself in its personal capacity.
- (3) However, the principal may not avoid the contract
  - (a) if it had consented to, or could not have been unaware of, the agent's so acting; or
  - (b) if the agent had disclosed the conflict of interest to it and it had not objected within a reasonable time.]

*Reference:*

Art. 3.205 PECL

## COMMENTS

### 1. Conflict of interests between agent and principal

It is inherent in any agency relationship that the agent shall act in the interest of the principal. In other words, when contracting with a third party, the agent is bound to pursue primarily the interests of the principal to the exclusion of its own or of anyone else if they conflict with one another. If the agent acts in violation of this duty, the principal is entitled to damages from the agent. Yet may the principal also avoid the contract which the agent has concluded with the third party in a situation of conflict of interests?

### 2. Conflict of interests as ground for avoidance of the contract

Paragraph 1 of this Article lays down the rule that a contract concluded by an agent acting in a situation of conflict of interests may be avoided by the principal, provided that the third party knew or could not have been unaware of the conflict of interests.

#### *Illustration 1*

Principal B instructs Agent A to buy certain goods. A purchases the goods from Company C, owned by A's wife. B may avoid the contract if it can prove that C was aware of A's conflict of interests.

### 3. Typical cases of conflict of interests

Paragraph 2 indicates two typical situations of conflict of interests between the agent and the principal. One is where the agent also acted as agent for the third party,

the other is where the agent concluded the contract with itself in its personal capacity.

### *Illustration 2*

The facts are the same as in Illustration 1, the difference being that A was acting also as an agent of C or, alternatively, that A purchased the goods which were its own property. B may avoid the contract.

## **4. Avoidance excluded**

Paragraph 3 lays down the rather obvious rule that the principal may not avoid the contract if it had consented to (or could not have been unaware of) the agent's acting in a situation of conflict of interests, or if the agent had disclosed the conflict of interest to the principal and the principal had not objected within a reasonable time.

### [Article 8] (*SUBAGENCY*)

**[An agent has implied authority to appoint a subagent to carry out tasks which are not of a personal character and which it is not reasonable to expect the agent to carry out itself. The rules of this chapter apply to the subagency; acts of the subagent which are within its and the agent's authority bind the principal and the third party directly to each other.]**

*Reference:*  
Art. 3.206 PECL

## COMMENTS

### **1. Role of subagents**

In carrying out the mandate conferred on it by the principal, an agent may find it convenient or even necessary to avail itself of the services of other persons. This is the case for instance where certain tasks are to be performed in a place distant from the agent's place of business or where particular skills are required.

## 2. Implied authority to appoint subagents

Whether or not the agent is authorised to appoint one or more subagents depends on the terms of the authority granted by the principal. Thus the principal may expressly exclude the appointment of subagents or make it conditional upon its prior approval. In case nothing is said in the authorisation as to the possibility of appointing subagents, this article lays down the rule that the agent has the right to appoint subagents to the extent that they are entrusted with tasks which are not of a personal character and which it is not reasonable to expect the agent to carry out itself.

### *Illustration 1*

Chinese Museum B instructs New York based Art Dealer A to buy available Greek antiquities. A learns of the sale of a private collection in Germany. A has implied authority to appoint German subagent S for the purchase of a single ancient Greek vase included in the private collection in Germany.

## 3. Effects of a subagent's acts

The acts of a subagent legitimately appointed by the agent bind the principal and the third party directly to each other, provided that they are both within the agent's authority and the possibly more limited authority conferred on the subagent by the agent.

### *Illustration 2*

The facts are the same as in Illustration 1. The purchase of the Greek vase by S directly binds B provided that it is within both the authority which B granted to A and the authority which A granted to S.

## Article 9 (Ratification)

**(1) An act by an agent who acts without authority or outside the scope of its authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.**

**[(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, the latter shall not be liable to the principal if at any time before ratification it gives notice of its refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if it promptly notifies the principal.]**

**[(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.]**

**[(4) The third party may refuse to accept a partial ratification.]**

**[(5) Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to its attention. Once effective, ratification may not be revoked.]**

**[(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.]**

**[(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.]**

**[(8) Ratification is subject to no requirement as to form. It may be express or may be inferred from the conduct of the principal.]**

*References:*

Art. 15 GenevaC

Art. 3.207 and 3.208 PECL

COMMENTS

**1. Notion of ratification**

This article lays down the generally accepted principle according to which acts carried out by an agent without authority or outside the scope of its authority and therefore with no effect on the principal, may be authorised by the principal at a later stage. Such a subsequent authorisation is known as ratification. Like the original authorisation, ratification is not subject to any requirements as to form. It may be express or inferred from the conduct of the principal.

*Illustration 1*

Agent A purchases on behalf of Principal B goods from Third Party C at a price higher than authorised by B. Upon receipt of C's bill, B makes no objection and pays it. The payment amounts to ratification of A's act.

## 2. Effects of ratification

On ratification the agent's act produces the same effect as if it had initially been carried out with authority. Thus, in the case of disclosed agency the agent's act will directly bind the principal and the third party to each other (cf. Article 3), while in the case of undisclosed agency or where the agent undertook to bind itself only, the result of ratification is that the principal and the third party will have the right of direct action against each other (cf. Article 4).

### *Illustration 2*

The facts are the same as in Illustration 1. If A has openly acted as B's agent, on ratification of the contract by B, B and C are directly bound to one another from the moment of the conclusion of the contract between A and C.

### *Illustration 3*

The facts are the same as in Illustration 1. If A has not disclosed the fact that it was acting as B's agent or has acted as a commission agent, on ratification of the contract by B the contract continues to bind A and C but B has a right of action against C and C has a right of action against B if A fails to fulfil its obligations vis-à-vis B or C.

## 3. Third persons' rights not affected

This article deals only with the effects of ratification on the three parties directly involved in the agency relationship, i.e. the principal, the agent and the third party. The rights of other third persons are not affected by this provision, as follows already from the general principle laid down in Article 1(3). For instance, if the same goods have been sold first by the false agent to C and subsequently by the principal to another person D, the conflict between C and D as a result of the principal's later ratification of the first sale will have to be solved by the applicable law.

### Article 10

#### *(Termination of authority)*

#### **[(1) The authority of the agent is terminated:**

- (a) when this follows from any agreement between the principal and the agent;**
- (b) on completion of the transaction or transactions for which the authority was created;**
- (c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement;**

**(d) when the applicable law so provides.]**

**(2) The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.**

**(3) Notwithstanding the termination of its authority, the agent remains authorized to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.**

*References:*

Art. 17, 18, 19 and 20 GenevaC

Art. 3.209 PECL

*[Note by the Reporter]*

This article incorporates Articles 17 to 20 of the GenevaC.

The inclusion of provisions on termination in the Convention was uncertain until the very last moment. Those who would have preferred not to deal with termination of the agent's authority stressed that the problem was essentially related to the internal relationship between the principal and agent and, as such, was excluded by definition from the scope of the Convention. Moreover, given the differences existing at domestic law with regard to various cases of termination of authority, it would be extremely difficult to provide a generally acceptable uniform solution. Those in favour of the inclusion of the provisions stressed that just as the manner in which authority is conferred on the agent, also the facts that determine its termination are clearly of interest to the third party and therefore fall within the scope of the Convention. As to the difficulties of reconciling the different positions taken by the various national laws, a distinction should be made between cases of termination such as the agreement between principal and agent, revocation or renunciation and the completion of the transaction, which could be uniformly regulated, and cases of termination such as death, loss of capacity, bankruptcy, etc., on the part of the principal or the agent, the regulation of which should be left to the applicable law.

This latter approach ultimately prevailed and is reflected in Articles 17 and 18 of the GenevaC, which correspond literally to paragraph 1 of the present article. The PECL follow basically the same approach (cf. Article 3.209(1)) with the difference however that also death, lack of capacity and insolvency are expressly regulated.

Paragraph 1 of the present article appears between square brackets as the Working Group may wish to first discuss the appropriateness of the general policy underlying Articles 17 and 18 GenevaC and Article 3.209(1) PECL.

Paragraphs 2 and 3, which correspond to Articles 19 and 20 GenevaC and to Article 3.209(2) and (3) PECL, are clearly within the scope of this Chapter and could become an independent article if the Working Group were to decide to delete paragraph 1.

## ANNEX I

### CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS

THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

BEARING IN MIND the objectives of the United Nations Convention on Contracts for the International Sale of Goods,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, bearing in mind the New International Economic Order,

BEING OF THE OPINION that the adoption of uniform rules which govern agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

#### CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

##### *Article 1*

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or the agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

##### *Article 2*

(1) This Convention applies only where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State, or

(b) the rules of private international law lead to the application of the law of a Contracting State.

(2) Where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

#### *Article 3*

(1) This Convention does not apply to:

(a) the agency of a dealer on a stock, commodity or other exchange;

(b) the agency of an auctioneer;

(c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;

(d) agency arising from statutory or judicial authorisation to act for a person without capacity to act;

(e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

#### *Article 4*

For the purposes of this Convention:

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.



#### *Article 5*

The principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, subject to Article 11, to derogate from or vary the effect of any of its provisions.

#### *Article 6*

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

#### *Article 7*

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

#### *Article 8*

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties at the time of contracting;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

## CHAPTER II - ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

#### *Article 9*

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

*Article 10*

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

*Article 11*

Any provision of Article 10, Article 15 or Chapter IV which allows an authorization, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.

CHAPTER III - LEGAL EFFECTS OF ACTS CARRIED OUT  
BY THE AGENT

*Article 12*

Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example, by a reference to a contract of commission, that the agent undertakes to bind himself only.

*Article 13*

(1) Where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party if:

(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

(2) Nevertheless:

(a) where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.

(3) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the agent shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

#### *Article 14*

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

#### *Article 15*

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification

before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(4) The third party may refuse to accept a partial ratification.

(5) Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to his attention. Once effective, it may not be revoked.

(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(8) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

#### *Article 16*

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

### CHAPTER IV - TERMINATION OF THE AUTHORITY OF THE AGENT

#### *Article 17*

The authority of the agent is terminated:

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

#### *Article 18*

The authority of the agent is also terminated when the applicable law so provides.

*Article 19*

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

*Article 20*

Notwithstanding the termination of his authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

**PRINCIPLES OF EUROPEAN CONTRACT  
LAW**

**Chapter 3 - Authority of agents**

**Section 1. General provisions**

**ART. 3:101: SCOPE OF THE CHAPTER**

- (1) This chapter governs the authority of an agent or other intermediary to bind his principal in relation to a contract with a third party.
- (2) This chapter does not govern an agent's authority bestowed by law or to the authority of an agent appointed by a public or judicial authority.
- (3) This chapter does not govern the internal relationship between the agent or intermediary and his principal.

**ART. 3:102: CATEGORIES OF REPRESENTATION**

- (1) Where an agent acts in the name of a principal, the rules on direct representation apply (Section 2). It is irrelevant whether the principal's identity is revealed at the time the agent acts or is to be revealed later.
- (2) Where an intermediary acts on instructions and on behalf of, but not in the name of, a principal, or where the third party neither knows nor has reason to know that the intermediary acts as an agent, the rules on indirect representation apply (Section 3).

**Section 2: Direct representation**

**ART. 3:201: EXPRESS, IMPLIED AND APPARENT  
AUTHORITY**

- (1) The principal's grant of authority to an agent to act in his name may be express or may be implied from the circumstances.
- (2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authority was granted.
- (3) A principal is treated as having granted authority if his statements or conduct induce the third party reasonably and in good faith to believe that the agent has been granted authority for the act performed by him.

ART. 3:202: AGENT ACTING IN EXERCISE OF HIS  
AUTHORITY

Where an agent is acting within his authority as defined by article 3:201, his acts bind the principal and the third party directly. The agent himself is not bound to the third party.

ART. 3:203: UNIDENTIFIED PRINCIPAL

If an agent enters into a contract in the name of a principal whose identity is to be revealed later, but fails to reveal that identity within a reasonable time after a request by the third party, the agent himself is bound by the contract.

ART. 3:204 : AGENT ACTING WITHOUT OR OUTSIDE HIS  
AUTHORITY

- (1) Where a person acting as an agent acts without authority or outside the scope of his authority, his acts are not binding upon the principal and the third party.
- (2) Failing ratification by the principal according to article 3:207, the agent is liable to pay the third party such damages as will place the third party in the same position as if the agent had acted with authority. This does not apply if the third party knew or could not have been unaware of the agent's lack of authority.

ART. 3:205 : CONFLICT OF INTERESTS

- (1) If a contract concluded by an agent involves the agent in a conflict of interests of which the third party knew or could not have been unaware, the principal may avoid the contract according to the provisions of articles 4:112 to 4:116.
- (2) There is presumed to be a conflict of interests where
  - (a) the agent also acted as agent for the third party;  
or
  - (b) the contract was with himself in his personal capacity.
- (3) However, the principal may not avoid the contract
  - (a) if he had consented to, or could not have been unaware of, the agent's so acting; or
  - (b) if the agent had disclosed the conflict of interest to him and he had not objected within a reasonable time.

#### ART. 3:206 : SUBAGENCY

An agent has implied authority to appoint a subagent to carry out tasks which are not of a personal character and which it is not reasonable to expect the agent to carry out himself. The rules of this chapter apply to the sub-agent; acts of the subagent which are within his and the agent's authority bind the principal and the third party directly.

#### ART. 3:207: RATIFICATION BY PRINCIPAL

- (1) Where a person acting as an agent acts without authority or outside his authority, the principal may ratify the agent's acts.
- (2) Upon ratification, the agent's acts are considered as having been authorised; without prejudice to the question of the rights of other persons.

#### ART. 3:208: THIRD PARTY'S RIGHT WITH RESPECT TO CONFIRMATION OF AUTHORITY

Where the statements or conduct of the principal gave the third party reason to believe that an act performed by the agent was authorised, but the third party is in doubt about the authorisation, he may send a written confirmation to the principal or request ratification from him. If the principal does not object or answer the request without delay, the agent's act is treated as having been authorised.

#### ART. 3:209 : DURATION OF AUTHORITY

- (1) An agent's authority continues until the third party knows or ought to know that
  - (a) the agent's authority has been brought to an end by the principal, the agent, or both; or
  - (b) the acts for which the authority had been granted have been completed, or the time for which it had been granted has expired; or
  - (c) the agent has died, become incapacitated or insolvent; or
  - (d) the principal has become insolvent.
- (2) The third party is taken to know that the agent's authority has been brought to an end under (1) (a) above if this has been communicated or publicised in the same manner in which the authority had originally been communicated or publicised.
- (3) However, the agent remains authorised during a reasonable time for the performance of those acts which are necessary to protect the interests of the principal or his successors



ART. 3:301: INTERMEDIARIES NOT ACTING IN THE NAME  
OF A PRINCIPAL

- (1) Where an intermediary acts
  - (a) on instructions and on behalf of, but not in the name of, a principal, or
  - (b) on instructions from a principal but the third party does not know and has no reason to know this, the intermediary and the third party are bound to each other.
- (2) The principal and the third party become bound to each other only under the conditions set out in articles 3:302 to 3:304.

ART. 3:302 : INTERMEDIARY'S INSOLVENCY OR  
FUNDAMENTAL NON-PERFORMANCE TO PRINCIPAL

If the intermediary becomes insolvent, or if he commits a fundamental non-performance to the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance when it becomes due,

- (a) on the principal's demand, the intermediary shall communicate the name and address of the third party to the principal; and
- (b) the principal may exercise against the third party the rights acquired on the principal's behalf by the intermediary, subject to any defences which the third party may set up against the intermediary.

ART. 3:303: INTERMEDIARY'S INSOLVENCY OR  
FUNDAMENTAL NON-PERFORMANCE TO THIRD PARTY

If the intermediary becomes insolvent, or if he commits a fundamental non-performance to the third party, or if prior to the time for performance it is clear that there will be a fundamental non-performance when it becomes due

- (a) on the third party's demand, the intermediary shall communicate the name and address of the principal to the third party; and
- (b) the third party may exercise against the principal the rights which the third party has against the intermediary, subject to any defences which the intermediary may set up against the third party and those which the principal may set up against the intermediary.

ART. 3:304 : REQUIREMENT OF NOTICE

The rights under articles 3:302 to 3:303 may be exercised only if notice of intention to exercise them is given to the intermediary and to the third party or principal, respectively. Upon receipt of the notice, the third party or the principal is no longer entitled to make performance to the intermediary.