Vaidas Jurkevičius
Law School, Mykolas Romeris University

II.1. THE LEGAL CONSEQUENCES OF APPARENT AUTHORITY FOR SUSTAINABLE AGENCY RELATIONSHIPS

Apparent authority and sustainability: general remarks

While sustainability is becoming an increasingly common topic in legal research, it is still a *terra incognita* issue in private law. However, private law does not operate in isolation (Akkermans 2020). Thus, there is already an emerging trend towards focusing on sustainability issues in individual private law studies. Sustainability is most often discussed in the context of property law (Robbie 2019), tort law (van Dijck 2019) and company law (Berg and Kawakami 2020). Meanwhile, no studies have yet been carried out on the topic of sustainability in the case of agency law.

Every contemporary economic system is based on the principle of the division of labor in the production and distribution of goods and services, the legal reflection of which is the institution of agency (Müller-Freienfels 2018). Civil legal relations cannot be conceived without the concept of agency, as the ability to participate in these relations through agents ensures freedom of economic activity (Smits 2007). The agency relationship is considered to be a fiduciary one, which implies the utmost trust between the parties to that relationship (Wendel 2020; Laby 2020; Carter 2020). One of the instruments of agency relationships that directly ensures sustainability is apparent authority (Jurkevičius and Pokhodun 2018). The essence of apparent authority is that, without any formal procedure, the principal is legally bound by the actions of an unauthorized agent if certain circumstances imply that the principal has contributed to the third party's justified belief that the agent has acted within the scope of the authority granted to them (Tsiura 2017). Apparent authority is one of the cases when the principal is liable by the actions of an unauthorized agent. Therefore, apparent authority *per se* is seen as a means of ensuring sustainability in agency and safeguarding the legitimate interests of the subjects involved in these legal relationships. However, in separate legal systems, different legal consequences of apparent authority are applied.

The aim of this research is to investigate whether the current rules of agency law on apparent authority provide sufficient incentives and possibilities for sustainable action, or whether these rules need to be changed. This research will focus on the analysis of the legal consequences of apparent authority in order to determine how the balance between the rights and legitimate interests of all

the entities involved in the agency relationship (i.e., the principal, the agent and third parties) is ensured.

The author has chosen the Republic of Lithuania as the primary jurisdiction for the analysis, as it is one of the few countries in the world that *expressis verbis* has the doctrine of apparent authority in its positive law. Using a comparative approach as the main method of data analysis in this chapter, the legal consequences of apparent authority are also discussed in the context of the major jurisdictions – Germany, France and the UK – as well as in *soft law* instruments.

The general legal consequences of apparent authority from the perspective of sustainability

In principle, the conditions for the application of apparent authority in all legal systems have similar legal consequences, the most important of which is that the principal may not invoke against a third party the fact that the agent did not have the necessary authority when concluding a transaction or performing other legal acts (Watts and Reynolds 2017). Such legal consequences are *per se* seen as helping to ensure sustainability in the legal relationship of representation, but an analysis of the specificities of different legal systems shows that the standard of legal protection varies from one country to another. Accordingly, national and international legal systems can be divided into three main groups.

The first group would include those systems where apparent authority is understood as an exclusive remedy for the protection of the rights of a third party. Moreover, these systems do not consider that, once the conditions of apparent authority have been established, a contract concluded by an unauthorized agent is valid (in cases when an agent has concluded a contract on behalf of the principal and has not performed any other legal acts). It is stated that, since the principal did not express their intention to enter into the contract, the legal existence of such a contract cannot be presumed, and that the third party can therefore only protect its rights infringed by means of the institution of damages. Such legal consequences are provided for in the common-law tradition (Tan 2009), and would also arise in the case of the notion of apparent authority as set out in the UNIDROIT Principles of International Commercial Contracts (2016) and the UNIDROIT Convention on Agency in the International Sale of Goods (1983), as well as in the case of agency by estoppel, as governed by the Restatement (Third) of Agency (American Law Institute 2006). It seems that France should also be included in this group. Although there is no consensus in comparative law doctrine as to the consequences of a finding of apparent authority in France (Sainter 2009), it seems likely that the validity of a contract concluded by an apparent agent should not be recognized here. This conclusion can be drawn in the light of the fact that, for a long time in that country, apparent authority has been interpreted in the context of tortious liability, which would seem to rule out the possibility of classifying the relationship between the parties as contractual. This position probably also implies that the principal cannot rely on the doctrine of apparent authority: if apparent authority is linked to civil liability, it would seem illogical for the principal to

claim it in respect of themselves. The rules in this group of countries presumably provide for the lowest standard of sustainability in representation relationships.

The second group includes those countries in which only a third party may initiate the application of apparent authority, but, unlike in the above-mentioned case of the systems of the first group, the contract between the principal and the third party is presumed to be valid. In this context, it is recognized that the principal and the third party are bound by mutual rights and obligations and that the principal may therefore bring any claim arising out of the contract against the third party. Such legal consequences of apparent authority are provided for in the Civil Code of the Netherlands (1992) and are also distinguished by Belgian case law and legal doctrine (Samoy 2009). In this group of countries, it is assumed that if the third party has not invoked apparent authority, the common legal consequences of unauthorized agency arise.

The third group would consist of those countries in which both the principal and the third party can rely on the rules of apparent authority and, given that the contract concluded by an apparent agent has the same legal effects as in the case of real authority, the parties (principal and third party) can assert the rights they have violated either by claiming specific performance or by claiming damages. This most sustainable concept is only reflected in soft law instruments – i.e. the *Draft Common Frame of Reference* (von Bar and Clive 2009), its predecessor, the *Principles of European Contract Law* (Lando *et al.* 2002), the Restatement (Third) of Agency (American Law Institute 2006) (specifically in the case of apparent authority, but not in the case of agency by estoppel), and, presumably, in the European Contract Code (2003). Doubts arise in Germany, where, in the case of true apparent authority – *Anscheinsvollmacht* – it is argued that, although it is a legal fiction, the legal consequences arising from it are real (Busch and MacGregor 2009). In this context, it should be assumed that, in the case of apparent authority, the contract concluded between the parties is valid and they can claim against each other not only for damages but also for the performance of the contract.

The question is which group Lithuania should be placed in. As the drafters of the Civil Code of the Republic of Lithuania (2000) were probably inspired by the notions of apparent authority in the Civil Code of the Netherlands and the UNIDROIT Convention on Agency in the International Sale of Goods (Selelionyte-Drukteinienė, Jurkevičius and Kadner Graziano 2013), in Lithuania only a third party should be entitled to invoke the rules of apparent authority. However, a systematic analysis of the provisions of the Civil Code of the Republic of Lithuania suggests that the principal also has the possibility to apply the doctrine of apparent authority. There is also no doubt that Lithuania, like the legal systems in the second and third groups, recognizes the validity of a transaction entered into by an unauthorized agent on behalf of the principal with a third party.

To sum up, those legal systems which consider apparent authority to be equivalent to real representation, and which make it possible to apply it to both the principal and a third party, in essence provide for the most sustainable rules, guaranteeing a balance between the interests of the parties involved in these complex relations. Lithuania, as mentioned above, could also be included in this group of countries and is therefore considered to have the highest standard of sustainability in agency law. This chapter further analyzes which specific legal consequences of apparent authority are considered to be the most sustainable and effective in terms of the interests of the individual subjects.

The legal consequences of apparent authority for third parties

In all legal systems that recognize apparent authority, third parties can rely on it to defend their rights in cases of unauthorized agency. The implementation of this doctrine depends exclusively on the will of the third party, i.e., they have the right but not the obligation to invoke apparent authority (International Institute for the Unification of Private Law 1983).

As mentioned above, the third party may, upon proving the conditions for the application of apparent authority, claim either performance of the obligation in kind (specific performance) or compensation for damages. Moreover, depending on the particularities of the legal system in question, they may be given the right to choose the specific remedy to be applied (Busch 2005). There is no doubt that, from a sustainability perspective, the interests of third parties are best protected in those legal systems that allow for several different remedies.

It should be noted that, in the common-law tradition, the main remedy for a creditor's violation of their rights is damages. This is also applicable in the case of apparent authority. However, even here, it remains *de facto* possible, in certain cases, to claim specific performance. One such case is where the object of the obligation is the transfer of a thing characterized by individual features (for example, the obligation to transfer ownership of a thing under a contract of sale and purchase). Another such case is where the obligation is monetary in nature.

In contrast, the civil law system gives priority to performance in kind (Beale 2009). An analysis of specific cases in foreign courts concerning apparent authority shows that damages are usually claimed, except where the obligation is pecuniary. This trend may be explained by the fact that this remedy is often not effective, particularly in the case of obligations to perform or refrain from performing certain acts.

In Lithuania, it is likely that the third party in the case of apparent authority also has the right to claim both performance in kind and damages. In Lithuania, as in many other countries in the civil law tradition, performance in kind is the primary remedy for breach of rights. This conclusion may be drawn on the basis of Article 6.216 of the Civil Code of the Republic of Lithuania (2000), which provides that if the debtor fails to perform a non-monetary contractual obligation in kind within the prescribed time limit or if the creditor is not entitled to demand performance of the obligation in kind, then the creditor may seek other remedies. The priority of performance in kind in the case of apparent authority is presumably also enshrined in the provisions of the Civil Code of the Republic of Lithuania (2000) governing apparent authority. The wording of Article 2.133(2) and (9) – "the transaction is binding on the principal" and "the transactions are binding on the principal" – implies that a transaction entered into in the context of apparent authority is enforceable. The Civil Code of the Republic of Lithuania (2000) does not expressly provide for the possibility of claiming damages in the case of apparent authority, but it is to be assumed that, in cases where it is not possible to perform the obligation in kind or in the context of a particular situation where it is not reasonable to do so, the institution of damages could certainly be applied. An analysis of the Lithuanian case law shows that in all of the cases in which the application of apparent authority has been at issue (both where the problem has been directly identified and where

the facts lead to such a conclusion), claims for the performance of pecuniary obligations in kind have been made (Judgment of the Supreme Court of Lithuania of 17 March 2021, civil case no. e3K-3-56-684/2021; Judgment of the Supreme Court of Lithuania of 10 March 2021, civil case no. e3K-3-51-313/2021; Judgment of the Supreme Court of Lithuania of 5 February 2021, civil case no. e3K-3-11-701/2021; Judgment of the Supreme Court of Lithuania of 17 December 2019, civil case no. e3K-3-381-684/2019; Judgment of the Supreme Court of Lithuania of 24 April 2019, civil case no. e3K-3-151-313/2019; Judgment of the Supreme Court of Lithuania of 10 January 2019, civil case no. e3K-3-75-701/2019).

Given that the rights and obligations between the principal and the third party derive from the contract, the third party is normally compensated for positive damages. Since contract law protects expectation interest (Norkūnas and Drukteinienė 2013), the amount of the third party's damages should be related to the benefit that would have been obtained if the principal had performed the contract properly. An exception to this rule is Germany, where the doctrine of *culpa in contrahendo* is used as a basis for true apparent authority (*Ancheinsvollmacht*). Under this doctrine, the injured third party is indemnified for negative damages. In pre-contractual relations, the principal has a duty to ensure that its agents act only within the limits of authority conferred. When this obligation is not fulfilled, the third party's reliance interest is protected, i.e., the aim is to put the third party back in the same position as it would have been in the absence of the breach of the pre-contractual duties (Schmidt-Kessel and Baide 2009).

It seems that, as in other legal systems, in Lithuania the third party claim for damages is likely to be based on certainty interest, i.e., positive damages.

The legal doctrine does not address the nature of the damages that should be awarded when the agent does not enter into transactions but performs other legal acts that cause damage to the third party. Although in the present case there is no contract as a result of the agent's actions, it is considered that the principle of good faith would require that the third party be compensated for positive damages.

The conclusion could be made that from the perspective of a third party, sustainability in the case of the apparent author is ensured most definitively when third parties have the right to choose which remedy is the most effective in the light of the particular factual circumstances of the case, i.e., compensation for the damages suffered or the performance of the obligation in kind (specific performance).

The influence of apparent authority on the principal

Many jurisdictions consider whether the application of apparent authority can be initiated only by the third party or also by the principal, and whether, if it is established that the agent has acted under the terms of apparent authority, the principal has the right to assert appropriate claims against the third party. As mentioned above, in the common-law tradition where the institution of apparent authority is exclusively intended to protect the interests of a third party, and in the UNIDROIT Principles of International Commercial Contracts (2016) which express this position, the principal cannot rely on this institution, and if the third party successfully proves the conditions for the

application of the conditions for apparent authority, the principal will only acquire duties and no rights in relation to the third party (Busch and MacGregor 2009).

However, it is argued that the principal can exercise their rights by confirming the acts performed by the unauthorized agent (Bonell 2011). In Belgium (Samoy 2009) and the Netherlands, the third party has the right, but not the obligation, to assert its interests on the basis of apparent authority, but if this right is applied, the contract between the principal and the third party is deemed to be valid, with the result that both parties acquire both rights and obligations in relation to each other. In countries which take this view (e. g. the Netherlands), a different view on the legal consequences of unauthorized agency is also expressed. It is argued that even a transaction which is concluded in excess of or without the rights conferred on the agent is valid, the third party is not entitled to repudiate it, and the principal is not obliged to initiate apparent authority or to ratify the actions of the unauthorized agent (Busch and MacGregor 2009).

As mentioned above, the most sustainable possibilities for the use of apparent authority are provided for in the *Principles of European Contract Law* (Lando *et al.* 2002), the Restatement (Third) of Agency (American Law Institute 2006) and the European Contract Code (2003), under which both the third party and the principal may rely on apparent authority. The latter position seems to be the most consistent with the general principles of civil law relations. If the third party, when negotiating with the agent, had an interest in the conclusion of the transaction in question, it should not be allowed to change its position subsequently on the basis of the absence of the agent's relevant authority (Busch and MacGregor, 2007). Apparent authority is a remedy for the violation of the third party's rights, but not a means of fraudulently avoiding its obligations towards the principal. In other words, if the principal justifies the conditions for the application of apparent authority, the third party's arguments concerning the scope of the authority conferred on the agent should not be considered. It should also be noted that allowing a third party to repudiate an apparent transaction on the basis of unrelated circumstances would unduly place them in a more favorable position than a person who deals directly with the other party, rather than through their agent. Given that agency, as an indirect means of exercising civil rights, produces essentially the same legal effects as when the subject of civil rights acts themselves, there should be no differentiation in the legal position of persons on the basis of whether they are negotiating with agents or directly with their counterparties.

It is true that there are contrary views in legal doctrine. It is argued that if the principal was entitled to rely on the doctrine of apparent authority, the third party would lose the safeguards which it would have enjoyed if the principal were obliged to approve the acts of an unauthorized agent in order to have the normal legal consequences of agency (Reynolds 2009). It is noted that this would be particularly relevant in cases of fraudulent ratification, although it is not disclosed how the principal's bad faith in ratifying the acts of the *falsus procurator* (unauthorized agent), which the third party perceived to be authorized, might manifest itself.

It is important to note that, where damages are claimed, such a remedy is not to be regarded as a liability of the principal to the third party. Damages are a form of civil liability, and it would therefore be accurate to argue that a claim of this nature by a third party implies that the third party is liable. Although this view has now been abandoned, it would not be wrong to say that the doctrine of apparent authority gives rise to the liability of the principal where the claim is for dam-

ages rather than for specific performance. According to this position, it is also important to determine what type of liability, whether contractual or in tort, is then applied by the principal. This would depend essentially on the prevailing notion of apparent authority in the legal system concerned. In those jurisdictions where the legal consequences arising from apparent authority are no different from those arising in the ordinary course of the agency relationship, the principal's liability to a third party is presumed to be contractual in nature. However, where the validity of the contract concluded between the third party and the principal is not accepted, the principal should be liable under the rules of tort liability.

However, even in legal systems which do not consider the contract between the third party and the principal to be valid, the third party is usually indemnified for positive damages, which implies that the liability of the principal is not based on the rules of tort liability, but on the rules of contractual liability. In view of the above, it is suggested that, where a claim for damages is made, the liability of the principal should not be interpreted in the context of a particular type of civil liability, but should be qualified as a *sui generis remedy* for the violation of the third party's rights in the context of a legal relationship of non-authorized agency.

Although the analysis of Lithuanian case law did not reveal any cases in which the principal invoked the doctrine of apparent authority, it should be assumed that the Civil Code of the Republic of Lithuania (2000) allows for its application at the initiative of the principal. As mentioned above, in the Lithuanian civil law system, a transaction entered into by an agent in excess of their authority is voidable and, therefore, remains valid and has legal consequences for the parties as long as the principal does not bring a claim to that effect before the court. For this reason, it would seem that the need for the application of apparent authority would only arise if the principal were to apply to the court for enforcement of the transaction concluded through the agent, and the third party were to rely, as a basis for its defense, on the general legal consequences of unauthorized agency, as provided for in Articles 2.133 and 2.136 of the Lithuanian Civil Code. In such a case, the principal should probably not be precluded from relying on the rules of apparent authority to justify the validity of the transaction. If, at the time of the conclusion of the transaction, the will of the third party was not distorted and there are no other circumstances which could invalidate the transaction, the third party's claim that the transaction should be declared invalid on the sole formal ground that the representative acted under unauthorized representation should be rejected. The opposite position would constitute a breach of the principle of good faith and would justify an abuse of the third party's rights. The use of apparent authority at the initiative of the principal also seems to be implicitly confirmed by Lithuanian case law. The Supreme Court has noted that it is for the party relying on these circumstances to prove that there were reasonable grounds to believe that the transaction was concluded with an authorized agent (Judgment of the Supreme Court of Lithuania of 17 March 2021, civil case no. e3K-3-56-684/2021). Thus, the possibility of the application of apparent authority to the legal relationship of representation is not limited to any one party. Although the third party is usually the main party interested in this possibility, it is likely that a claim brought by the principal or the agent for the establishment of the fact of apparent authority would also be considered. On the other hand, it should be considered whether the principal's application to the court (as well as the fact that the principal had already, before the commencement of the proceedings before the court, requested the third party to perform the contract) could not be

considered as ratification of the actions of an unauthorized agent, which in principle produces the same legal effects as apparent authority.

In conclusion, the most sustainable possibilities for the application of apparent authority are those where not only the third party, but also the principal can invoke this institution. Where damages are claimed in the context of apparent authority, such a remedy should not be seen in the light of the general rules on the civil liability of the principal to a third party. Apparent authority is a specific remedy for the protection of the rights violated and, therefore, where damages are claimed, the liability of the principal should be qualified as a sui generis remedy for the protection of the rights violated by the third party.

The rights and obligations of the agent in the case of apparent authority

Since the application of apparent authority renders the principal liable for the acts of the unauthorized agent, there is no direct legal relationship between the agent and the third party, i.e., they are deemed not to be bound by any contractual rights and obligations. However, if the third party in good faith is unable to prove apparent authority, they may assert their rights by bringing an action for damages against the unauthorized agent (*falsus procurator*). Some jurisdictions provide for the possibility to rely on these defenses as alternatives; therefore, if the factual circumstances meet the conditions of apparent authority, the third party may choose between applying this doctrine or claiming damages from the *falsus procurator*. The possibility of alternative remedies from the perspective of third parties as victims seems to be the most consistent with the concept of sustainability in agency law.

In contrast to the relationship between the agent and the third party, the application of apparent authority is of considerable importance in the internal legal relationship between the agent and the principal. The establishment of apparent authority means in all cases that the agent did not have authority, or exceeded that which they did have, when concluding the transaction on behalf of the principal, which gives rise to a claim for damages against the principal.

As the doctrine of apparent authority can be invoked only when a person acts without or in excess of their authority, it follows that, in all cases where apparent authority is established, the acts of the agent may be presumed to be unlawful. Where an agent exceeds their authority, they are in breach of the obligations imposed in the internal agency relationship and, in the case of a wholly unauthorized person, their actions are in breach of the general duty of care, i.e., in breach of the requirement that one may act on behalf of another person only with the requisite authority. Consequently, the principal should not have to prove the unlawfulness of the agent's actions in addition to the agent's claim for damages. However, the presumption of unlawfulness, like any other presumption in civil law, can be rebutted. The agent may prove that they have acted in accordance with the obligations laid down in the contract, the law or any other basis governing the internal agency relationship.

It is important to note that the liability of the agent towards the principal should not be strict, i.e., without fault. Given that in most legal systems the presumption of fault of the debtor applies in

the case of civil liability, it is incumbent on the agent to rebut their own fault in order to avoid its application. The agent could do so by proving that they did not know and could not have known, in the circumstances, that they did not have the requisite authority. Therefore, if an agent enters into transactions or performs other legal acts which they believe in good faith that they are entitled to perform, such conduct should not be regarded as supporting the fault condition (Busch 2002).

The specifics of the determination of the fault of an agent depend on the particular situation of the non-authorized agency. It seems that, where the agent acts without any authority, their fault could be excluded only in exceptional cases, such as in situations of *negatiorum gestio*. However, in cases of excess of authority (which would include situations where the agent abuses the authority conferred on them or where there is a conflict of interest between the agent and the principal), account should be taken of the specific factual circumstances on the basis of which the agent's fault may be assessed. If the agent exceeds the authority conferred on them, the content of the rights conferred on the agent should be examined in the first place. In determining the limits of authority, as mentioned above, it is necessary to analyze such factors as the form in which the rights were conferred on the agent (oral or written), the degree of definiteness of the rights, the way in which their content would be assessed by a reasonable person in a similar situation, and so on. Where the doctrine of apparent authority is applied in relation to the termination of an agent's authority, it must be ascertained whether the agent was objectively aware of the specific circumstances to which the termination of their rights is attributed (for example, whether they received notice from the principal that authority was being revoked, etc.). If the finding of unauthorized agency is the result of the invalidity of a transaction in which the agent has been granted rights, it is important to establish the grounds for such invalidity. If these legal consequences arise from circumstances for which the agent is not held liable (e.g., the principal's mistake), then the agent should not be liable to the principal. Conversely, if the reasons for the invalidity of the transaction are in some way attributable to the agent (e.g., fraud, violence, economic threat, etc.), then the principal is entitled to claim compensation for damages.

As a general rule, the amount of the damages to be paid by the agent to the principal shall be equal to the loss resulting from the settlement of the third party's claim due to the agent's unauthorized acts. In other words, if the conditions for the liability of the agent are proven, the principal may claim from the agent the loss suffered by the third party in reliance on the agent's authority. Indeed, the principal may also claim other damages which are the result of the unauthorized acts of the agent.

So far, there has been little discussion in the doctrine as to whether an agent may apply to a court for recognition of the fact of apparent authority. It is considered that the agent may have an interest in establishing apparent authority in order to avoid the negative legal consequences of unauthorized agency. However, as long as the principal has not made a claim for damages against the agent, the agent does not normally have the intention of initiating proceedings for the establishment of apparent authority themselves. The agent will be able to make arguments in this respect in the course of a specific dispute with the principal. On the other hand, in those jurisdictions where it is accepted that, in a situation of apparent authority, the third party cannot bring a claim *falsus procurator*, it may be in the latter's interest to use apparent authority, as it would enable them to avoid, at least for a certain period of time, direct liability both towards the third party and towards the principal.

The question is whether it is possible that, after the court has established the fact of apparent authority, the agent will later have the possibility, in a separate dispute with the principal, to deny apparent authority by claiming, for example, that a relationship of constructive agency has been established. As mentioned above, the basic premise for the application of the deemed agency is that the agent is acting without authority or in excess of authority. It is therefore only when a case of unauthorized agency is established that the possibility of the application of apparent authority can be examined. Consequently, where a final judgment has established the existence of apparent authority, there is no legal or factual basis for re-examining and reassessing the same circumstances. In such a case, the agent could only defend themselves against the principal by arguing that the conditions for their liability to the principal do not exist.

The agent could also challenge the conditions of apparent authority in the course of the dispute between the principal and the third party. Since the resolution of the dispute may affect their rights and obligations (in the event that the liability of the principal under apparent authority is established, it is likely that the latter will seek to recover damages from the agent by way of recourse), the agent should be brought in as a third party by the parties to the proceedings (i.e., the principal or the third party) or on the initiative of the court. By acquiring the status of a party to the proceedings, the agent will be able to state their arguments on the substance of the dispute between the agent and the principal.

It is also necessary to analyze on which side of the proceedings the agent should intervene – whether as a third party or as a principal, taking into account the fact that the agent may not act in the proceedings against the interests of the party on whose side they are acting. On the one hand, the interests of the agent and those of the principal are fundamentally opposed in situations of unauthorized agency (the principal seeks to prove that the agent has exceeded the authority conferred on them without any justification for doing so, and that it is therefore the agent who is liable to the third party, while the agent, on the other hand, seeks to prove that they acted in a manner which did not misrepresent the intention of the principal). On the other hand, the positions of the third party and the agent may also be at odds, where the third party relies on apparent authority and the agent seeks to prove the circumstances of apparent authority. Since the establishment of apparent authority implies a presumption of wrongful conduct on the part of the agent, it is not in the agent's interest to have the third party prove the conditions for its application. Although that presumption may be rebutted, it is important for the agent to establish, already at the time of the dispute between the third party and the principal, that there is a relationship of constructive agency rather than a relationship of apparent authority, and thus to avoid any subsequent claims by the principal. The fact that the agent will try to prove that their rights were implied on the basis of specific facts should not be prejudicial to the interests of the third party, since the principal will be held liable if both implied and apparent authority are established. In some cases, the third party may even benefit more from the establishment of implied agency, since, as mentioned above, the legal consequences of implied agency are not identical to those of actual (express or implied) agency in all legal systems. It is therefore noted that, in a dispute with the principal, the agent and the third party are in the same boat, since, in the event of a problem as to the content of the authority, both parties are primarily concerned with establishing that the agent acted in accordance with the authority conferred on them, and the nature of the authority, whether it is apparent or implied, is a sec-

ondary issue (Stoljar 1961). In this context, it is considered that the agent should generally intervene on the side of the third party. Consequently, if, in the course of the dispute between the principal and the third party, the agent succeeds in proving the existence of implied agency, it would follow that their conduct cannot be regarded as unauthorized agency. Since one of the conditions for the liability of the agent, i.e., unlawfulness, cannot be proven, the claim for damages by the principal against the agent should be rejected as unfounded.

In conclusion, if the particular facts of the case meet the conditions of apparent authority, the third party should have the sustainable choice of applying this doctrine or claiming damages from the *falsus procurator*. The establishment of apparent authority should only imply the unlawfulness of the unauthorized agent, but should not be presumed to be their fault. Although the agent does not normally have an interest in bringing proceedings in respect of authority, it should presumably be possible for them to do so, which would also imply a sustainability standard.

Protecting the interests of fourth parties in the event of apparent authority

The legal consequences of apparent authority, as well as of agency without authority in general, are not only of importance for direct participants in the agency relationship, but may also be of importance for those persons who are in one way or another involved in that relationship. Although the debate on the protection of the interests of fourth parties is still in its infancy in some jurisdictions, the need for the legal protection of fourth parties has been emphasized in those jurisdictions whose courts have already dealt with real problems relating to the violation of the rights of these subjects.

These problems arise mainly when an unauthorized agent enters into a transaction, the objective of which is to give something, and the principal (either directly or through an agent) enters into another similar transaction for the same objective. Where the facts allow the rules of apparent authority to be invoked, the third party to the first transaction may claim performance in kind, but the party to the second transaction (the fourth party) may also reasonably make such a claim. The issue is how the interests of these parties acting in good faith should be protected. In cases where the property has not yet been actually transferred to either person, priority should be given to the person who concluded the transaction earlier. The other party to the transaction could then assert their violated rights by claiming damages. This remedy is also applicable in cases where one of the parties (either a third or a fourth person) has already been effectively transferred. Since that person is a bona fide purchaser, the property cannot be taken from them, and, therefore, the other creditor, who cannot exercise their right to demand performance in kind, can only protect their rights by means of the institute of damages.

It should be noted that fourth parties are not only protected from the adverse consequences of apparent authority, but may also themselves rely on the doctrine as a remedy for their own prejudice (Busch and MacGregor 2007). It is submitted that where persons indirectly concerned in the legal relationship of agency had a reasonable belief that the contract concluded between the principal

and a third party was valid or that other acts carried out by the agent on behalf of the principal had real legal consequences, such a belief must be protected.

A classic example in this context is the US Supreme Court case of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp* (1982). The essence of that dispute was that the legal relationship between the principal (the American Society of Mechanical Engineers), acting through its unauthorized agent, and the third party (McDonnell and Miller) affected the interests of a fourth party (Hydrolevel Corp.). The American Society of Mechanical Engineers is a not-for-profit organization active in the field of engineering. Since it had adopted a technical regulation on the manufacture, design and safety control of heating equipment and pressure boilers, it was approached by McDonnell and Miller for clarification of the specific provisions of that technical document. On that basis, McDonnell and Miller sought to justify that a company operating in the same market segment, Hydrolevel Corp., did not comply with the standards set. McDonnell and Miller received the requested reply from the American Society of Mechanical Engineers, signed by the president of one of its branches. The courts held that, although this person was not authorized to issue such findings, the facts were such that McDonnell and Miller could reasonably have believed that the reply to the enquiry was signed by an authorized person. In view of the above, it was found that the agent of the American Society of Mechanical Engineers acted under the conditions of a *quasi agency*. As a result of this technical finding, which was later found to be unsubstantiated, Hydrolevel Corp. suffered substantial losses which ultimately led to its bankruptcy. As a result, an action for $6 million was brought against the American Society of Mechanical Engineers, Inc., which was upheld by the courts of all instances. It should be noted that the American Society of Mechanical Engineers, as the principal in the context of the legal relationship with McDonnell and Miller, did not and could not by its conduct have actually caused Hydrolevel Corp. to believe that the agent had the requisite authority, since the opinion was addressed to McDonnell and Miller and not to that company. Moreover, the official report did not contain any reference to Hydrolevel Corp. However, the fact that the fourth party's loss was caused by the actions of a third party acting in good faith and as a result of the principal's assertion of the rights conferred on the agent is sufficient to provide a basis for the fourth party to invoke the doctrine of apparent authority.

Thus, since fourth parties may also be involved in the agency relationship, the principle of sustainability requires that they not only be protected from the negative consequences of apparent authority, but that they themselves may also rely on this doctrine as a remedy for the violation of their rights.

Conclusions

Establishing apparent authority usually leads to the same legal consequences as if the agent had real (express or implied) authority. Those legal systems which make it possible to apply apparent authority to both the principal and a third party in essence provide for the most sustainable rules, guaranteeing a balance between the interests of the parties involved in these complex relations.

In some legal systems, the content of apparent authority is considered to be limited to the principal's obligation to indemnify the third party for the (usually positive) loss suffered. It is sug-

gested that, in the context of sustainability, the application of the doctrine of apparent authority should cover both the compensation of damages and the performance of the obligation in kind (specific performance). The third party should have a choice as to the remedy to be applied in the case of apparent authority. If the particular facts of the case meet the conditions of apparent authority, the third party should also have the sustainable choice of applying this doctrine or claiming damages from the *falsus procurator*.

Not only the third party, but also the principal must have the right to claim the application of apparent authority. Such a right should also be provided for fourth parties who are involved in the agency relationship.

Apparent authority is a specific remedy for the protection of violated rights. Therefore, where damages are claimed, the liability of the principal should be qualified as a *sui generis* remedy for the protection of the rights violated by the third party.

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