PROPOSED CODE OF AGENCY CONTRACTS

INTRODUCTION

The law of agency has been partially codified in California and a few other western states.[1] Another partial codification of agency law is found in the Indian Contract Act, which has also been enacted in Malaysia.[2] All of these codes were adopted in the nineteenth century and necessarily fail to incorporate the developments in the field in the last 100 years. To the arguments for recodification of these outdated statutes, one must add the arguments for codification in the majority of American states which have had no agency codes. The latter are much the same as those which resulted in the codification of other commercial law. Uniformity of law between states and with other common law jurisdictions, however, is only one of the primary objectives. Equally important is the removal of ambiguities in language of the law as found in the appellate decisions in any single jurisdiction. Conceptual confusions in opinions, such as those resulting from numerous overlapping definitions of implied authority and apparent authority, can add materially to the research tasks of the lawyer or judge meeting a novel problem in the field of agents' contracts. In this code, rigour of definitions and of categories of classification are designed to supercede common-law concepts. Nevertheless, this is primarily a codification of a branch of the common law, and where pre-code decisions are not in conflict with the code, they may be useful in its explication.

This proposed codification of the law of contracts by agents is the first part of a planned code of the entire law of agency. The structure of this proposed code is based on my two earlier articles on the theoretical basis of the law of agency.[3] Briefly, the objective theory of agency defines the power of the agent to create contract relations between his principal and third parties to be based on the reasonable expectations of third parties derived from the principal's representations concerning the scope of the agent's authority. Following this unifying theoretical structure, each of those sections of the code which seemed to require an explanation of its relation to the central theme is followed by a comment.

1. See California Civil Code, Sections 2295-2356, 2362-2389 (1961). These sections were all enacted in 1872.
2. See Indian Contract Act, 1872 (No. IX); The Contracts (Malay States) Ordinance, 1950 (No. 14); Sheridan, L.A., *Malaya and Singapore, The Borneo Territories, The Development of Their Laws and Constitutions* (1961), p. 260.
3. See Conant, M., "Liability of principals for torts of agents: a comparative view", *Neb. L. Rev.* (1968), vol. 47, p.42; ——, "Objective theory of agency: apparent authority and the estoppel of apparent ownership", *ibid.*, p. 678.

The comments have the further function of explaining the interrelations between different code sections which might come into conflict in any particular controversy.

A few sections of this code are borrowed directly from the *Restatement of the Law of Agency.* For the most part, however, the approach of the *Restatement* is rejected. The initial definitions in the *Restatement* are illustrative of its language, most of which is too generalized to be useful in a statute. Under Sections 1 and 2 of the *Restatement* all servants and employees other than independent contractors are agents, and all of these "agents" are in a fiduciary relation to their employers. In Section 7 of the *Restatement* Authority is defined in the same way as most judges and writers define Actual Authority, and Apparent Authority in Section 8 is clearly not a subclass of Authority. Inherent Agency Power in Section 8A of the *Restatement* is a concept which has not been accepted by the courts and is critically discussed in my earlier article.[4] Those particular issues are treated in this code in the broad definitions of apparent authority in Sections 3.7 to 3.9 and the liabilities of the undisclosed principal for creating apparent ownership in his agent in Section 5.18.

Most of this proposed code and its accompanying comments are self-explanatory. Consequently, only a few general comments on its structure will be made in this introduction. In a few instances, a section of the code is in part redundant. This is deliberate. The sin of redundancy imposes much less guilt than the sin of ambiguity. In the definition of agency in Section 1.1, for example, "in his behalf in a representative capacity" may be redundant; but it is designed to distinguish the principal-agent relationship from the master-servant relationship. This is in contrast with Section 1 of the *Restatement,* which uses the phrase "on his behalf" but is intended to include both servants and agents. Another obvious redundancy is the general definition of apparent authority in Section 3.7 followed by two special cases of apparent authority in Sections 3.8 and 3.9. The purpose here is to give apparent authority the broadest possible interpretation consistent with some generalized consent of the principal.

Article IV is designed to fit ratification into the objective theory of agency. Consequently, the definition of ratification in Section 4.1 and the specific rule of Section 4.7 require that the agent or purported agent must have professed to act for the party who subsequently ratifies. The ratification merely confirms the third person's original expectation. Section 4.9, in allowing the third person to withdraw at any time before ratification is also derived from basic contract law, though not the objective theory. The mutuality of obligation rule allows the third person to repudiate before ratification even in violation of his expectations. It could well be argued that Section 4.9 should be amended to allow withdrawal of the third person before ratification only if he has knowledge that the principal or purported principal is not legally bound. This would make Section 4.9 conform to an objective theory of agency.

4. *Ibid.*, pp. 678, 686.

Article V attempts to clarify the many distinctions between disclosed, partially disclosed, and undisclosed principals. The basic approach is to combine the former two in one class (Sections 5.1 to 5.12) and treat the undisclosed principal separately (Sections 5.13 to 5.22). The policy on undisclosed principals, in applying an objective theory, is to apply a basic assumption that the agent has only actual authority (Sections 5.14 and 5.17). This is followed by the broad liability of the undisclosed principal arising from his creation of apparent ownership in the agent (Section 5.18). The undisclosed principal is also subject to special rules relating to defenses, set-off, and discharge (Sections 5.20 and 5.21), all of these also being based on the reasonable expectations of the parties in the circumstances.

Article VI is an attempt to reduce the basic rules relating to notice to agents into three sections of statute. Article VII is a codification of the established common law of subagents. The definition of subagent in Section 7.1 is designed to make the key distinction between a subagent and an agent who was employed for the principal by another agent. The subsequent rules all derive from this basic distinction. Article VIII codifies the basic common-law liabilities of agents to third parties. Sections 8.2 and 8.3 incorporate the special rules relating to interpretation of written contracts in this area. The basic liabilities of agent by warranty of authority are codified in Sections 8.6 to 8.8.

ARTICLE I: DEFINITIONS AND APPOINTMENT OF AGENTS

Section 1.1 — Definition of Agency. Agency is the consensual relationship in which one person appoints another to act in his behalf in a representative capacity to effect contracts and other legal relations between the first person and the third persons.

Section 1.1A — Definition of Principal. A Principal is one who appoints another to act for and represent him in contractual or other legal dealings with third persons.

Section 1.1B — Definition of Agent. An Agent is one who represents another in contractual or other legal dealings with third persons.

Comment on Section 1.1. The Principal-agent relationship, though usually an employment relation based on contract, needs only the consent of the parties and may be gratuitous. The representative character of the agent makes it a more particular relationship than that of master and servant. In the latter, a master employs a servant to do physical or mental work entirely under the control of the master and without power to create legal relations between the master and the third persons. In spite of these basic distinctions, a person whose basic employment status is that of servant can be delegated limited or special agency powers by his master.

Section 1.2 — Acts Which are Delegable. An agent may be appointed to do any acts which the principal may legally do, unless public policy or an agreement with another party requires personal performance.

Section 1.3 — Appointment to Perform Illegal Acts. The appointment of an agent to do an act is illegal and void if an agreement to do such an act or the performance of the act would be criminal, a civil wrong or otherwise opposed to public policy.

Section 1.4 — Capacity of Principal. Legal capacity to employ another as one's agent shall be governed by the general laws on capacity to contract in this jurisdiction.

Comment on Section 1.4. There is no policy reason to distinguish contractual capacity to become a principal from any other contracts entered by a party. A principal who is an infant may disaffirm the contract employing his agent and all contracts with third parties negotiated by his agent.

Section 1.5. — Capacity of Agent. Any person may become an agent and no contractual capacity is required; but an agent who is not of the age of majority and of sound mind shall not have fiduciary responsibility to his principal according to the provisions on that topic herein contained.

Comment on Section 1.5. Since the agent of a disclosed principal is not a party to the contracts he negotiates for his principal with third parties, contractual capacity is not in issue. The agent's duties to his principal, however, must be limited if he has less than normal ability to comprehend them.

Section 1.6 — Consideration. No consideration is necessary to create an agency.

Section 1.7A — Definition of General Agent. A general agent is an agent empowered by his principal to conduct a series of transactions with a continuity of service.

Section 1.7B — Definition of Special Agent. A special agent is an agent empowered by his principal to conduct a single transaction or a number of transactions without continuity of service.

Comment on Section 1.7. The distinction between general agents and special agents is one of degree, the determining characteristics being the number of transactions and the continuity of service. A special agent needs fresh authorization for each transaction while a general agent is usually a regular employee with generalized authorization to enter a class of transactions with an unspecified number of third parties. The amount of discretion in the agent is not a test of the distinction, since a general agent may be delegated very little discretion while a special agent may be delegated broad discretion for a single transaction.

The distinction between general and special agents becomes important in the interpretation of apparent authority. See Section 3.7 to 3.9. General agents in particular lines of business may have substantial apparent authority. Special agents, by virtue of no continuity of service, may have no apparent authority or at most a very limited apparent authority.

ARTICLE II: AGENCY LIABILITY WITHOUT AGENCY

Section 2.1 — Agency Liability by Estoppel. A person who has not employed an agent is nevertheless subject to liability to third persons who have entered transactions with a purported agent and changed their positions in reliance on the belief that the transactions were authorized, if

(a) the first person intentionally or carelessly caused such belief or consented to such representation by another, or

(b) knowing of such belief and that third persons might change their positions because of it, the first person did not take reasonable steps to notify them of the facts.

Comment on Section 2.1. This section codifies the concept, agency liability by estoppel. It applies only when no principal-agent relationship exists. When a person by words or conduct misrepresents himself, or consents to another misrepresenting him, to any third person as principal of a purported agent, he is liable to such third person who in reasonable reliance on the misrepresentation, changes his position by entering legal relations with the purported agent. If the purported principal has made such misrepresentation or consented to its being made in a public manner, he will be liable to any third person who changes his position in reliance on it, even though the misrepresentation has not been communicated with his knowledge. Agency liability by estoppel, which requires proof of all the elements of estoppel by representation, should not be confused with apparent authority of agents, which in this code is not a type of estoppel. See Section 3.7.

Section 2.2 — Agency Liability of Necessity. In case of an emergency in which it is not practicable for a bailee to communicate with his bailor or for a servant or other employee without agency powers to communicate with his master or employer, such bailee, servant or employee shall have special agency authority to enter such contracts or do such other acts for the purpose of protecting his bailor, master or employer from loss as would be done by any reasonable person of ordinary prudence, for his own account, under the circumstances.

Comment on Section 2.2. This section codifies the concept of agency liability of necessity. It applies when no principal-agent relationship exists. The bailee or employee is given a power by operation of law to create a liability for his bailor or employer in order to protect the bailor's property or the performance of the employer's legal obligations. A carrier hired only to transport perishable goods may sell the goods in an emergency as agent of necessity in order to minimize the loss of the

owner. After a railway accident, a railway policeman, the senior employee present, may contract for the railway to purchase food, lodging and medical care for injured persons. This section should not be confused with that providing for broad implied actual authority of an agent in an emergency, which, because of the agency status, may be much more extensive in scope than the power of non-agents enacted here. See Section 3.5.

ARTICLE III: AUTHORITY

Section 3.1 — Actual Authority. Actual Authority is the legal power in the agent, voluntarily delegated to him by the principal, to make contracts or affect other legal relations between his principal and third persons.

Comment on Section 3.1. Actual authority is the power of the agent to negotiate a transaction, such as entering, executing or terminating a contract between his principal and a third person, pursuant to the principal's manifestation of consent to the agent. Actual authority must be distinguished from apparent authority (Sec. 3.7) which is based on the principal's manifestations of consent to the third person.

Section 3.2 — Actual Authority: Express or Implied. The actual authority of an agent may be express or implied.

Section 3.3 — Express Actual Authority. Express actual authority is delegated to the agent in his contract of employment or subsequent directions from his principal in written or spoken words.

Section 3.4 — Implied Actual Authority. Implied actual authority is that authority which the agent may reasonably infer from the express actual authority. It is the power in the agent to do all acts reasonably necessary or incidentally appropriate to accomplish the express actual authority.

Comment on Section 3.4. The agency relation is always the result of agreement, usually a contract. In order to interpret authority, the effect of customs, and similar matters, the normal rules for the interpretation of contracts are applicable. Implied actual authority is implied by the principal's statements in the express actual authority.

Among the detailed factors to be considered are the length of time the agent has been employed, the type of acts he has been doing with the acquiescence of the principal, the amount of discretion in the express actual authority, and whether the employee is a general agent or merely a special agent for one or a few transactions. A principal must expect his agent to follow the methods of other agents in the principal's line of business except for activities in which the principal has adopted his own special methods and informed the agent of them.

The more detail which the principal has given to the agent concerning the objectives of the agency, the more the implied actual authority is circumscribed. In any case, the agent may not act contrary to any known objective without explicit directions of the principal. A managing agent of a business, for example, will have discretion in balancing the objectives of short run profits and expansion of the firm unless principal explicitly states that one of these objectives is paramount.

Formal instruments, such as powers of attorney and detailed formal contracts of employment may delineate the express actual authority with a high degree of particularity. Such instruments would be interpreted in light of the technical language of the particular trade or business rather than the popular meaning of words. These formal documents are likely to leave much less to implied actual authority than are hastily drawn memoranda giving an agent only a general outline of his powers.

Section 3.5 — Implied Actual Authority: Emergency. In case of an emergency in which it is impracticable for the agent to communicate with the principal, an agent has implied actual authority to do all such acts for the purpose of protecting his principal from loss as would be done by any reasonable person of ordinary prudence, for his own account, under the circumstances.

Comment on Section 3.5. Implied actual authority is enlarged in emergencies to include all actions of the agent reasonably necessary to protect or preserve the property or other interest of his principal. This expanded authority exists if the principal did not anticipate it by directions to the agent, if it is not feasible or is relative to the emergency or too expensive for the agent to communicate with the principal, and if it is necessary for the agent to exceed his usual implied authority in order to utilize the best method in protecting the interests and purposes of the principal. If the agent acts reasonably, the fact that he is mistaken about the necessity of action does not prevent the existence of the special implied authority. For the special agency powers of non-agents in an emergency, see Section 2.2.

Section 3.6 — Implied Actual Authority: Power of Attorney. When agency is created by a formal power of attorney, implied actual authority shall be strictly construed under the following two rules:

(i) Unless otherwise agreed, general expressions used in delegating actual authority to an agent are limited in application to acts done to execute the specific transactions to which the authority primarily relates.

(ii) Specific authorization of particular acts implies that more general authority is not intended.

Comment on Section 3.6. This section is adopted from the *Restatement of Agency 2d,* Sec. 37. It is designed to codify the rule that a formal power of attorney is to be strictly construed. General terms are not to be interpreted literally but only in connection with the transactions which are the subject matter of the actual authority.

Section 3.7 — Apparent Authority. Apparent Authority is the legal power in the agent, though in excess of his actual authority, to make contracts or affect other legal relations between his principal and third persons, arising from and in accordance with the statements or conduct of the principal to such third persons concerning the agent's authority.

Comment on Section 3.7. As distinguished from actual authority, which is based on consent of the principal to the agent, apparent authority is based on consent of the principal to the third party and exists where there is no actual authority. Apparent authority is nevertheless a full legal power in the agent to contract for his principal. In this code, apparent authority is not a type of estoppel, as many courts have held under the common law. Consequently, an executory contract is enforceable, and no change of position by the third person in reliance on the principal's representations is necessary for liability.

Apparent authority is created by words or conduct of the principal to third persons, which, reasonably interpreted, causes such persons to believe that the principal consents to have particular classes of contracts or other legal relations executed for him by his agent. The manifestations of assent by the principal to the third person concerning the agent's authority may be intentional or inadvertent. The representations may come directly from the principal by letter or word of mouth, from statements of the agent which are actually authorized by the principal, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent's general grant of actual authority through authorized or permitted channels of communications.

Apparent authority is interpreted in light of all accompanying circumstances. Among other matters, considerations would include the previous business relations between the principal and the third person, the general usages of business and the particular usages of the businesses of the principal and third person, and the extent to which the third person is informed that the principal's practices differ from the customary ones in his line of business. The two largest categories of apparent authority are specifically codified in Sections 3.8 and 3.9.

Section 3.8 — Apparent Authority: General Grant; Secret Limitations. A third person, informed by the principal of the appointment of the agent to his position or of the general grant of actual authority in the agent and uninformed of particular limitations thereon, may infer from the appearance of authority thus created that the agent has the same authority as is normally and usually exercised by agents appointed to similar positions in that line of business or in that trade.

Comment on Section 3.8. This is a specific codification of the largest category of cases of apparent authority. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the ordinary habits of persons in the locality, trade or profession, it is usual for the agent to have a particular kind of authority, anyone dealing with him is justified in inferring that he has such an authority,

in the absence of reason to know otherwise. This rule is effective even if the agent acts secretly for his own benefit or some other improper purpose.

Section 3.9 — Apparent Authority: Acquiescence in Disobedience. Acquiescence by the principal in a series of contracts or other legal relations effected by his agent with a third person in excess of the agent's actual authority creates apparent authority in the agent to effect similar contracts or legal relations with the same third person in the future.

Comment on Section 3.9. This is a specific codification of the second largest category of cases of apparent authority. A principal ordinarily expresses dissent to a third person with whom his agent has contracted in excess of his actual authority. Acquiescence in one such act is ratification but does not justify an inference of authority to repeat it. If an agent performs a series of similar unauthorized acts, however, the failure of the principal to object to them creates a reasonable inference in the particular third persons that the principal consents to similar acts in the future under similar conditions.

ARTICLE IV: RATIFICATION

Section 4.1 — Definition of Ratification. Ratification is the subsequent affirmance by one person of acts which were previously performed, professedly on his behalf, by another who was without actual or apparent authority to so act.

Comment on Section 4.1. Ratification is not defined in terms of a principal-agent relationship, since the unauthorized acts of a non-agent may be ratified if they were purported to be done for the person who later ratifies. If a discharged agent, in an attempt to harm his former principal, makes a contract with a third person who has received notice of the discharge but failed to read it, the former principal may choose to ratify the contract in order to protect his business reputation. These non-agent cases are rare, however. The overwhelming majority of cases concern an agent who has contracted, purportedly for his principal, in excess of his actual or apparent authority.

Affirmance is either words or conduct which manifest an election by the one on whose account the unauthorized acts have been done to treat them as authorized. The transaction, which is originally inoperative for liability of the principal, is subsequently validated by ratification so that by operation of law the principal's liability relates back to the time of the original act. See Sec. 4.10. The rationale of the rule is that it merely confirms the reasonable expectation of the third party created when he contracted with the agent or purported agent.

Section 4.2 — Ratification: Express or Implied. Ratification may be express or it may be implied by the conduct of the person on whose behalf the acts are done.

Section 4.3 — Implied Ratification. Implied ratification may be established by any conduct of the purported principal manifesting his consent to become a party to the transaction after he has been informed of all material facts of the transaction.

Comment on Section 4.3. Ratification may be implied in many ways including, among others, the following: (a) express ratification of acts forming part of the transaction without disavowal of any other parts; (b) receipt of benefits under the transaction without immediate repudiation thereof; (c) retention of benefits under the transaction without immediate repudiation thereof; (d) performance of part or all of his duties under the terms of the transaction; (e) remaining silent and failing to repudiate the transaction under such circumstances that the third person, acting as a reasonable man, would expect the purported principal to communicate if he did not consent; and (f) bringing a suit to enforce promises which are part of the transaction or basing a defence to suit upon the transaction.

Section 4.4 — Knowledge of Principal at the Time of Affirmance. Ratification is voidable by the person ratifying if, at the time of affirmance, he was uninformed of any material fact of the transaction and unaware of his lack of knowledge.

Comment on Section 4.4. A contract resulting from ratification is not binding on the person who ratifies if he was ignorant of any material fact of the transaction, unless he assumes the risk by failing to inquire when he knows he is ignorant of material facts. If the principal or purported principal is shown to have knowledge of some facts which would lead a reasonably prudent person to investigate further, and he fails to make such an investigation, his affirmance without qualification is evidence that he is willing to ratify on the basis of the partial knowledge which he has.

It is not necessary for valid ratification that the principal have knowledge of all the legal consequences of his ratification. Ratification of an agent's unauthorized purchase of a chattel is binding on a principal even though he does not know it was bought from a person without the legal right to sell; the principal is guilty of conversion.

Section 4.5 — Affirmance of Part of a Transaction and Disavowal of Part. Attempted ratification by the person in whose behalf the acts were done is void if accompanied by his disavowal of any part or consequence of the transaction.

Comment on Section 4.5. The purported principal may ratify only the entire transaction; he may not affirm its benefits and reject its burdens. He may not affirm a sale and disavow the warranties made by the agent or purported agent to induce it. The rule applies to each single transaction and would not apply if two separate transactions were made by an agent or purported agent at the same time followed by ratification of one and disowning of the other.

Section 4.6 — What Acts May be Ratified? Any act which, when done by the agent or purported agent, could legally have been authorized by the person on whose behalf it was done may be ratified by that person.

Comment on Section 4.6. If the act was not legal at the time it was done, it may not be ratified unless a statute having retroactive effect makes it legal. Capacity of the principal or purported principal is also determined at the time the agent or purported agent acted. Ratification of a transaction which is voidable for mistake or fraud would have the double effect of making the principal a party to the transaction and preventing subsequent rescission. This of course presumes full knowledge of the principal of the material facts which would constitute mistake or fraud.

Section 4.7 — Purporting to Act as Agent. Ratification is not effective unless the agent or purported agent professed to act for the person who subsequently attempts to ratify.

Comment on Section 4.7. This rule follows directly from the definition of ratification in Section 4.1. The primary rationale of holding a third person liable to ratification is that it merely confirms the expectations created by the agent or purported agent. One of the essential expectations in the third party is that a specific principal existed and would be liable as of the date the contract was made. Hence, the agent or purported agent must have professed to act for a disclosed principal or an unnamed principal who was sufficiently described so that he can be later identified. This rule precludes ratification by an undisclosed principal, because he has no actual or reputed tie to an unauthorized contract of his agent at the time it is made.

Section 4.8 — Communication of Affirmance. Ratification may be communicated to the agent or purported agent or to the third person, or it may be shown by any other manifestation of definitive election to treat the acts as if they had been authorized.

Comment on Section 4.8. Ratification must be established by competent evidence. Usually, it is by words to or conduct toward the agent or the third party. Other manifestations of assent which would be sufficient are, for example, entries by the principal into his books of account or his unqualified statements of affirmance to others which have been related to the third person.

Section 4.9 — Affirmance After Withdrawal of Third Person. Ratification is effective only if the affirmance of the transaction occurs before the third person has manifested his withdrawal from it either to the person on whose behalf the act was done or to the agent or purported agent.

Comment on Section 4.9. Until ratification, the principal or purported principal is not liable in contract but merely has a legal power to become bound, similar to the legal power in an offeree. The mutuality of obligation rule of contract law supports the rule that the third person is free

to withdraw at any time before ratification. Death or loss of capacity of the third person before ratification would also terminate the power in the principal or purported principal to ratify.

Section 4.10 — Relation Back in Time and Place. The liabilities of the parties to an act or transaction which has been ratified shall relate back and be determined in accordance with the law governing the act or transaction at the time and place it occurred.

Comment on Section 4.10. The legal effect of ratification is the same as original authorization, a contract liability of the one who ratifies as of the date the agent or purported agent acted. This rule is qualified by Section 4.13, for other persons who acquire interest between the time of the transaction and the time of ratification. The rule is further limited by Section 4.9, which allows withdrawal of the third person at any time before ratification. Only by this relating back can both the full benefits and burdens of the contract be gained and borne by both parties, since contract conditions and warranties may have effective meaning only in relation to the original date. The third person reasonably expects his rights to accrue as of the date of contracting, and the principal or purported principal should ratify only if he will undertake that the third person will realize his full expectations.

Section 4.11 — Illegality or Lack of Capacity at the Time of Affirmance. The persons held liable and the validity of defenses when a contract is ratified shall be the same as those resulting from original authorization, except that if between the time the transaction occurred and the time it was ratified, there has been a change in the capacity of the purported principal or third person or in the legality of authorizing or performing the transaction, capacity and legality may be determined as of the date of ratification in order to do equity between the parties.

Comment on Section 4.11. The liabilities in terms of persons affected by the contract and defenses which may be interposed are the same as if the contract had been originally authorized. Thus, fraud or duress by the agent or purported agent in inducing the contract may be asserted as defenses against the party who ratifies. If the party who ratifies loses capacity, by becoming insane between the date of the transaction and the date of ratification, his capacity is then determined as of the date of ratification. Likewise, if the party who ratifies gains capacity, by becoming of legal age between the date of the transaction and the date of ratification, capacity is determined as of the date of ratification. If the object of the transaction was illegal at the time it was made, the contract is void then at the time of ratification, unless retroactive legislation removes the illegality as of the date the contract was made.

Section 4.12 — Misrepresentation or Duress. Ratification shall be voidable by the person who ratifies if affirmance is induced by misrepresentation or duress.

Comment on Section 4.12. If the third person, by fraud or duress, induces the principal or purported principal to ratify, the ratification is voidable. This rule codifies the general rule of contract law when applied to affirmance in ratification.

Section 4.13 — Rights of Persons not Parties to Transaction. Ratification shall not be effective to diminish the rights or interests of persons not parties to the transaction which were acquired between the time of the transaction and the time of ratification.

Comment on Section 4.13. This section protects persons such as a judgment creditor who makes an attachment on land on which an agent has previously recorded his unauthorized contract of sale.

ARTICLE V: LIABILITIES OF PRINCIPALS AND THIRD PERSONS

Section 5.1 — Principal: Disclosed and Unnamed. Unless designated as undisclosed, the term principal in this article shall include disclosed principals, those whose existence as principal and name is revealed to the third person; and unnamed or partially disclosed principals, those whose existence as principals is revealed to the third person but whose names are not revealed to the third person.

Section 5.2 — Liabilities Based on Actual and Apparent Authority. A principal and a third person are mutually liable in all contracts made by an agent acting in behalf of the principal within the agent's actual or apparent authority, as if the contracts had been made by the principal in person, with the exceptions noted in Sections 5.3, 5.4 and 5.5.

Comment on Section 5.2. If a contract is made by an agent in the name of the principal or by a description sufficient to identify the existence of a principal, this primary rule of liability is applicable. For the purpose of identifying an unnamed (partially disclosed) principal and charging him upon a contract in writing, parol evidence is admissible under the general rule of contract law that such evidence is admissible when it does not vary or contradict the written terms.

The principal is subject to liability upon a contract within the agent's actual authority even though the third person does not know that the agent is authorized, or even if the third persons informs the agent that he disbelieves the agent's representations concerning his authority, so long as he manifests his intention to enter contract. In contrast, the principal is affected by apparent authority only to the extent that it relates to those who rely upon the words or conduct of the principal which causes them reasonably to believe that the agent is authorized. There may be actual authority for part of a transaction and apparent authority for the remainder.

There may be apparent authority in the agent of an unnamed (partially disclosed) principal. When an unnamed principal appoints a broker who usually deals in his own name but for principals, the unnamed principal must except he may be bound by the usual warranties such a broker makes to third persons, even though he has specifically directed the broker to make no warranties. This rule is also applicable to contracts made by one member of a partnership with a third person who knows that there are other partners but does not know their names.

Even though the agent exceeds his actual and apparent authority in making a contract, the principal may become liable upon it under the principle of estoppel of apparent ownership, as stated in Section 5.18.

Section 5.3 — Sealed Contract or Negotiable Instruments. In the absence of specific statutory authorization, a principal is not liable on a sealed contract or conveyance nor on a negotiable instrument signed by his agent unless the principal is therein named as a party.

Comment on Section 5.3. The purpose of this section is to make agency law conform to other existing common law and statutory rules, so that the general rule of liability in the previous section will not be interpreted to overrule the law relating to sealed contracts and negotiable instruments.

Section 5.4 — Exclusion of Principal or Exclusive Credit to Agent. If a contract made by an agent by its specific terms excludes the principal as a party or specifies that exclusive credit is given to the agent by the third person, the principal will not be a party to the contract.

Comment on Section 5.4. Even though contracts by an agent would otherwise be within the agent's actual or apparent authority, the principal can be expressly excluded from liability. If so excluded, the principal is not liable for the agent's failure to perform even if the third person conveys the subject matter directly to the principal or to the agent who reconveys it to the principal, unless the seller retains a lien. If, however, the transaction is voidable by the third person because of mistake, fraud or duress, the principal is protected in an action for the value of property thereby received only if he is not responsible for the agent's conduct and is a bona fide purchaser. This follows from the general law of restitution.

Section 5.5 — Third Person with Notice of Limitations on Agent. A third person with notice of a limitation of an agent's actual or apparent authority or with knowledge which would lead a reasonable man to believe that the agent was exceeding his authority may not subject the principal to liability upon a transaction of which he has such notice or knowledge.

Comment on Section 5.5. This section restates in negative form the limits of liability of principals inherent in the definitions of actual and apparent authority. See Sections 3.1 and 3.7. The principal may notify the third person directly that he has curtailed the previously delegated actual authority of his agent. If a third person does not have direct notice from the principal but has information which would lead a reasonable man to believe that the agent was violating orders of the principal, he may not subject the principal to liability. Any substantial departure by an agent from the usual methods of conducting business is ordinarily a sufficient warning of lack of authorization. If, for example, the third person has reason to believe that the agent is acting for his own benefit in violation of his fiduciary duty, he may not subject the principal to liability upon a contract which is shown to have been unauthorized.

Section 5.6 — Contracts Authorized in Part. When an agent enters into a contract with a third person which in part exceeds his actual and apparent authority, the principal and the third person are mutually liable in con-

tract only to the extent that acts within the agent's actual or apparent authority can be distinctly separated from those which exceed his actual or apparent authority.

Comment on Section 5.6. The purpose of this section is to save those parts of a contract which are within an agent's authority and distinctly separable from those in excess of authority. As to the latter portion the agent will be liable to the third person for breach of warranty of authority.

Section 5.7 — Agent with Two or More Principals. Unless otherwise agreed by two or more principals and an agent, the principals are not liable to a third person when the agent combines orders of the principals and purports to make a single joint contract between them and the third person.

Comment on Section 5.7. An agent must have actual authority of each of several principals to lump their orders into one contract with a third person. Although principals do not become subject to liability on such a contract unless they have agreed to joint liability, a single transaction calling for separate and distinctly defined performance of each of several principals may subject them to liability to the third person severally.

Section 5.8 — Agent's Representations: Existence or Scope of Authority. A principal is not subject to liability in contract or in tort for untrue representations of his agent concerning the existence or scope of the actual authority of the agent or the facts upon which his actual authority depends.

Comment on Section 5.8. Since all authority in agents is based on the principal's consent to be bound in contract or other legal relations, the manifestations of assent of the principal are the only legally binding source of authority. Hence, the representations of an agent or alleged agent concerning the existence or scope of his authority have no legal standing. The duty of inquiry is on the third person. He must find out from the principal what general grant of actual authority is in the agent. If he fails to do so and relies on the representations of the agent, he assumes the risk that the representations may be untrue, in which case he would have no legal claims against the principal.

Section 5.9 — Agents Representations: Incident to Execution of Authority. A principal is liable in contract and in actions for recission for authorized and unauthorized representations of the agent which are incidental to the execution of his actual or apparent authority if any representations concerning the matters are within the actual or apparent authority of the agent, *provided* that Section 5.8 is not applicable and that the third person has no notice that the representations are untrue or unauthorized.

Comment on Section 5.9. If an agent has actual or apparent authority to make true representations about the subject matter of his agency, the principal will be responsible to third persons in contract for all the agent's representations (except existence and scope of authority) concerning the subject matter. The rule deals only with the principal's

liability in actions brought for breach of a contract or for its rescission, and it is distinct from the principal's liability for statements of the agent which constitute the tort of fraud. Whether the agent believes the statements to be true or untrue, and whether they are authorized or not, the principal is subject to liability under this section. If the third person has notice that the agent is unauthorized to make the statements, he cannot maintain an action against the principal for breach of warranty. Nevertheless, if he can prove that in spite of receipt of the notice he entered contract in reliance on untrue representations of the agent, the whole transaction may be rescinded.

Section 5.10 — Defense of Principal and Third Person. The principal and the third person to a contract made by an agent on behalf of his principal may interpose against each other any defense arising out of the transaction which each could have interposed if the defense had arisen in a contract made by the principal in person.

Comment on Section 5.10. Defenses to an action arising in the transaction negotiated by the agent, such as non-performance, breach of a condition, fraud or misrepresentation by either party or the agent, and set-offs between principal and third person, are available to the parties.

Section 5.11 — Rights and Defenses: Effects of Claims By or Against Agent. Unless otherwise agreed by the principal and the third person, the liabilities of a principal and a third person to each other upon a contract made by an agent are not affected by any rights or liabilities existing between the third person and the agent.

Comment on Section 5.11. Under this rule, a principal cannot set off against the third person a claim owed by the third person to the agent, nor can the third person set off against the principal any claim which he has against the agent, unless it is part of the agreement that either of these set-offs may be asserted. This rule holds even though the agent consents to be a party to a contract made primarily for his principal.

Section 5.12 — Settlement with Agent by Principal. A principal is not discharged from liability to a third person in a transaction conducted by his agent by payment to or settlement of accounts with the agent, unless the principal does so in reasonable reliance on the conduct of the third person which is not induced by misrepresentations of the agent.

Comment on Section 5.12. A principal is not discharged from liability merely because he pays his own agent in reasonable belief that the agent has settled the principal's accounts with the third person. Such payment discharges the principal only if conduct of the third person leads him reasonably to believe that the agent had previously settled the account. If fraud of the agent induces the third person's conduct, the principal is not relieved of liability.

Section 5.13 — Definition of Undisclosed Principal. An undisclosed principal is one whose existence is not disclosed to the third person, so that the third person believes that the agent is dealing for himself in a transaction.

Comment on Section 5.13. An undisclosed principal is defined in terms of the knowledge of the third person at the time he contracts with the agent. Hence, the failure to put the principal's name in a written contract does not alone make him undisclosed. A principal is liable under the rules for undisclosed principals if the third person has no knowledge of his existence even though the agent violated the principal's direction to reveal his existence, unless the principal is excluded from contract by its form or terms.

Section 5.14 — Liabilities of Undisclosed Principal and Third Person. An undisclosed principal and a third person are mutually liable in all contracts made by an agent for the undisclosed principal acting within the agent's actual authority, as if the contract had been made by the principal in person, with the exceptions noted in Sections 5.15 and 5.16.

Comment on Section 5.14. The undisclosed principal is liable to the third person for contracts within the agent's actual authority for the same reason as disclosed principals. He assents to liability by voluntarily delegating the actual authority to the agent, and hence the liability merely enforces his expectation. If the contract is partially executed and the principal has received benefits from the third person, the principal's liability is even more clearly seen as an application of contract law. For the reason why this sale is limited to the actual authority of the agent, see Section 5.17.

The liability of the third person is based firstly on the consideration doctrine of mutuality of obligation in contract. If the undisclosed principal is liable to the third person on contracts within the agent's actual authority, as noted above, the third person must be liable to the principal in order to supply consideration for the principal's promissory liability on the agent's promises. The liability of the third party can be based secondly on the public policy which presumptively favours the transferability of legal rights, the same legal basis as assignment. The agent of the undisclosed principal has a primary liability to the third person, a liability which is presumptively transferable. If the third person has not stipulated in the contract that he will perform only for the agent (who is then posing as a principal), he will not later be permitted to deny his assent to perform for any person who comes forward as the true principal. Although analogous to assignment, the rationale is not the same as assignment, since the legal rights are in the undisclosed principal from the moment the agent contracts and are not transferred from the agent to the principal. The liability of the third person can be based thirdly on a trust doctrine. As noted, the agent when acting within the scope of his actual authority creates legal rights in himself for the benefit of his principal. Since the agent may always sue as a party to a contract which he negotiated for his principal, it is merely a procedural short-cut to allow the principal as beneficiary to sue the third person directly. The trust analogy is not altogether correct. Although an agent would sue a third person in his representative capacity, the agent has created two separate contracts with the third party, his own and the undisclosed principal's. The principal does not sue on the agent's contract but on his own, and at common law this makes the agent's contract unenforceable. The principal's unlimited right to control the agent's conduct of his business is also inconsistent with a beneficiary's usually limited power to control his trustee.

Section 5.15 — Undisclosed Principal: Contracts Under Seal and Negotiable Instruments. An undisclosed principal and a third person are not liable for contracts made by the agent for the principal within the agent's actual authority if the contract is under seal or is a negotiable instrument, or upon a contract which specifically excludes an undisclosed principal as a party.

Comment on Section 5.15. The rule relating to contracts under seal presumes no statute has been passed abrogating the common law rule for seals. The rule relating to negotiable instruments merely reiterates that statute. If, however, even though the principal's name is not on the negotiable instrument as a party, his name does appear thereon, extrinsic evidence is admissible to show that both the agent and the third person contemplated that the principal should be a party. Under the law of restitution, even though the undisclosed principal is held not to be a party to a negotiable instrument, he is liable for benefits received by him or his agent acting within actual authority in case of valid rescission for cause by the third person. The rule relating to excluding an undisclosed principal as a party requires specific exclusion as a term of the contract. Mere agreement between the principal and agent or mere denial by the agent that there is a principal is insufficient.

Section 5.16 — Undisclosed Principal: Personal Relationship in Performance. An undisclosed principal for whom an agent has acted within his actual authority may not enforce liability of the third person in any contract which requires a personal relationship in performance, or any contract in which the personal qualities of the agent can be shown by the third person to have been so material a factor in his entering contract that enforcement by the principal would create a substantially different liability.

Comment on Section 5.16. Personal service contracts require a personal relationship in performance, and no third person will be required to enter a personal relationship which was unrevealed at the time of contracting. Certain other contracts, though not requiring a personal relationship in performance, are materially dependent on personal qualities of the agent. A surety company which issues a surety bond for the performance of a construction contract by an agent of an undisclosed principal is not surety to the principal if he undertakes the construction.

Section 5.17 — Undisclosed Principal: Agents Has No Apparent Authority. An agent of an undisclosed principal has no apparent authority.

Comment on Section 5.17. This rule follows necessarily from the fact that apparent authority is based on manifestations of assent by the principal to a third person. An undisclosed principal, by definition, makes no representations of any kind to the third person.

Section 5.18 — Undisclosed Principal: Apparent Ownership in Agent. An undisclosed principal who directs or permits his agent in dealing with third persons to misrepresent by words or conduct that the agent is owner of property or chattels which in fact belong to the principal is liable upon all contracts between the agent and such third persons:

(a) to sell or otherwise dispose of such property or chattels, or

(b) to enter or execute any other transaction in which a third person extends credit in reasonable reliance on the apparent ownership.

Comment on Section 5.18. Although an agent of an undisclosed principal can have no apparent authority, the principal may have liability by creating apparent ownership in the agent. From this application of estoppel by misrepresentation, there is a power in the agent to affect the interests of the principal aside from any rule of agency. If third persons extend credit or make other contracts in reliance on the apparent ownership of assets by the agent, when the principal is ultimately responsible for causing such appearance, the principal is estopped to deny contractual liability. The liability of the principal under this doctrine is limited to the extent of the assets subject to the misrepresentation, or to the extent to which the principal has been benefited under the contracts with the third persons. Although this section deals in part with the same issues as do the Factors Acts, it is not enacted to replace those acts but only to supplement the liabilities created by them.

Section 5.19 — Undisclosed Principal: Representations of Agent. An undisclosed principal is liable in contract and in action for rescission for authorized and unauthorized representations of his agent concerning matters within the agent's actual authority if any representations about the subject matter are within the agent's actual authority, unless the third person has reason to know that the representations are untrue.

Comment on Section 5.19. Although the agent of an undisclosed principal can have no apparent authority, this is one of the exceptional instances in which the principal is liable when the agent does exceed actual authority. So long as the agent makes contracts which are within his actual authority, the undisclosed principal assumes the risk that the agent may make warranties which he was specifically directed not to make. Since the main substance of the contract is within the actual authority of the agent because the undisclosed principal delegated such authority, it would be inequitable to excuse the principal from contract liability because of excesses by the agent relating only to the secondary issue of representations about the subject matter.

Section 5.20 — Undisclosed Principal: Defenses. The undisclosed principal and the third person to a contract made by the agent in behalf of the principal may interpose against each other any defense arising out of the transaction; and the third person may interpose against the principal any defense which he had against the agent before disclosure of the principal, unless the agent was actually authorized to contract only in the principal's name.

Comment on Section 5.20. The undisclosed principal and the third person have all the defenses against each other as are available in any two-party transaction, such as fraud, misrepresentation, recoupment, breach of condition, non-performance and set-offs. In addition the third person may interpose any defense which would be available to him if the agent

had brought the action. Since the agent is a party to the transaction and the third person thinks him the only other party, the third person reasonably expects any defense against the agent to defeat claims against him.

Section 5.21 — Undisclosed Principal: Settlement with Agent by Principal. An undisclosed principal is discharged from liability to a third person in a transaction conducted by his agent by good faith payment to or settlement of accounts with the agent before the existence of the principal is disclosed to the third person.

Comment on Section 5.21. This rule differs from that for disclosed and unnamed principals in a comparable situation. See Section 5.12. Until the principal's existence becomes revealed, the third person expects a claim only against the agent. If the principal settles with the agent while he is still undisclosed, no expectations of the third person can be disappointed. And since the principal in most cases of this type hopes never to be disclosed, the only way he can execute payment is through his agent. Thus, it is reasonable for the principal to expect that payment to the agent will settle his debt to the third person.

ARTICLE VI: NOTICE

Section 6.1 — Definition of Notice. A person has notice of a fact if he has knowledge of the fact, should know the fact by exercising ordinary care in the exercise of his duties, or has been given notification by another person.

Comment on Section 6.1. A person has notice of a fact under the definition adopted in this Section if he has knowledge of it, should have knowledge of it or has been given notification of it. A person should know those facts relating to a transaction which any reasonable person acting in his own interest would ascertain by exercising ordinary care. If he is a specialist in the particular trade, he should know all those facts which a reasonable specialist of that type would ascertain by exercising ordinary care. Notification concerns the actual receipt of information and is defined in Section 6.2.

Section 6.2 — Definition of Notification. Notification is the formal act in which one person makes information known to another.

Comment on Section 6.2. Notification is the delivery of information to another person, such as notification of creditors of dissolution of a partnership, the notification of stoppage in transit, or the revocation of an offer. It is a formal act affecting the legal rights or powers of the person entitled to receive notification, and it must be given to a person legally authorized to receive it.

Section 6.3 — When Notification to Agent Affects Principal. Unless the person giving notification to an agent has notice that the agent has an

adverse interest to the principal, notification given to an agent shall be legally effective as notification to the principal if:

(i) The agent has actual or apparent authority to receive the notification;

(ii) The agent has actual or apparent authority to conduct the transaction to which the notification pertains and it is customary in that trade to give notification to an agent, unless the principal has informed the third person that the agent is without authority to receive the notification; or

(iii) The agent had an undisclosed or unnamed principal and notification concerning transactions within the agent's actual or apparent authority was given to the agent before discovery of the identity of the principal by the third party.

Comment on Section 6.3. Notification to an agent may have the legal effect of notification to the principal because the agent was actually appointed to receive such notice or because the principal led third persons to believe the agent had such authority. Such actual or apparent authority to receive notification can be delegated to the agent even though he had no part in the previous transactions to which this later notification relates. Thus, the managing agent of a business may have actual or apparent authority to receive notice of dissolution of partnership to which his principal had extended credit before employing the agent.

As to transactions which the agent has actual or apparent authority to conduct, notifications pertaining to those transactions will be effective as notifications to the principal only if this is customary in the particular business and the principal has not informed third persons that his agent has no such authority. Thus, in most trades, a travelling salesman will have actual authority to receive offers in the form of orders for his principal's goods but in most cases a cancellation of the order must be sent directly to the principal in order to revoke the offer.

If an agent of an undisclosed or unnamed principal receives a notification before the third person discovers the identity of the principal, it must necessarily be effective against the principal. This rule would apply to notifications relating to all acts within the actual or apparent authority of the agent of an unnamed principal and within the actual authority of the agent of an undisclosed principal. As noted in Section 5.17, the agent of an undisclosed principal has no apparent authority. After the third person discovers the identity of the principal, the rule in subsection (ii) for disclosed principals would be applied.

ARTICLE VII: SUBAGENTS

Section 7.1 — Definition of Subagent. A subagent is a person, appointed by an agent acting within his actual or apparent authority, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.

Comment on Section 7.1. If a principal represents to his agent or to third persons that the agent has authority to appoint another to carry out the agent's negotiating and contracting functions, the appointed party to be an agent of the primary agent and of the principal, a person so appointed is a true subagent. In contrast, a similar person appointed by an agent with authority to do so, who is to be responsible only to the principal, is merely another agent and not a subagent. The key characteristic of the true subagent is that the appointing agent is responsible to the principal for the conduct of the appointee. The subagent may be a regular employee of the agent, such as a salesman or a broker; or he may be appointed for a specific business deal such as a second broker in a distant city appointed by the broker employed by the principal in his own city.

Section 7.2 — No Implied Authority to Delegate Personal Tasks. With the exception stated in Section 7.3 (v), actual authority in an agent to conduct a transaction does not create implied authority to delegate to another the performance of acts which the agent has expressly or impliedly undertaken to perform personally, including those requiring use of discretion, judgment or special skill of the agent.

Comment on Section 7.2. A principal may give an agent express authority to delegate his agency functions of dealing for the principal with third persons. If the agent has no express authority to delegate his powers, there is a general presumption that he has no implied authority to do so. This presumption is rebuttable, and the usual exceptions to it are stated in Section 7.3.

The performance of acts which are merely mechanical normally may be delegated by an agent to a servant whom he employs. A sales agent may employ a typist or office boy to do the mechanical part of his tasks but he may not employ another sales agent to carry out his representative functions unless the principal has given him actual or apparent authority to do so.

Section 7.3 — When Implied Authority to Delegate to Subagent. Unless otherwise agreed, authority to appoint a subagent is inferred from authority to conduct a transaction for the principal for the performance of which the agent is to be responsible to the principal if:

(i) the authorized transaction cannot lawfully be performed by the agent in person;

(ii) the agent is a corporation, partnership or other organization;

(iii) the business is of such a nature or is to be conducted in such a place that it is impracticable for the agent to perform it in person;

(iv) the appointment of subagents for the performance of such transactions is usual, or the principal has reason to know that the agent employs subagents; or

(v) an unforeseen contingency arises in which it is impracticable to communicate with the principal and in which such an appointment is necessary in order to protect the interests of the principal entrusted to the agent.

Comment on Section 7.3. This section is borrowed from the *Restatement of the Law: Agency 2d*, Section 80. It summarizes the instances in which there is implied authority in an agent to appoint a subagent to perform discretionary acts for which the agent is primarily responsible to the principal.

Section 7.4 — Liability of Principal to Third Persons When Subagent Validly Appointed. When a subagent is validly appointed by an agent, the principal is liable to third persons for contracts or other legal relations effected by the subagent under the same rules of law as if the subagent were an agent originally appointed by the principal.

Comment on Section 7.4. A subagent has the power to create legal relations binding on the principal only when the subagent is appointed by an agent pursuant to authority from the principal. If an agent without authority to do so appoints a subagent, the subagent's acts are binding only on the agent.

Section 7.5 — Liability of Agent to Principal for Acts of Subagent. Unless otherwise agreed, an agent is responsible to the principal for the acts and conduct of a subagent appointed by him with reference to the principal's dealings or legal relations entrusted to the subagent.

Comment on Section 7.5. This rule follows directly from the definition of a subagent as an agent of the agent appointed to do acts originally delegated by the principal to the agent. If a subagent exceeds his actual authority but contracts with a third person within his apparent authority, the agent will be liable to the principal for his loss on the transaction. If a subagent commits fraud in doing acts within his authority or violates his fiduciary duty, the agent is responsible to the principal for the resulting losses.

Section 7.6A — Duties of Subagent to Principal. Unless otherwise agreed, a subagent who knows of the existence of the agent's principal has the same duties to that principal as would an agent appointed by the principal, except the duties dependent upon the existence of a contract.

Section 7.6B — Duties of Subagent to Agent. Unless otherwise agreed, a subagent has the same duties to the agent as an agent has to a principal.

Comment on Section 7.6. A subagent has a contractual relation only to his employer, the agent, and he is not liable to the principal for failures to perform duties arising solely from his contract of employment. A subagent does have a fiduciary relationship to the principal, and he is also liable to the principal for any losses caused to the principal by his tortious acts arising from the transaction of the business of the agency. The duties of the subagent to the agent are the same as those of the agent to a principal.

Section 7.7 — Liability of Agent to Third Person. The liability of an agent to third persons for the acts and conduct of his agents and subagents is the same as that of a principal for the acts or conduct of his agent.

Comment on Section 7.7. The true subagent is firstly an agent of the agent. Consequently, the agent stands as a principal toward his subagent and is liable to third persons under the same rules as all other principals. If the "subagent" is appointed by the agent without actual or apparent authority of the principal, he is not a true subagent but merely an agent of the agent. The liability of the agent to third persons, however, is the same whether he appoints a true subagent or one who is merely his agent.

ARTICLE VIII: LIABILITIES OF AGENTS TO THIRD PERSONS

Section 8.1 — Agent of Disclosed Principal not Liable. Unless otherwise agreed by the agent and the third person, an agent who contracts with a third person on behalf of a disclosed principal is not a party to the contract and is not liable for its non-performance.

Comment on Section 8.1. This primary rule, excluding agents of disclosed principals from liabilities to third persons, derives directly from the definition of agency and agent in Sec. 1.1. The chief purpose of agency is to effect contracts between principals and third parties. In the usual case, the agent is merely the medium to effect these contracts.

Section 8.2 — Written Contract Determines Liabilities. If the unequivocal language of a written contract designates the agent as a party thereto or as not a party thereto, extrinsic evidence to show a contrary intent is not admissible in any legal action except in an action for reformation of the contract.

Comment on Section 8.2. The presumption of the law of contract in favour of the clear language of written contracts is here codified in application to agreement on the liabilities of agents to third persons.

Section 8.3 — Written Contract not Denoting Agency. If the language of a written contract made by an agent does not denote the fact of agency, the agent whose promises make him appear to be a party thereto may not introduce extrinsic evidence to show that he is not a party in any legal action, except:

(i) in an action for reformation of the contract; or

(ii) to establish that his name was signed as the business name of the principal and that such was agreed by the principal and the third person.

Comment on Section 8.3. If an agent signs a contract and does not denote the fact of agency either in the text of the contract or the signature, he must be presumed to be a party. In some of these cases, the liability

of the principal may be in question if the agent has failed to include his name in the signature. The presumption of the law in favour of valid contracts would require the liability of the agent in this situation.

Section 8.4 — Agent of Unnamed Principal Presumed Liable. Unless otherwise agreed by the agent and the third person, an agent contracting on behalf of an unnamed (partially disclosed) principal is a party to the contract and is liable for its non-performance.

Comment on Section 8.4. A third person who deals with the agent of an unnamed principal can extend credit only in reliance on the credit standing of the agent. This presumption of liability of the agent is rebuttable by explicit exclusion of liability in the contract.

Section 8.5 — Agent of Undisclosed Principal is Liable. An agent who purports to contract on his own account but is in fact contracting on behalf of an undisclosed principal is a party to the contract and is liable for its non-performance.

Comment on Section 8.5. This section codifies the basic common-law rule that an agent of an undisclosed principal, by posing as dealing for himself, is liable according to the expectations created by his promises.

Section 8.6 — Definition of Warranty of Authority. A warranty of authority of an agent is a promissory undertaking of the agent to the third person that the principal will be legally obligated in a contract or other legal relation effected by the agent.

Comment on Section 8.6. A warranty of an agent is promissory in nature. If it is breached, the third person has a cause of action against the agent in the nature of breach of contract. This section applies even though the agent reasonably believed that he was authorized.

Section 8.7 — Warranty of Authority: Express or Implied. An agent's warranty of authority may be express or implied.

Comment on Section 8.7. An express warranty of authority may take either of two forms. The agent may make an express representation that he has authority to make a particular contract or conveyance. On the other hand, the agent, without representing that he has the appropriate authority because he is uncertain of it, may undertake that he will be liable if he does not have authority.

Section 8.8 — Implied Warranty by Entering Contract. An agent is liable to a third person upon an implied warranty of authority if he purports to enter into a contract or affect other legal relations between his principal and the third person and he is in fact without legal power to so act, unless the agent expressly disavows a warranty of authority or the other party knows the agent is not authorized.

CONCLUSION

The first principle of codification of commercial law is to enact rules based on the reasonable reliances of businessmen in their dealings with one another. The objective theory of agency is an obvious example. The theory is based on the reasonable expectations of third persons created by representations and conduct of principals concerning the scope of their agents' authority. This code is designed to reduce such rules to as clear and simple language as possible. The basic theoretical structure which develops the interrelations of the sections, combined with rigour of definitions and categories of liability, should add materially to the certainty of counsel in estimating the scope of the rules of law of agency. The consequence should be a substantial reduction of appeals litigation in the field.

This proposed code for agency contracts is, of course, tentative. Thorough review by commissioners on uniform law, after consultation with businessmen concerned with agency problems, could result in different approaches to some sections. Nevertheless, it is submitted that the codification of agency law is long overdue. Strongest support for this conclusion is the many benefits that we have derived from more than sixty years of codes in other areas of commercial law.

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