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MINIMIZING THE AGENCY PROBLEM AND ALIGNING THE INTERESTS IN INTERNATIONAL COMMERCIAL AGENCY

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Abstract

Purpose of the current research is how to ensure the balance of rights and lawful interests for the participants in legal relations of representation (agent, principal, third parties) in international commercial agency. The problem will be described from the perspectives of civil law and common law. Even though, the perception of legal institutions via just these legal systems has been widely critiqued as being too simplistic on both theoretical and empirical grounds (Coffee, 2001; Armour, at al., 2009), a closer look at these systems shows that approaches vary greatly regarding what mechanisms of controlling and minimizing the conflicts of interests are the most effective (Filatotchev, I., Jackson, G. & Nakajima, C., 2013, 975).

Design/methodology/approach in the research paper will be mainly aimed at revealing all the significant features of aligning the interests of commercial agency actors in common law and civil legal systems. The scientific work is based on the view and principles of qualitative methodology as it permits a study of a discrete phenomenon in order to discover its new perspectives without the need to come to a preliminary view on the nature of the problem set.

According to the formulated purpose and goals of the thesis, the research is executed from the comparative perspective by contrasting the problem of aligning the interest of commercial agency actors and mechanisms of its solution in Civil Codes of countries with civil law and common law legal systems along with the mentioning of international sources of commercial agency regulation.

Findings. The analysis of scientific works has shown that agency theory is regarded as very pragmatic and widely applied. It has roots in different academic fields and its usefulness is very extensive and prominent. Nevertheless, the theory is vastly "under-theorized" as there has been no unified explanation or theory adopted on how legal and social environments shape the identities, interactions and interests among participants to agency relations in different countries.

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As far as international commercial agency is concerned, it usually implies that at least two of the participants (agent and principal) are located in different states where an agent performs legal acts, and is authorized to act, on behalf of the principal (Bonell, 2018, 24). Therefore, in theory international commercial agency relations are equally beneficial for both parties, however, they are also extremely complex and usually involve many participants, whose interests might be misaligned, affecting the efficiency of agency relationships and increasing agency costs.

The most frequent reason of misalignment is the information asymmetry that influences agents' decisions and creates a systemic gap in the incentives of both the principal and the agent. Conflict between the principal and agent (hereinafter agency problem) arises when the agency requires personal costs from the agent during the performance of actions directed at maximizing the principal's welfare. In other words, when the agency becomes not equally beneficial or even unprofitable for one of its participants, the agency problem arises.

All mechanisms designed to minimize agency conflicts and align the interests of the participants to agency relationships, are mainly focused on minimizing agency costs that are higher when the interests within agency relationships are not properly aligned. Moreover, in cases of so-called malfunctioning agency, the problem of unauthorized agency may take place that severely diminishes the quality of agency relationships. This may bring an undesirable result to the principal caused by the agent acting against the instructions or ignoring the limits of authority in order to get the agreed commission fee (Busch, D.; Macgregor, L. J. 2009c, 971).

Research limitations/implications. The conflict of interest and agency costs arise due to the different risk preferences, information asymmetry and moral hazards. Scientists have developed many mechanisms in order to constraint opportunism of the agents acting on behalf of their principals (such as strong ownership control, compensation, etc.). However, it is worth mentioning, that close alignment of shareholder and director interests may also give rise to another agency problem in financial distress: the shareholder-creditor problem.

To balance the incentives of all participants to commercial agency, a good system of legal regulation should be developed in order to show the level of alignment of the parties' interests within the company. Therefore, good corporate governance, control mechanisms and their effectiveness would also constitute an object of the present paper.

Practical implications Legal framework is extremely important in minimizing agency conflicts, since it sets the rules, under which the businesses and agents are expected to perform, however, this is not universally applicable. Being based on the system of judicial precedent, English law require the courts to introduce constraint mechanisms, but in practice courts have remained reluctant to interfere into the commercial decision making either because they lack sufficient experience or knowledge to decide commercial matters and such interference will slow up the pace of commerce (Lesini v Westrip Holdings Ltd, 2009, 85).

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When it comes to the international and European legal framework, currently no standard legislation exists, neither nationally, nor internationally. European Community (EC) Directive on Electronic Commerce is based on the UNICITRAL Model Law on Software Commerce, however, unlike UNCITRAL is binding upon each Member State to which it is addressed, but it is left to the national authorities to choose the form and methods (Directive 2000/31/EC, 2000). This problem becomes even more crucial when the transactions are performed internationally, and the problem arises what national law has to be used, especially when there was no explicit agreement made on the applicable law in the general terms and conditions of the contract. Thus, an adequate legal framework should be introduced in order to solve the problems that might arise out of dealing with software agents, not only at national but also on an international level.

Originality/Value of the research is stipulated by the fact that no comprehensive international research has been provided in respect of the determination of agency conflicts, ways of their minimization and control from the perspectives of civil law and common law. Scientific value of the current research is also justified by the fact that a deep comparative analysis of the mechanisms of aligning the interests in commercial agency from the perspective of common law is absent nowadays. Common law terminology was adopted into the international trade due to the simplicity of its application, in comparison to the continental vision. Moreover, this research would be of particular interest to the lawyer specializing in continental law, since agency theory in common law has developed in its distinctive manner and its exploration may be useful for comprehensive understanding of the problem and finding the most suitable solution.

Keywords: agent; commercial agency; agency problem; alignment of interests.
Research type: research paper.

References:

Bonell M. J. (2018) "The law governing international commercial contracts and the actual role of the UNIDROIT Principles" Uniform Law Review, Vol. 23, Issue 1, 15–41.

Busch, D.; Macgregor, L. J. (2009c). Unauthorized Agency, European Review of Private Law 17(6): 967-974. Available at: https://www.kluwerlawonline.com/abstract.php?area=Journals&id=ERPL2009061

Coffee, J.C. (2001). The rise of dispersed ownership: The role of law and the state in the separation of ownership and control. Yale Law Journal, 111: 1-82; Armour, J., Deakin, S., Sarkar, P., Siems, M., & Singh, A. (2009). Shareholder protection and stock market development: An empirical test of the legal origins hypothesis. Journal of Empirical Legal Studies, 6: 343-380.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. (2000). Official Journal of the European Communities, (178):1–16.

Filatotchev, I., Jackson, G. & Nakajima, C. (2013). Corporate governance and national institutions: A review and emerging research agenda. Asia Pacific Journal of Management, 30(4), pp. 965-986, at 975.

Lesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch); [2010] BCC 420, at [85].