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AGENCY LAW IN BUSINESS RELATIONSHIPS: THE MAIN CHARACTERISTICS FROM A COMPARATIVE PERSPECTIVE

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Abstract. This article tries to comparatively analyse theoretical and practical problems of agency law in terms of business relationships. In order to reach this goal the major issues of agency law are analyzed in this work, such as legal effect of agency, grant of authority, mandate contracts, unauthorized agency, liability imposed on the principal for wrongs committed by the agent and other important and problematic aspects in this field. When analysing every one of them, most of the emphasis is put on the ways allowing to ensure the balance of rights and legal interests of participants in business relations of agency.

Keywords: agency (representation), business law, grant of authority, mandate contracts, unauthorized agency.

JEL classification: K10, K12, K13, M21.

1. Introduction

Every modern system of economics is based on the principle of division of labour when creating and distributing the goods and services which is legally reflected through the institute of agency. A possibility to participate in business relationships through the agent is a guarantee for implementing the right of a person to freedom and initiative of economic activity. Therefore in essence, legal system of any state is not complete with regulations regarding these types of relations.

The law of agency is emphatically described as a legal miracle or a subject of never ending fascination (Bonell 2011). Agency law is important for several reasons. First of all, representation is the only real opportunity for the implementation of capacity when it is limited or person lacks it altogether. Secondly, it gives the possibility to enter into transactions when due to various social circumstances a person is unwilling or unable to participate personally in civil relations. And finally, the most significant outcome of representation is that it allows individuals to participate in the civil circulation on a much wider scale and more efficiently, thereby enabling the rapid development of economic relations. In the absence of agency, it is impossible to imagine the normal turnover of trade, investment, services and many other activities. Therefore, a possibility to participate in business relationships through the agent is a guarantee for implementing the right of a person to freedom and initiative of business activity.

Although researchers of various countries pay much attention to the problems of agency law in the business relationships, there is still a lack of comparative analysis, especially in the Eastern European legal context. That is why the comparative legal method is the main empirical method used in this article. It enables to identify the differences and similarities of legal regulation and practical application in the selected jurisdictions in order to reveal arising problems and provide constructive suggestions on how to solve them.

As it is seen from the recent tendencies in the European countries and the United States of America, there are problems faced by all legal systems in the field of agency law. The search for efficient ways of solving the identified common problems is going on and this could be seen by continuing practice of drafting soft law. One of the latest quasi-legal instruments which does not have a legally binding force is the Draft Common Frame of Reference (hereinafter - the DCFR). Besides other model rules on private law, it includes chapters on representation and mandate contracts. The DCFR is the result of more than 25 years of academic research on European private law and is described

as the most interesting development in contract law since the French *Code Civil* and the German *BGB* (Emmert 2012). The declared purpose of the DCFR is to provide a possible source of inspiration within the European Union, at both national and Community law levels, and beyond the EU (Draft Common Frame of Reference (DCFR), 2009). Lithuania is one of several countries in Eastern Europe that are currently implementing modern civil law codification, so the DCFR could be used as an effective tool for formulating suitable solutions for tackling the problems of private law, including representation (*The Case of the Supreme Court of Lithuania* (date: March 7, 2012, case No. 3K-3-90/2012)). It could be also very important for the Russian Federation, where efforts are currently undertaken to modernize private law. It is expected that the DCFR could direct towards Europe the Russian private law, which is at the crossroads in the reform process.

This article not only analyses the rules of the DCFR on representation in relation to Lithuanian and Russian private law, but also compares these two jurisdictions with each other. The link between Lithuanian and Russian legal systems can be explained by references to historical reasons and the recent trends in the legal and economic development in each of these countries. After the declaration of independence of Lithuania in 1918 the Russian civil legislation of 1840 was applied in the largest part of the territory. When Lithuania was occupied in 1940, the former legal system was replaced by the Soviet legal tradition. From 1940 until 1964 the USSR Civil Code of 1922 was applied in Lithuania and in 1964 the Civil Code of Lithuanian Soviet Socialist Republic was adopted on the basis of the USSR Fundamental Principles of Civil Legislation of 1961. Although in 1990 Lithuania regained independence, the Civil Code of 1964 with some amendments remained in force until July 1, 2001 when a new Civil Code of the Republic of Lithuania (hereinafter – the LR CC) entered into force (*Lietuvos Respublikos civilinis kodeksas* (the Civil Code of the Republic of Lithuania) Valstybės žinios (Official Gazette), 2000, No. 74-2262).

Drafters of the LR CC state (Mikelėnas 2000; Mikelėnas 2008) that it was composed using the civil codes of the Netherlands, Quebec, Italy, France and Germany. Although the influence of the Civil Code of the Russian Federation of 1994 (hereinafter – the RF CC) is officially not confirmed (*The Civil Code of the Russian Federation*), while analysing separate problems Lithuanian legal scholars of private law stress out that the Russian legal doctrine has had a huge impact on Lithuanian law (Pakalniškis 2002; Jakutytė-Sungailienė 2009). Moreover, Russia still remains as one of the main trade partners of Lithuania, thus it is very important for both countries to have a clear legal framework favouring business development. It is obvious that each modern economic system is based on the principle of division of labor and they cannot be imagined without the delegation of certain authorities to agents. Hence the rules on agency should also strengthen the effective turnover of trade, investment, services and many other activities.

Since agency law is very wide institution of private law, this article deals only with the major issues in representation, such as legal effect of agency, types of representation, grant of authority, mandate contracts, unauthorized agency, liability imposed on the principal for wrongs committed by the agent and other important and problematic aspects in this field.

2. General features of agency law

2.1. Definition and the legal effect of agency

Broadly speaking the law of agency deals with situations where one person enters into legal relationships with another person by acting not personally but through an intermediary. Such concept of agency is known for almost every modern legal system, however, rather than providing the exact definition of representation, most of them explain this legal phenomenon though its consequences.

For example, paragraph 1 of Article 2.133 of the LR CC states that a contract concluded by one person (the agent) in other person's (the principal's) name by disclosing the fact of agency, and without exceeding the rights conferred, assigns, alters and destructs directly the civil rights and obligations of the principal. Such effect of agency has been established in the RF CC as well. In paragraph 1 of Article 182 the above mentioned provision of the LR CC is almost repeated: a transaction concluded by one person (the agent) in the name of another person (the principal) on the basis of authority, based on the power of attorney, effect of law, or act of an authorised state body or local self-government body, authorized for this purpose, directly creates, amends and terminates the civil rights and duties of the principal.

The DCFR also covers a normal basic effect of a judicial act by a representative. What is important, Article II. – 6:105 establishes two exact conditions the acts of the agent should comply with in order for them to affect the principal's legal status. Firstly, the agent should act in the name of the principal or otherwise in such a way as to indicate to the third party an intention to affect the

legal position of the principal. Secondly, the agent should act within the scope of the gained authority. These two prerequisites of representation are similar to those expressed in Lithuanian and Russian jurisdictions. The only difference is that the DCFR focuses not only on the situations where one person represents another person in legal transactions, but also in performing other judicial acts. The LR CC and the RF CC mention only conclusion of contracts as the consequence of representation, however, legal doctrine of both countries recognizes the possibility of applying legal norms of agency for other judicial acts other than contracts (Aviža *et al.* 2009; International Agency and Distribution Law 2009).

Although the basic effect of representation does not give rise to any legal relationship between the principal and a third party, this rule does not always seem very clear for Lithuanian courts. That could be illustrated by the Lithuanian civil case of the Supreme Court No. 3K-3-15/2009 (*The Case of the Supreme Court of Lithuania (date: 2009-03-03, case No.: 3K-3-15/2009*) where the third party was allowed to sue the agent, notwithstanding the fact that the agent was sufficiently authorized by the principal and acted without exceeding the rights conferred to him. In this civil case, the dispute arose between an independent work contractor and a client (owner) who employed a legal person to manage a construction work, i.e. a construction manager. The client did not pay to the independent work contractor who then brought a case against both the client and the construction manager in order to demand the payment for the work fulfilled. According to the Law of Construction of the Republic of Lithuania (*Lietuvos Repsublikos statybos įstatymas* (the Law on Constuction oft he Republic of Lithuania) Valstybės žinios (Official Gazette), 1996, No. 32-788), construction management means a type of organisation of construction works when construction and other technical works related to the construction are organised by a construction manager on the basis of a contract of *agency* between the principal – client (owner) and the agent – construction manager. On the basis of such legal regulation the Supreme Court of Lithuania clarified that the relationship between the owner and the construction manager is based on the contract of mandate in which the owner is considered as a mandator and a construction manager as a mandatary. The court recognised that in the relationship with the independent work contractor the construction manager acted not personally, but as the agent of the owner. This fact was also clear for the independent work contractor. However, the court rendered a decision that failing to fulfill the obligations contained in the contract of independent work, the debt should be paid not only by the principal (i.e. the owner), but also by his agent (i.e. construction manager). Such practice demonstrates the vacuum of Lithuanian jurisprudence and this means that it is hard to foresee the judgements of courts in cases regarding representation.

Article 182 of the RF CC states that the agent shall not conclude contracts on behalf of the principal in his own interest. Neither shall he conclude such contracts in the interest of another person, whose representative he is at the same time, with the exception of the cases of the commercial representation. Similar restrictions can be found in the LR CC. Article 2.134 says that the agent may not conclude contracts in the principal's name either with himself or with a person, whom he represents at the given time, as well as his spouse, parents, children or other close relatives. Such contracts, upon the principal's request, may be deemed null and void. The agent also may not conclude a contract which the principal himself is not authorised to conclude. Article 2.135 states that a person may not act as the agent of both parties to the contract. This provision, however, is not applied in the cases where contractual obligations are performed and also in the cases where both parties to the contract explicitly express their will that the agent has to act in the interests of both parties.

2.2. Different types of agency

Civil law tradition countries make a distinction between direct and indirect representation while in the common law system the terms of disclosed and undisclosed agency are used. Despite the differences in legal terminology, the concepts of direct (disclosed) and indirect (undisclosed) agency are practically the same. Direct (disclosed) representation means that the agent acts in the principal's name (the agent informs a third party that he is a representative of another person or this is obvious from the circumstances under which the agent acts) and the rules of indirect (undisclosed) are applied when the agent acts in his own name or fails to disclose that he is the representative on another person.

Systematic analysis of the Articles 2.132 – 2.152 shows that they are exclusively applied for disclosed (direct) agency, i.e. such relationship when the agent entering into transactions acts in the principal's name. Meanwhile, the general rules on representation are not applicable for the relationship when one person acts in his own name. According to the Article 2.133, if during the conclusion of a contract the agent fails to inform that he acts in the principal's name and in his in-

terests, the principal shall acquire the rights and assume the duties arising from the contract only where the other party to the contract was in a position to understand from the circumstances of conclusion thereof that the said contract was concluded with the agent, or where the identity of the person with whom the contract was concluded was of no importance to the said party. In the RF CC the denial of indirect representation is stated in Article 182: the persons, who operate in the interest of the other persons, but on their own behalf (the trade agents, the trustees of a bankrupt's estate, the executors of the will, etc.), and also the persons, authorized to enter into negotiations on the deals, which may be possibly effected in the future, shall not act as representatives. And the same position is expressed in the DCFR. Article II. – 6:106 points out that when the representative, despite having authority, does an act in the representative's own name or otherwise in such a way as not to indicate to the third party an intention to affect the legal position of the principal, the act affects the legal position of the representative in relation to the third party as if done by the representative in a personal capacity. It does not as such affect the legal position of the principal in relation to the third party unless this is specifically provided for by any rule of law.

So neither according to the LR CC and the RF CC, nor according to the DCFR if the contract is made by the agent in his name, the principal cannot sue a third party and the third party does not have a right for the claim against the undisclosed principal.

Another possible classification of agency is based on the ground of the agent's authority. If the agent's authority is attached by the operation of law, by an administrative act or by a court judgment, such representation is called legal. And if the agent's authority is granted by a contract (e.g. contract of mandate) or other juridical act, e.g. warrant (power of attorney) as a unilateral act, the rules of consensual representation are applied.

According to the general provision of Article 2.132 of the LR CC, persons shall enjoy the right to conclude contracts through agents with the exception of those contracts which, due to their character, may be concluded only personally as well as other contracts prescribed by the law. According to the same article, the agency rules are applied not only to the agent's authority conferred upon a contract but also based on a statute, court judgement or an administrative act. So both consensual and legal representation are recognized by the LR CC. It is the case in the RF CC as well: a transaction can be concluded by one person (the agent) in the name of another person (the principal) on the basis of authority, based on the power of attorney, effect of law, or an act of an authorised state body or local self-government body, authorized for this purpose […] (Article 182). It is interesting that the DCFR, contrary to other soft law instruments (i.e. the Principles of European Contract Law or the UNIDROIT Principles of International Commercial Contracts), recognizes both consensual and legal agency. Such conclusion is made taking into consideration Article II. – 6:102 stating that the authority of a representative may be granted by the principal or by the law.

One more type of representation is commercial agency. The LR CC has a separate chapter on commercial agency (it is influenced by the EU law: *Directive of the Council of the European Communities directive on the coordination of the laws of the Member State relating to self-employed commercial agents* (86/653/EEC), adopted on 18 December 1986) and in the RF CC there is Article 183 that deals with commercial agency. In both laws the definition of commercial agent is almost the same: in the Article 2.152 of the LR CC a commercial agent is described as an independent person whose basic business activity is to continually act for payment as intermediary for the principal in conclusion of contracts or conclusion of contracts in the principal's name and at the principal's expense and the Article 184 of the RF CC presents the following concept of commercial agent: the commercial agent is a person, who constantly and independently represents and acts on behalf of businessmen in their concluding agreements in the sphere of business activities. The DCFR distinguishes this kind of agency in the Part E "Commercial Agency, Franchise and Distribution" of Book IV, however, the general rules are also applied in terms of actions of commercial agents.

What is interesting to point out is that the LR CC distinguishes one more type of representation, i.e. agency in conclusion and performance of contracts of international sale of goods. This is dealt in the Section two of Chapter XII "Commercial Agency" (Articles 2.169 – 2.175). This chpater is based on the Convention on Agency in the International Sale of Goods, which was signed in 17 February, 1983 in Geneva (*The Convention on Agency in the International Sale of Goods*, signed on 17 February 1983). Although the Convention has not yet entered into force (it has not been ratified by the required number of states), it helps to reveal the concept of agency in the international context and provide rules that can be included in the contracts of international sale of goods (Bonell 1992). Provisions of this section are applied only in the cases where the following requirements are

fulfilled: 1) an international contract of purchase and sale of goods has been concluded and is performed; 2) the principal and a third party reside in different states. Furthermore, it is stated in Lithuanian legal doctrine that as a separate kind of agency can be distinguished procuracy, which was included in the LR CC on the basis of the German *HGB*, where conception of this institution was established first (Mizaras 2007). According to the Article 2.176 of the LR CC, procuracy can be explained as a power of attorney, which a legal person (entrepreneur) grants to his employee or other person to perform, in principal's name and in his interests, all legal acts related to legal person's (entrepreneur's) undertaking. Besides, procuracy grants the right to perform, in principal's name and in his interests, legal acts in the court or other non-judicial institutions. Procuracy is a unilateral act which is issued only by a will of principal and the consent of a party to whom a procuracy is given (procurator) is not required. For all these reasons it is not clear why procuracy is identified as an separate kind of agency. It seems more reasonable to consider procuracy as a special type of power of attorney under which a specific agency relationship is created.

2.3. Who can be considered as the agent?

The LR CC provides that agents can be either natural persons who have legal capability, that is they are over 18 years old and mentally sound, or any legal persons (Article 2.132). The same rule is applied in Russian law, although it is not directly expressed in the RF CC. As it was mentioned, both civil codes state that persons, who operate in the interest of the other persons, but on their own behalf (the trade agents, the trustees of a bankrupt's estate, the executors of the will, etc.), and also the persons, authorized to enter into negotiations on the contracts, which may be possibly effected in the future, shall not act as agents (Article 2.132 of the LR CC and Article 182 of the RF CC).

According to the Article 6:102 of the DCFR a "representative" is a person who has authority to affect directly the legal position of another person, the principal, in relation to a third party by acting on behalf of the principal.

It is not clear if the concept of agency could be applied to the relations between a legal entity and its organs (Baranauskas 2008). Some Lithuanian scholars are of the opinion that in accordance with different bases on voidability of transactions. Article 1.82 deals with voidability of a transaction contradicting the legal passive capacity of a legal person by whom the transaction was formed and Article 1.92 is related to voidability of a transaction formed by the agent outside the authority conferred on him. Hence the legal rules of agency law cannot be used while solving the disputes arising out of relations between corporation and its organs. The opposite opinion is based on the consideration the second paragraph of Article 1.22. It states that a legal person or any other organization may not claim for annulment or invalidity of a transaction formed *by its body or any other representatives* in excess of their competence (powers) if the law of the state where the domicile or the head office of the other party to the transaction is located does not provide for any restrictions on their representative powers, unless the other party knew or, taking into account its position and the relationship with the other party, should have known of such restrictions. In Russian legal doctrine several different opinions can be found as to whether the organs of legal entity are its agents. In the comments of the DCFR it is expressly stated that the provisions of the chapter on representation should apply to the authority of directors of a corporation in recalling that company law often merely deals with the granting of authority to the legal representatives of the company leaving the consequences of the exercise of the authority to the general rules on representation. It seems reasonable that the general rules on representation should be applied for the organs of legal entity except in so far as the respective law contains specific restrictions or other qualifications. That legal position could be followed in Lithuania and Russia as well.

3. Internal and external agency relationships

Similarly to the legal systems of other countries, the LR CC and the RF CC, as well as the DCFR, make a distinction between the internal relationship between the principal and the agent, on the one hand, and the external relationship between the principal (or in some cases the agent) and a third party, on the other.

The terms agency and representation were unknown in Russian private law until 1994 when the State Duma adopted the first part of the RF CC (it entered into force in 1995). In this part the external agency relationship is regulated by Chapter 10 "Representation. Power of Attorney" of Subsection 4 "Transactions and Representation" of Section I "General Provisions". The second part of the RF CC dealing with law of obligations was adopted in 1995 and entered into force in 1996. In this part there are two types of contracts fully or partially related to the internal relationship of agency, i.e. Chapter 49 deals with agency (man-

date) contracts and Chapter 52 with agency service contracts.

In the LR CC the external relationship in general is governed by the chapter XI "General Provisions" of part II "Agency" of Book Second "Persons" (Articles 2.131-2.152) and the internal relationship is regulated by chapter XXXVI "Mandate" of part IV "Nominate Contract" of Book Six "Law on Obligation" (Articles 6.756-6.765).

The peculiarity of the DCFR is that it deals with both internal and external relations of agency: the Chapter 6 "Representation" of Book II "Contracts and Other Judicial Acts" is for external effect of agency and the Part D "Mandate contracts" of Book IV "Specific Contracts and the Rights and Obligations Arising from Them" governs the internal relationship between the principal and the agent. That is contrary to other soft law instruments that set rules exceptionally on the external relationship between the principal and a third party.

3.1. Grant of authority

In a case of consensual agency, i.e. when the authority is derived from the principal, there are several types the principal's authorization (granting of the authority). It can be expressed when the powers of the agent are defined in power of attorney (warrant) – a written document granted by a person (the principal) to other person (the authorised agent) to represent the principal in establishing and maintaining relations with third parties. Also authorisation may be implied. It means that rights of the agent may arise from the circumstances under which the agent acts. It is considered that the representative has the powers that are necessary to properly fulfill the principal's tasks, which are usual in a particular business field or position occupied by the agent, also arising from business customs (Watts *et al.* 2010). Implied powers may also be defined by the law.

Express authority and implied authority are set in both the LR CC and the RF CC. Article 2.133 of the LR CC defines that rights of the agent may also arise from the circumstances under which the agent acts (salesperson in retail trade, cashier, etc.) and according to Article 182 of the RF CC the power may stem from the setting, in which the representative operates (salesman in retail trade, cashier, etc.). The DCFR deals with express and implied authority in Article II. – 6:103.

What is important, the DCFR in the case of express authority does not require a written grant. In the LR CC and the RF CC a power of attorney is considered as a written document (Article 2.137 of the LR CC and Article 185 of the RF CC). Both the LR CC and the RF CC provide with quite exact rules on power of attorney, including term, delegation, termination, consequences of termination and other aspects of power of attorney.

3.2. Mandate contracts

The authority of the agent may arise not only from a unilateral transaction and be defined in a written power of attorney, but also in a contract between the agent and the principal. Usually this kind of agreement is called a mandate contract, under which one party (the agent) undertakes in the name and at the expense of another party (the principal) to perform certain legal actions with third parties. However, the representation may arise from other agreements: service, employment, partnership and others, where one person clearly expresses his willingness to authorize another person to act on his behalf and interests. It should be noted that in case of contractual relationship between the agent and principal the power of attorney is not required, because the agent's authority might be described in that particular contract. So mandate contract could also define the content of external agency relationship, however, its primary task is to describe the rights and obligations of the principal and the agent in the internal agency relationship.

In the LR CC under a contract of mandate, one party (mandatary) takes an obligation to perform in the name of and at the expense of another party (mandator) determined legal actions in respect of third parties. Under a contract of mandate, the mandator may empower the mandatary to perform legal actions related with the defence of the mandator, execute administration of the mandator's property in total or a part thereof, perform procedural actions on behalf of the mandator in the court and other institutions, as well as to effectuate any other legal actions. A contract of mandate can be either by gratuitous title or by onerous title.

In the RF CC the internal relationship between the agent and principal can be regulated by two different contracts. One of them is called agency (Chapter 49 of the RF CC) and the other – agency service (Chapter 52 of the RF CC) (The Russian Civil Code 2009). Under the contract of agency (or in other words, contract of mandate) one party (the agent) undertakes to perform certain legal actions on behalf and at the expense of the other party (the principal). The rights and obligations under the transaction completed by the agent shall accrue directly for the principal. The contract of agency service contains elements not only of agency, but also of commission (Butler 2009). Under a contract of commission one party (the

commission agent) is usually obliged to conclude upon mandate of another party (the committent) for remuneration one or several transactions in his own name but at the expense of the committent. Since Russian law recognises only direct representation, a contract of commission cannot be considered as a contract confirming internal relationship of agency. That is why agency service contract deals with agency partially: only when one party (the agent) undertakes for remuneration to perform legal and other actions on behalf and at the expense of the principal. When the agent performs legal and other actions on the instruction of the other party (the principal) on his own behalf, but at the expense of the principal, such contract is not related to agency *stricto sensu*. Article 1011 sets out that rules provided for by Chapter 49 are applied accordingly to the relations following from the agency service contract depending on the fact whether the agent acts under the terms and conditions of this contract on behalf of the principal or in his own name, unless these rules contradict the provisions of Chapter 51 or the substance of the agency service contract. However, the RF CC does not make a clear distinction between a contract of agency and a contract of agency services.

As it was mentioned, the Part D of Book IV "Specific Contracts and the Rights and Obligations" deals with mandate contracts in the DCFR. It needs to be mentioned that rules on the mandate contracts in the DCFR are very comprehensive: they include the main obligations of the principal and the agent, performance by the agent, directions and changes, conflicts of interest, termination by notice other than notice for non-performance, and many other issues. So Lithuanian and Russian courts could follow these norms while solving disputes arising out of agency relationship.

4. Unauthorized agency

Unauthorized agency deals with a situation when the agent acts without authority or beyond the scope of the authority granted. In such cases three different issues can be distinguished: the problem of apparent authority, the concept of ratification and the liability of the *falsus procurator*.

4.1. Apparent authority

According to the general rule explaining apparent authority, if the behaviour of the principal gives reasonable grounds for a third party to think that the principal has appointed another person to be his agent, contracts concluded by the third party in the principal's name shall be binding on the principal, notwithstanding the fact that the agent was not authorised by the principal to conclude particular contracts. In the absence of evidence of apparent authority the agent shall redress the damage incurred on the third party in cases where the third party was not aware, and was under no obligation to be aware, of circumstances that the person acted in other person's name without their express authorisation or in excess of their authority.

The principal should be liable for actions of the apparent agent if the following three requirements are proven: words or conduct of the principal caused the impression of authority; the third party could reasonably presume the existence of sufficient authority; the third party acted in good faith. The third party's legitimate expectations must be aligned with the principal's will in order to apply the doctrine of apparent authority efficiently (Pakalniškis *et al.* 2011).

Lithuania is one of the few countries where the idea of apparent authority is expressed in the positive law. In the RF CC there are no rules on apparent authority and this kind of authority is not clearly recognized by court practice. The DCFR as the other soft law instruments deals with apparent authority in the Article II. – 6:103. It sets out a rule that if a person causes a third party reasonably and in good faith to believe that the person has authorised a representative to perform certain acts the person is treated as the principal who has so authorised the apparent representative.

It is important to distinguish apparent authority from other types of authority, in particular, implied authority. As it was explained, implied authority arises from circumstances in which the agent operates and is considered as part of real authority. Contrary to apparent authority, legal actions carried out by the agent on the basis of implied authority are considered within the scope of the mandate. As stated in the Lithuanian legal doctrine (Bakanas *et al.* 2002; Aviža *et al.* 2009; Baranauskas 2008) and court practice, the second paragraph of Article 2.133 of the LR CC establishes implied agency and paragraph 9 of the same Article explains apparent authority. The second paragraph of Article 2.133 states that "*the rights of the agent may also arise from the circumstances under which the agent acts (salesperson in retail trade, cashier, etc.); in the event that behaviour of a person gives reasonable grounds for third parties to think that he has appointed the other person to be his agent, contracts concluded by the said person in the principal's name shall be binding for the principal*". And the ninth paragraph of the same article says that "*where the agent acted in excess of his powers but in the manner which gave to a third party serious grounds to think that he was concluding a contract with the duly author-*

ised agent, the contract shall be obligatory to the principal, except in cases where the other party to the contract was aware or had to be aware that the agent was exceeding his powers". Such understanding that the second paragraph is for implied authority and the ninth – for apparent authority is subject to doubts, especially taking into consideration the legal doctrine in foreign countries.

4.2. Ratification

Lithuania is one of the few countries where the idea of apparent authority is expressed in the positive law. In the RF CC there are no rules on apparent authority and this kind of authority is not clearly recognized by court practice. The DCFR as the other soft law instruments deals with apparent authority in the Article II. – 6:103. It sets out a rule that if a person causes a third party reasonably and in good faith to believe that the person has authorised a representative to perform certain acts the person is treated as the principal who has so authorised the apparent representative.

4.3. Liability of the *falsus procurator*

As it was mentioned, if a contract concluded by a person in other person's name without express authorisation or in excess of his authority is not approved by the principal the agent has to redress the damage incurred on a third party in the cases where the third party was not aware and was under no obligation to be aware of the said circumstances. In such cases the third party can ask the unauthorised agent (the *falsus procurator*) to pay damages that he has suffered as a consequence of the agent's lack of authority. Such rules are provided for in Article 2.136 of the LR CC and II. 6:107 of the DCFR. The RF CC contains a slightly different concept in case of unauthorized agency: if the contract has been concluded on behalf of the other person in the absence of relevant powers, or in case such powers have been exceeded, the contract is regarded as made on behalf and in the interest of the person who has made it, unless the other person (the principal) subsequently directly approves of such a deal.

It is necessary to identify the legal basis on which liability of the *falsus procurator* may arise. As far as there are no contractual relationship between the *falcus procurator* and the third party, the claim should be made on the basis of tort. It is also important to clarify what types of damages (reliance or expectation) the unauthorised agent would be bound to pay and what are general and specific conditions of his liability that must be proven (whether the liability of the unauthorised agent is strict, i.e. should the agent be liable in the absence of fraud or negligence and if so to what extent). The DCFR suggests that the compensation must put the third party into the same position as if the person had acted with authority. If the person proves that the principal could not have performed the contract, nor have paid compensation (for instance, because the principal is insolvent) the person need not even pay damages.

4.4. Liability imposed on principal for wrong commited by the agent

This issue raises many questions in terms of the protection of the interests of an aggrieved party and the scope of liability of the principal (or/and the agent) in such cases. The DCFR deals with representation only from the perspective of contract law, so there are no rules in this soft law instrument on liability imposed on the principal for wrongs committed by his agent. However, this kind of liability is directly regulated in the LR CC and indirectly in the RF CC.

In Lithuania the principal's liability for torts committed by the agents is regulated by the second paragraph of Article 6.265 "Liability to compensation for damage caused by others". It indicates that a represented person himself and the representative executing his mandate shall be solidarily liable to make compensation for the damages caused by the latter. It is interesting to note that this legal norm has not yet been applied in the practice of Lithuanian courts and has not been analysed by legal doctrine. Article 6.264 together with the previously mentioned article from section 3 "Non-contractual (delictual) liability" of the LR CC is also relevant to this context. It regulates the liability of an employer for damage caused by the fault of his employees. The first paragraph stipulates that an employer shall be liable to compensation for damage caused by the fault of his employees in the performance of their service (official) duties. On this basis it is not clear if Lithuanian private law considers the employee as the agent. It is recommended to apply Article 6.265 only when a person concludes contracts or performs other legal actions on behalf of another person, while Article 6.265 should deal with a situation when a person performs either legal or factual actions on the grounds of an employment or civil contract. Furthermore, it is important to determine the level of control in such relationships: if it is relatively high, then the rules of Article 6.264 are applied. And Article 6.265 covers situations when a person acts without the supervision or orders of the corresponding person.

Also it is not clear why the legislator has decided that the rule of solidarity is applied in the cases when the agent commits a tort and why difficult rules exist for tortious liability of the agent and the employee: the agent is solidarily liable with the principal while only the employer's liability to the third party is applied. It seems reasonable to follow the position of Western European countries in such matters. In many of them the liability of an employer does not eliminate the liability of an employee for his illegal acts (*Unification of Tort Law: Liability for Damage Caused by Others*, 2003). The plaintiff usually has the right to claim both the employee (personally or jointly with the employer) and the employer.

The solidary liability of the agent could also mean that the concept of an agent is closer to the meaning of an independent contractor. But if the agent is considered as the independent contractor, the principal should not be responsible for the agent's acts since in the cases of wrongful acts committed by the independent contractor only he is found liable in tort. The main difference between the agent and the independent contractor is that the latter is bound only by purposes that are specified by his contractor, but exercise discretion in deciding how to achieve it.

Finally, the LR CC does not specify whether the liability for damage caused by others is strict liability or should the fault of agent be proved. However, with respect to the legal rule implemented in Article 6.264, liability of the principal in breach of his duties should be based on fault.

In the RF CC there are no special rules on this tort, so it is dealt by general provisions. It means that the principal can be liable to make compensation for the damages caused by his agent if damages occurred because of the execution of mandate. It is not clear if Russian law would recognize the agent as a joint and several debtor with the principal in this kind of tort.

5. Conclusions

The comparative legal method could allow identifying common weaknesses and providing efficient solutions in the field of agency law. First of all, the DCFR could be taken into account as this soft law instrument provides very reasonable rules on agency, especially in terms of apparent authority, liability of *falsus procurator*, mandate contract, etc. Furthermore, according to the close connection between the Lithuanian and Russian legal systems it seems reasonable that the provisions of the Russian doctrine can be used in explaining and developing the Lithuanian legal regulation on representation and vice versa.

After examining Lithuanian positive law, the conclusion can be drawn that the rules on representation in the LR CC are consistent with classical agency doctrine and recent trends in this field of law. What distinguishes agency law in Lithuania form other jurisdictions (especially of the civil law tradition) is that legal regulation is very broad and comprehensive: there are specialized rules on apparent authority, commercial agency, agency in conclusion and performance of contracts of international sale of goods, procuracy, liability Imposed on principal for wrongs committed by the agent, etc. However, the lack of a well developed legal doctrine on the subject-matter results in the wrong interpretation and the application of legal norms in legal disputes concerning agency relations, for example, when allowing the third party to sue the agent, notwithstanding the fact that the agent was sufficiently authorized by the principal and acted without exceeding the rights conferred to him.

Assessing the legal regulation of representation in Russia, it can be pointed out that agency has not been developed to the extent it has been in other jurisdictions, including Lithuania. This is obvious from Chapter 10 "Representation. Power of Attorney" which has only seven articles. However, it is not necessary to make any immediate amendments in the RF CC concerning agency – in cases of incomplete legal regulation, the existing gaps can be filled out by courts using comparative legal method.

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