

Ключевые слова: Соглашение об ассоциации, зона свободной торговли, адаптация законодательства, имплементация, экономика, торговля.

Summary

Petrov V. Current state of legal obligations in the context of the economic part of the Agreement on Deep and Comprehensive Free Trade Area between Ukraine and the European Union.

The article is devoted to analyze Ukraine's compliance with legal obligations in accordance with the Association Agreement in such areas as access of economics. The article deals with the current aspects of European integration of the state in the context of implementation of the EU-Ukraine Association Agreement

Key words: Association agreement, free trade area, adaptation of legislation, implementation, economy, trade.

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Y. POKHODUN

Yuliia Pokhodun, Bachelor of Law of the Taras Shevchenko National University of Kyiv

UNAUTHORIZED AGENT * FROM A COMPARATIVE PERSPECTIVE

The actuality of the problem of unauthorized agency is that in the light of modern commercial relations, it would be inconvenient for the agent communicate every transaction with the principal, particularly where the business undertaking is a large and complex¹. For this reason, it is important for the law of agency, not to limit agency relations only to cases where the agent has an actual authority, as it would severely diminish the utility of agency.

The research is aimed to develop the theoretical foundations of the concept of unauthorized agent under the domestic civil law and to provide the scientific analysis of the agent's authority in order to ensure the possibility of full realization of the agency relations.

The discussion of this issue may be found on the scientific papers of Wolfram Müller-Freienfels, Pothier R.-J., Danny Busch and Laura J Macgregor, Paul Foriers, who tried to find an adequate legal solution that would reflect the interests of all three parties to an agency agreement and would be directed to protect their interests.

Although under the Ukrainian law this issue, has not been paid much attention but some domestic scholars such as Y. O. Kharitonov, O. V. Startsev, S. G. Kerimov, V. L. Granin, V. V. Tsiura, O. I. Heletska still tried to give answers to the most urgent problems².

After preliminary investigation, it can be traced that the doctrine of unauthorized agency consists of three more specific concepts: apparent authority, ratification and the liability of *falsus procurator* (in continental law) or *the breach of warranty of authority* (in common law and mixed systems). Within each of these broad doctrines, the law of agency strives for a proper balancing of the rights and obligations of the parties to this triangular relationship.

There is a general rule in basically all legal systems that neither the principal, nor the third party is bound under the contract entered into by an unauthorized agent. Under French Civil Code, the concept of representation is determined by the concept of mandate which defines the scope of agent's authority and he cannot bind the principal acting beyond the authority described in it³.

The legal nature of an unauthorized act as a legal phenomenon, has not received much attention. Only Dutch law and German law discuss this question. In Dutch law, such act is regarded as invalid, whereas in German law, it is described as *'awaiting'* either for ratification or refusal by the principal or revocation by the third party and it cannot be placed within any of the existing categorization of void, voidable or invalid transaction⁴.

Under Ukrainian law civil code also finds it hard to attribute such an act either to null or void before a definite approval or disapproval of the principal⁵. Before the approval, such an act includes the features of both null and void transaction⁶, so the description of *"awaiting"* act is the most appropriate regarding the specific nature of the agency relationship where the protection of all parties' interests cannot be provided without giving the chance to enforce an unauthorized act.

Due to the extremely dynamic development of modern commerce, apparent authority is an essential part of the unauthorized agency. An excellent description of the concept was given by *the Restatement Third of Agency* in the art. 2.03 as "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations"⁷.

Manifestations of authority must have been made to the third party to show that the agent is duly authorized to act on the principal's behalf. This may be made by words (oral or written) or by conduct.

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* In this work the notion of an agent is regarded from a common law perspective that describes a person acting on behalf and in the interests of his principal in respect of the third parties. This term will be also applied to civil law jurisdictions in order not to mislead the reader by different terms, which, however, have the same basis.

Countries with civil law order also focus on the circumstances of the agent's appearance of authority. In France and Belgium, for instance, liability historically was based on the doctrine *l'apparence*, depending on the proof of the principal's fault.

Such appearance may commonly take the form of appointing the agent to a certain position which implies to have certain authority⁸. Thus, the authority can be delegated to the agent/employee under the memorandum and articles of association in order to act on behalf of the company in the ordinary course of such business⁹.

The same situation can be observed in Ukrainian law as an employee is allowed to act on behalf of an enterprise or institution *ex officio* without any documents proving his authority.

Also for apparent authority to arise, it is important to establish third party's good faith when entering into a contract with the agent. Courts in France and Belgium, in their turn, go further in their understanding of apparent authority and offer to make third party's *legitimate beliefs* the determinative factor. German law does not contain an express requirement of the reasonable belief, but it seems unlikely that a court would allow a third party to invoke apparent authority where the belief of the third party was not reasonable.

This requirement is also present in the Article 232 of the Civil Code of Ukraine¹⁰. There is also a view that if a third person knew or should have known that the agent acted outside the scope of his authority or acted beyond the scope of mandate, such a person acted against the will of the principal, and therefore the agreement, should be considered as null¹¹.

Accordingly, unless all conditions are met, there is a danger that the principal would be able to rescind from an unauthorized contract, so the third party should bear always a risk that the agent acts without authority¹².

Under the doctrine of apparent authority the third party is allowed to sue the principal. However, if the principal wants to sue the third party there is a requirement to ratify the unauthorized act¹³.

Ratification is the second constituency of the doctrine of unauthorized agency. If the transaction entered into by the unauthorized agent does not contradict the principal's interests there is a possibility provided to enforce such a contract. The doctrine of ratification preserves the utility of the law of agency because the agent who acted in a good faith but accidentally exceeded his authority will retrospectively be granted the authority.

Ratification is regarded as the unilateral legal act that may be performed expressly or be implied from the principal's words or conduct that must unequivocally show that he has affirmed the agent's acts. Silence and inactivity, in general, will not amount to ratification, moreover in some cases that may give rise to an estoppel against the principal that will prevent him from saying that he has not ratified¹⁴.

The same position is true for Ukrainian doctrine, as in legal literature the approval (ratification) of unauthorized act is defined as a unilateral act aimed at the emergence of a legal result and should be expressly made in order to pay the attention of others¹⁵. It is a confirmation of the existence of agency relationship between the principal and agent¹⁶.

It is also regarded as the healing of the fault found in that particular agreement. It expresses the will of the principal to enforce an agreement entered into by the agent with the excess of the powers granted to him¹⁷. It may be written or oral or implied from the principal's conduct¹⁸. Some Ukrainian scholars state, however, approval by tacit consent is also available under the civil law provisions¹⁹.

The prevailing view there is that the sole tacit consent cannot be an independent form of approval of the unauthorized actions. So, ratification must be made either by express statement, regardless of its form, or by making conclusive action that clearly indicates the principal's aim to execute a contract²⁰.

The third party's interests are protected by providing a possibility to choose whether to consent to the ratification or to declare the withdrawal from the transaction. For example, the Dutch and German civil codes, the Restatement (Third) of Agency provide the third party with a limited right to withdraw in the form of declaration.

Unfortunately, no specific provisions regarding the third party's engagement have been found under the Ukrainian doctrine, but there is a strong need to allow the third party to interact with the agent or principal. It is suggested to provide the third party with the limited right to withdraw with the requirement to act in a good faith. This would protect both the interests of the principal and the third party.

One more requirement which is particularly important for the ratification to become possible is that it must be of an entire act and with the principal's full knowledge of the circumstances of an agent's unauthorized act. By allowing the principal to choose only those parts of a transaction in which he is interested may appear to be extremely unjust in respect to the agent and the third party. Art. 2.2.9 of UNIDROIT Principles states that partial withdrawal of the third party from the transaction will amount to the contract modification²¹, so most legal systems, including Ukrainian law countries regard partial ratification as not possible.

Principal's refusal to ratify may lead to the nullity of the transaction and holding the agent liable for exceeding the authority. Basically, all modern legal systems provide the possibility for the third party to hold the unauthorized agent liable for the damage suffered but such liability arises only in case when neither the doctrine of apparent authority, nor the doctrine of ratification is applicable.

Under the English law, in its turn, the doctrine of breach of warranty of authority is well-developed and gives the rise to the liability on the part of an unauthorized agent. Dutch, law, English law, French law, the Restatement (Third) of Agency and the PECL follow the English approach and base such liability on breach of contractual warranty of authority which results in payment of damages for the loss of expectation²². Under the English law the warranty is regarded as a type of collateral contract which in case of breach holds the agent strictly liable²³. The concept presumes that the agent warrants that he has an authority to enter into the contract but not that the principal will be able to perform the contract.

Under the continental view, holding the unauthorized agent liable is regarded as the measure of the last resort which can be applied only when other avenues have failed. For instance, under French law, other than ratification, the doctrine of *mandate apparent* is a possible way to hold the principal liable for the agent's acts²⁴. Also under French law actions against the agent will usually be based on tort, requiring the proof of the agent's fault²⁵. Most of other countries reserve the preference for a contractual basis of agent's liability as higher measure of damage is allowed on such a basis and there is no need to establish the fault.

Under the Ukrainian law, there is no express doctrine introduced to hold the representative who acted with excess or even without authority liable, but after the analysis of the legal provisions it may be traced that the continental law approach is being followed. The warranty is considered as law-approving document, rather than law-establishing, and the warranty of authority itself cannot be breached and lead to liability as it is always based on the agreement between the principal and agent²⁶.

In most cases, the injured party will be entitled to substantial damages on expectation basis followed from the lack of authority. The only exception can be found in German law where the damages are awarded on the reliance basis²⁷. Also in civil law jurisdictions specific performance is the primary remedy available to the third party²⁸. Common law stipulates that is a discretionary remedy which is only available where damages would not be an appropriate remedy.

Under the Ukrainian law without subsequent approval, the transaction is treated as the one which did not occurred and does not give rise to any legal consequences. In such a case, the representative becomes fully liable to a third party. Such an agent is obliged to return to the other party everything that was received in pursuance of this transaction, or reimburse the cost. If the third party has suffered damages, the representative is considered to be the one who will be responsible for their compensation²⁹. The possibility for the third party to request specific performance, unfortunately, is not provided.

Summarizing, unauthorized agency takes place when the agent performs some act on behalf of his principal with a lack of authority or without authority or all. The doctrine is oriented on the protection of the principal's autonomy by accepting the general rule that unauthorized act of an agent binds neither the principal nor the third party.

Unfortunately, under the Ukrainian law this issue, irrespectively of its importance and urgency, has not been paid much attention by the domestic scholars and the legislator. Although certain trials to develop the doctrine of unauthorized agency are being undertaken, in comparison to other jurisdictions, Ukrainian civil law still does not possess an adequate definition of apparent authority of a representative, correct understanding of an unauthorized act and no exact means of holding the unauthorized representative liable are provided.

¹ The unauthorized agent: perspectives from European and Comparative law // Ed. by Danny Busch and Laura J Macgregor Cambridge: Cambridge University Press (www.cambridge.org), 2009. xxxiv + 480 pp. – p. 186.

² Гранін В. Л. Повноваження представника та його реалізація за цивільним законодавством України [Текст] : автореф. дис. ... канд. юрид. наук : 12.00.03 / В. Л. Гранін ; Одес. нац. юрид. акад. – О., 2005. – 20 с. – С. 1.

³ Civil Code (Napoleon Ed.) : as of 21 March 1804 [Electronic Resource]. – Access mode : http://www.napoleon-series.org/research/government/c_code.html ; Article 1989 CC.

⁴ The unauthorized agent: perspectives from European and Comparative law // Ed. by Danny Busch and Laura J Macgregor Cambridge: Cambridge University Press (www.cambridge.org), 2009. xxxiv + 480 pp. – p. 388.

⁵ Харитонов С. О., Харитонova О. І., Старцев О. В. Цивільне право України : підруч. [Текст] / С. О. Харитонов, О. І. Харитонova, О. В. Старцев. – [Вид. 3, перероб. і доп.]. – К. : Істина, 2011. – 808 с. – С. 271.

⁶ Гелецька І. О. Представництво без повноважень [Текст] / І. О. Гелецька // Науковий вісник Херсонського державного університету. – 2014. – Випуск 5. – Том 1. – С. 155–159. – С. 157.

⁷ American law Institute's Restatement of the Law-Agency. Restatement (Third) of Agency Vols. 1 and 2 (Sec. 1.01 – 8.14). St. Paul, Minn.: American Law Institute Publishers, 2006. – Art. 2.03.

⁸ Bürgerliches Gesetzbuch (BGB) : Neugefasst durch Bek. v. 2.1.2002 I 42, 2909; 2003, 738; zuletzt geändert durch 29.6.2015 I 1042 [Electronic Resource]. – Access mode : <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf> – Art. 54 (3) BGB.

⁹ Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480.

¹⁰ Dissertation for the Doctor's degree in Law, specialty 12.00.03 – civil law and civil procedure; family law; private international law (081 – Law). – Taras Shevchenko National University of Kyiv of Ministry of Education and Science of Ukraine. – Kyiv, 2017. – С. 346.

¹¹ Шершеневич Г. Ф. Учебник русского гражданского права (по изданию 1907 г.) [Текст] / Г. Ф. Шершеневич ; вступ. ст. Е. А. Суханов. – М. : Фирма «СПАРК», 1995. – 556 с. – С. 97.

¹² Wolfram Müller-Freienfels // Agency. – Encyclopædia Britannica/ [electronic resource]: <https://www.britannica.com/topic/agency-law>

¹³ UNIDROIT Principles on the International Commercial Contracts : 2010 edition [Electronic Resource]. – Access mode : <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010>

¹⁴ Smith v Henniker-Major & Co, Court of Appeal – Civil Division, July 22, 2002, [2003] Ch 182, [2002] EWCA Civ 762.

¹⁵ Dissertation for the Doctor's degree in Law, specialty 12.00.03 – civil law and civil procedure; family law; private international law (081 – Law). – Taras Shevchenko National University of Kyiv of Ministry of Education and Science of Ukraine. – Kyiv, 2017. – С. 336.

¹⁶ Полтавський О. В. До питання про правочин, який вчиняється з перевищенням повноважень [Електронний ресурс] / О. В. Полтавський // Право і Безпека. – 2012. – № 1. – С. 272–276.

¹⁷ Харитонов С. О., Харитонova О. І., Старцев О. В. Вказана праця. – С. 271.

¹⁸ Керимов С. Г. Представництво за законом в цивільному праві України [Текст] : дис. ... канд. юрид. наук : 12.00.03 / С. Г. Керимов ; НДІ приват. права і підприємництва Акад. прав. наук України. – К., 2006. – 194 с. – С. 132–133.

¹⁹ Харитонов С. О., Харитонova О. І., Старцев О. В. Вказана праця. – С. 272.

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²¹ UNIDROIT Principles on the International Commercial Contracts : 2010 edition [Electronic Resource]. – Access mode : <http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010> – Article 2.2.9.

²² The unauthorized agent: perspectives from European and Comparative law // Ed. by Danny Busch and Laura J Macgregor Cambridge: Cambridge University Press (www.cambridge.org), 2009. xxxiv + 480 pp. – p. 422.

²³ Collen v. Wright (1857) 8 E & B 647.

²⁴ The unauthorized agent: perspectives from European and Comparative law // Ed. by Danny Busch and Laura J Macgregor Cambridge: Cambridge University Press (www.cambridge.org), 2009. xxxiv + 480 pp. – p. 45.

²⁵ Civil Code (Napoleon Ed.) : as of 21 March 1804 [Electronic Resource]. – Access mode : http://www.napoleon-series.org/research/government/c_code.html ; Article 1997 CC.

²⁶ Dissertation for the Doctor's degree in Law, specialty 12.00.03 – civil law and civil procedure; family law; private international law (081 – Law). – Taras Shevchenko National University of Kyiv of Ministry of Education and Science of Ukraine. – Kyiv, 2017. – С. 337.

²⁷ Bürgerliches Gesetzbuch (BGB) : Neugefasst durch Bek. v. 2.1.2002 I 42, 2909; 2003, 738; zuletzt geändert durch 29.6.2015 I 1042 [Electronic Resource]. – Access mode : <http://www.gesetze-im-internet.de/bundesrecht/bgb/gesamt.pdf> ; Art. 179 (2) BGB.

²⁸ The unauthorized agent: perspectives from European and Comparative law // Ed. by Danny Busch and Laura J Macgregor Cambridge: Cambridge University Press (www.cambridge.org), 2009. xxxiv + 480 pp. – p. 81.

²⁹ Гранін В. Л. Поняття та наслідки неналежного представництва [Текст] / В. Л. Гранін // Актуальні проблеми держави і права. – 2004. – Вип. 22. – С. 616–621. – С. 618.

Резюме

Походун Ю. О. Здійснення неналежного представництва: порівняльний аспект.

Стаття присвячена визначенню юридичних проблем, спричинених представниками у зв'язку зі здійсненням неналежного представництва по відношенню до особи, яку представляють та третіх осіб. Інститут представництва є недостатньо досліджений, і багато аспектів заслуговують на увагу, проте в статті в аналізуються три центральних питання доктрини неналежного представництва: явні повноваження, схвалення дій неналежного представника особою, яку представляють та відповідальність неналежного представника. Мета дослідження полягає у визначенні ключових елементів доктрини неналежного представництва в континентальних та загальних правових системах та надання пропозицій щодо вдосконалення правового регулювання представницьких відносин шляхом впровадження зарубіжного досвіду в українське законодавство.

Ключові слова: неналежне представництво, комерційне представництво, явні повноваження, схвалення дій неналежного представника, відповідальність неналежного представника.

Резюме

Походун Ю. О. Осуществление ненадлежащего представительства: сравнительный аспект.

Статья посвящена определению юридических проблем, вызванных представителями в связи с осуществлением ненадлежащего представительства по отношению к представляемому и третьих лиц. Институт представительства недостаточно исследован, и многие аспекты заслуживают внимания, однако в статье анализируются три центральных вопроса доктрины ненадлежащего представительства: явные полномочия, одобрение действий ненадлежащего представителя представляемым и ответственность ненадлежащего представителя. Цель исследования заключается в определении ключевых элементов доктрины ненадлежащего представительства в континентальных и общих правовых системах и предоставления предложений по совершенствованию правового регулирования представительных отношений путем внедрения зарубежного опыта в украинское законодательство.

Ключевые слова: ненадлежащее представительство, коммерческое представительство, явные полномочия, одобрение действий ненадлежащего представителя, ответственность ненадлежащего представителя.

Summary

Pokhodun Y. Unauthorized agent from a comparative perspective.

The article is devoted to the determination of the legal problems cause by the agents who act with a lack of authority from a comparative perspective. Agency law appears to be an under-researched area and many aspects deserve attention, however the article mainly analyses the three central issues of the doctrine of an unauthorized agency: apparent authority, ratification and the liability of falsus procurator. The purpose of the research is to identify the key elements of the doctrine of unauthorized agency in both continental and common law systems and to provide suggestions regarding the improvement of legal regulation of representative relations by implementation of the foreign experience into the Ukrainian legislation.

Key words: unauthorized agency, commercial representation, apparent authority, ratification, liability of falsus procurator.