

## **Ratification: Useful But Uneven**

By

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### **1. Introduction**

As a component doctrine within agency law, ratification is both useful as a practical matter and somewhat ragged from the perspective of theory. Ratification consists of a unilateral expression by the principal of assent to be bound by a prior unauthorized act of the agent; if effective, the principal is bound as if the agent had acted with actual authority to bind the principal at the time of the agent's action. The

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practical value of enabling principals to create the legal consequences of actual authority after the fact of an agent's unauthorized action is undeniable. Even when the principal (or, less commonly, the third party) is unlikely to challenge the binding effect of an agent's original action, ratification may usefully clarify circumstances that earlier were ambiguous or uncertain concerning the precise scope of the agent's authority. For example, ratification may serve to reassure "fourth parties" concerned with the enforceability of the contract between the principal and the third party.

Ratification doctrine also has qualities that are difficult to rationalize completely within single systems as well as notable variations across systems. The doctrine's theoretical unevenness and its variability across systems follow inevitably from the fact that ratification reflects a tradeoff between the sometimes-conflicting demands of two basic considerations. On the one hand, to be effective as a ratification the principal's act must reflect the principal's consent, comparable to the consent by the principal that underlies the creation of actual authority. On the other hand, considerations of fairness to third parties require that ratification doctrine also constrain the extent of a principal's power to bind the third party after the fact of an agent's unauthorized action, distinct from whether the principal consents to be bound. What might be termed ratification's "consent" principle and its "fairness" principle are themselves complicated, as are interactions among them; determining how best to implement the demands of these principles at a level of greater doctrinal specificity is not a straightforward exercise.

Moreover, the overall significance of ratification in the broader scheme of agency doctrine also varies across systems. How ratification doctrine's ragged edges are or should be resolved may turn in part on the degree of significance accorded ratification: is it on a par with apparent authority and the liability of the *falsus procurator*, the foundational doctrines applicable when an agent acts without actual authority? Or should it play more of a character role, complementing and supporting the field's major doctrinal players? Systems also vary in the contexts in which ratification doctrine matters: in the United States, the doctrine's operation is significant as a basis on which to ascribe liability to a principal for the legal consequences of torts and other wrongful acts committed by an agent but is arguably less significant in connection with contractual liability; in many other systems ratification doctrine appears solely focused on the contractual context.

This paper begins by discussing the concept of consent within agency doctrine more generally, given consent's essential role in ratification doctrine. It then turns to considerations of fairness to third parties and agents that are distinctive to the operation of ratification. Next examined are the specifics of ratification and variations in doctrine within the systems covered by *The Unauthorised Agent*.<sup>1</sup> Many variations stem from the strength with which a given system adheres to the consent principle. Others are the

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<sup>1</sup> See D. BUSCH & L. J. MACGREGOR, 'Introduction,' in D. BUSCH & L. J. MACGREGOR (eds), *The Unauthorised Agent*, Cambridge University Press, Cambridge 2009, p 2.

result of different translations of the fairness principle into doctrinal specifics. The paper concludes by suggesting tentative explanations for some of these variations.

## **2. Consent and Agency Doctrine**

Although the principal's consent is central to many elements of agency doctrine, the specifics requisite to legal effectiveness are not constant, either across doctrinal systems or within individual systems. These variations are a useful prelude to examining consent as an element of a principal's ratification.

Consider first variations in the specificity with which the principal may consent to representation by a particular agent in dealings with third parties. Although the principal may authorize an agent to deal with a particular third party on precise terms, the principal's consent to representation may be much more generalized and may amount to consent to all acts of the agent carried out on the principal's behalf. Such consent "lurks" in the background of the agent's dealings.<sup>2</sup> To be legally effective, it need not be particularized deal-by-deal and, if limited to one transaction, it need not delineate the terms on which the agent has authority to transact. In other contexts, however, a principal's consent is not legally effective unless it is highly specified. Relevant in this light are the requisites for legally effective consent by a principal to conduct by the agent that, but for the principal's consent, would constitute a breach of the agent's fiduciary duty of loyalty to the principal, such as a self-dealing transaction. Legally effective

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<sup>2</sup>See *ibid.*

consent from the principal's consent requires specificity, at least to the type of transaction in which the agent has engaged, if not to an individual transaction.<sup>3</sup>

Against this background, legally-effective consent to ratification is situated toward the end of the range requiring more specificity. To be effective to ratify an agent's unauthorized conduct, a principal's expression of consent, by definition given after the fact of the agent's action, requires that the principal be informed of all material facts. Additionally, the principal's expression of consent is ineffective if it is open-ended or otherwise fails to specify the conduct of the agent to which the principal assents to be bound. Ambiguity in this respect weighs against ratification.

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<sup>3</sup> See *Restatement (Third) of Agency* § 8.06 (1)(b)(St Paul: American Law Institute Publishers 2006); F.M.B. REYNOLDS, *Bowstead & Reynolds on Agency* ¶ 6-050, 18<sup>th</sup> ed., Sweet & Maxwell, London 2006, pp 200–201.

In an illustrative recent case, *Siener v. Zeff*, the principal suffered injury in an automobile accident.<sup>4</sup> Acting on the principal's behalf, his attorney filed suit against the other motorist. Soon thereafter and acting without the principal's authority, the attorney settled his principal's claim with the defendant's insurer for \$25,000, cashed the settlement check, and absconded with the proceeds. When the principal learned from the insurer what his attorney had done, he (now unrepresented by counsel) filed a claim for \$25,000 against the state bar's client protection fund, which paid his claim in full. After the principal received and retained the proceeds of the fund's payment, the insurer argued that the principal had ratified his attorney's unauthorized settlement with it. The court held that the principal's actions did not clearly constitute ratification as a matter of law without further factual investigation. Nothing in the documentation executed by the principal indicated that accepting reimbursement from the fund would effect ratification of his attorney's unauthorized settlement with the other motorist's insurer. Thus, consent for purposes of ratification requires that its object be specific, a requirement furthered by insistence that the principal be informed of all material facts.

### **3. Ratification and Fairness to Third Parties and Agents**

That an effective ratification operates retrospectively creates significant risks of unfairness to the third party. One might think of the principal's right to ratify as an option,

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<sup>4</sup> 194 P.3d 467 (Colo. Ct. App. 2008).

exercisable by the principal after the fact of the agent's unauthorized action, but exercisable by the principal with knowledge of interim changes in market conditions. The unilaterally-exercisable right that the option represents has value even if the principal ultimately determines not to exercise it. In determining whether to ratify, the principal may take into account whether the transaction to which the agent purported to commit the principal is advantageous as of the time of the principal's later decision to ratify. Should the third party have an offsetting option to withdraw from the transaction to which it has committed through the agent on the basis of the third party's later assessment of market changes? In the interim, the third party, believing the principal to be bound, may have failed to pursue opportunities for transactions with parties other than the principal that once foregone cannot be revived at the time the third party learns that the principal was not bound to the transaction and has determined not to ratify the agent's actions.

Thus, a principal might, once it learns of the agent's unauthorized action but knowing that it has through ratification the ability to bind the third party, determine whether a transaction on better terms is available from another party before deciding whether to ratify. But if ratification doctrine confers a one-sided right solely on the principal, the third party is at a strategic disadvantage. Moreover, if the effectiveness of the principal's ratification does not require communication to the third party, the principal might ratify—but in a manner that will ultimately elude the third party's ability to prove that it has done so—and wait still longer to determine whether the terms of the

transaction with the third party remain advantageous as time passes. This imbalance is more severe if the principal may ratify in part, either severing now-attractive portions of a particular transaction from other less attractive portions or embracing the transaction but disowning as unauthorized the means used by the agent to obtain the third party's assent to it.

To be sure, the position of the third party is not always so straightforwardly sympathetic. If the third party knows at the time of the transaction that the agent lacks actual authority to bind the principal (which would rule out apparent authority as a basis on which the third party might hold the principal) but can later establish an act of ratification by the principal, the principal may argue that there was nothing to ratify, especially if the third party made an offer that the agent accepted.<sup>5</sup> This more complexly-motivated third party might seem to be acting strategically, if not necessarily in bad faith. After all, the third party may be aware that the principal has the option of ratifying the agent's action. On the other hand, overall strategic advantage still seems to lie with the principal. The third party unquestionably has determined to gamble, a gamble that will pay off if the transaction remains advantageous to the third party at the time the principal determines its advantage is also furthered by ratifying. Overall, though, whether to ratify remains the principal's decision, as does the time at which it communicates the fact of ratification to the third party.

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<sup>5</sup> F. REYNOLDS, 'The American *Restatements* and Other Countries,' in *The Unauthorised Agent*, p 254.

An agent also has interests that are affected by whether the principal ratifies the agent's prior unauthorized act. Although agents who act in an unauthorized fashion may be stereotyped as rogues who are aware that they overstep the bounds of their authority, many are simply mistaken. Additionally, in some instances the principal's characterization of the status of the agent's action may be unreliable. Thus, although it breaches the agent's duty to the principal even unwittingly to act beyond the scope of actual authority, it is important not to assume that such all agents have acted in bad faith or in deliberate contravention of limits on their authority.

Ratification's effect—creating after-the-fact the legal consequences of actual authority—if it operates in an all-or-nothing manner thus restores the agent to the principal's good graces, releasing claims the principal would otherwise have against the agent and reinstating claims the agent may have against the principal for commissions and other compensation. However, from the standpoint of the principal, so to treat the effects of ratification vis-à-vis the agent can be both unfair and inconsistent with the consent principle. The act that constitutes ratification by the principal may be prompted, not by consent fully to embrace all consequences that stem from the agent's unauthorized act, but by the necessity to avoid a greater loss that would follow were the principal not to ratify. Unsurprisingly, ratification doctrine tends to mitigate to one degree or another the impact of ratification on the principal's relationship with the agent.

#### **4. Significant Points of Variation**

Differences among the systems canvassed in *The Unauthorised Agent* illustrate the complex tradeoffs between competing principles that underlie ratification doctrine, as well as different understandings of what those principles require. Each system may place somewhat different emphasis on the importance of ensuring the principal's consent relative to guarding against risks of unfairness to the third party were the principal to ratify an agent's unauthorized actions. Likewise, consent and unfairness are themselves open to different understandings reflected in specific doctrinal requirements.

#### **4.1 *The Principal's Capacity to Ratify***

Integral to an agency doctrine that turns on a principal's consent is the principal's identity: an act must be that of the principal for it to express the principal's uncoerced expression of will to be bound by an agent's action. Requiring that the principal have capacity to ratify assures that the principal's expression should be treated as legally consequential, whether or not the principal is an individual person.

Even on the basic (and seemingly easy) question of capacity to ratify, answers differ in a basic respect among systems of agency: for an act of the principal to be effective as a ratification, must the principal have capacity only at the time of that act? Or must the principal have had legal capacity at both the time of ratification, as well as at the time of the underlying transaction or other act of the agent? In French, Belgian, and Dutch law, whether a principal has capacity to ratify focuses solely on the time of

ratification.<sup>6</sup> Likewise, in the United States, so long as the principal existed at the time of the agent's action, the sole question is the principal's capacity at the time of ratification.<sup>7</sup>

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<sup>6</sup> D. BUSCH & L. J. MACGREGOR, "Comparative law evaluation," in *The Unauthorised Agent*, p 417.

<sup>7</sup> *Restatement (Third) of Agency* § 4.04 (1). *Restatement (Second) of Agency* § 84(1) required that the principal have capacity at both the time of ratification and the

In contrast, English and Scots law require that the principal additionally have had capacity at the prior time of the agent's unauthorized act.<sup>8</sup>

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prior unauthorized act. *Restatement (Third)* found a lack of support in contemporary cases for the requirement that the principal have had capacity at the earlier time of the agent's unauthorized act. See *Restatement (Third) of Agency* § 4.04, cmt. b.

<sup>8</sup> D. BUSCH & L. J. MACGREGOR, 'Comparative law evaluation,' in *The Unauthorised Agent*, pp 417-18. South African law may also impose comparable requirements. *Ibid*; see also D. YUILL, 'Unauthorized agency in South African law,' in *The Unauthorised Agent* pp 319-20.

This difference may be explicable in two ways that are related but still distinct. General agency doctrine on this point may reflect a dominant focus in some systems on the incorporated company as the prototypical principal, combined with a refusal to permit ratification by companies, once in existence, of contracts entered into purportedly on their behalf by promoters before their existence began. Separately, if much ratification doctrine can be rationalized as an effort to assure the integrity of the principal's expression of consent, concern for the principal's underlying continuity of existence may seem closely related. Companies aside, as applied to individual principals this restriction seems unwarranted and potentially the source of unfairness if the principal wishes, by ratifying, to assure the benefit of an advantageous transaction made by an agent (albeit without authority) on the principal's behalf while the principal lacked capacity. If the third party committed itself to the transaction at that earlier point, why permit the third party to renege at the later point at which the principal, capacity achieved<sup>9</sup> or restored,<sup>10</sup> now wishes to ratify?

#### ***4.2 Ratification Through Silence or Acquiescence***

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<sup>9</sup> From infancy to legal majority.

<sup>10</sup> From temporary incapacity to full capacity.

Thus far, this paper has treated ratification as stemming from an explicit or affirmative expression by the principal that is referable to the agent's unauthorized action. If a principal remains silent once the principal has learned of the agent's action, the principal has not indicated in any way that the principal consents to be bound by that action, even if the principal knows all material facts.

However, other variations are readily imaginable in which inferring consent on the principal's part does no violence to the basic principle of consent. The principal may have dealt through the agent with the third party in the past and, based on those dealings, have reason to know that the third party will reasonably understand the principal's failure to repudiate a transaction after some period of time as a manifestation of the principal's assent to be bound by it.<sup>11</sup> Consent may also be inferred when the principal receives and retains the benefit of the agent's unauthorized action; although ratification does not require that the principal have benefitted from the transaction,

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<sup>11</sup>Alternatively, this past pattern may have created actual or apparent authority in the agent as to future consistent dealings. See *Restatement (Third) of Agency* § 2.02, cmt. e (“[i]n determining whether an agent’s action reflected a reasonable understanding of the principal’s manifestations of consent, it is relevant whether the principal knew of prior similar actions by the agent and acquiesced in them”) and § 3.03, cmt. b (“[a] principal’s inaction creates apparent authority when it provides a basis for a third party reasonably to believe the principal intentionally acquiesces in the agent’s representations or actions”).

retention of benefit is consistent with consenting to the action of the agent that produced it. Such a principal may, of course, claim unawareness of the specifics of the agent's conduct, or the principal may have an independent claim to the benefit.

The force with which the consent principle operates in this context is reflected in the evidentiary onus placed on the third party who seeks to bind a silent or acquiescent principal. Among the systems canvassed by *The Unauthorised Agent*, South Africa may be the most explicitly protective of the principal: only when the principal's intention to ratify is the sole reasonable interpretation to be placed on the principal's conduct will the principal be held to have ratified an agent's unauthorized act.<sup>12</sup>

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<sup>12</sup> D. YUILL, 'Unauthorised agency in South African law,' in *The Unauthorised Agent*, p 322.

Relatedly, a principal may reasonably appear to a third party to have ratified an agent's unauthorized action. In common-law systems, the third party's reliance on an appearance of ratification for which the principal is accountable estops the principal from denying that ratification has occurred; the precise line of delineation between ratification through silence and estoppel may be difficult to draw.<sup>13</sup> The Principles of European Contract Law ("PECL") also acknowledge the possibility of giving effect to apparent ratification on the basis that another party's reasonable understanding of a party's statements or conduct may ground a determination of the intention of the party whose statements or conduct are at issue.<sup>14</sup> In these formulations, just as the line between ratification and estoppel is indistinct, so is the delineation between consent and fairness as underlying bases.

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<sup>13</sup> Along these lines, it has been said that "[r]atification merges almost imperceptibly into estoppel" Bowstead & Reynolds (n 3 above) ¶ 2-075, p 80. See also *Restatement (Third) of Agency* § 4.08 ("If a person makes a manifestation that the person has ratified another's act and the manifestation, reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification.").

<sup>14</sup> D. BUSCH, 'Unauthorised agency in the Principles of European Contract Law,' in *The Unauthorised Agent*, p 355; D. BUSCH & L. MACGREGOR, 'Comparative law evaluation' in *The Unauthorised Agent*, p 405.

### **4.3 Ratification Not Communicated to Third Party**

The prospect that a principal may ratify an agent's unauthorized act but not communicate that fact to either the agent or the third party evokes divergent reactions among doctrinal systems. These differences may reflect varying assumptions about the contexts in which ratification matters more strongly than differing treatments of the consent requisite to ratification. Whether or not a principal communicates its ratification to the agent or the third party may be indicative of whether the principal has consented to be bound by the agent's act but is not determinative on the question of consent.

In French and English law, as in the United States and under the UNIDROIT Principles, a ratification may be effective although the principal does not communicate it to either the third party or the agent.<sup>15</sup> The prospect of an effective ratification that is not communicated beyond the principal may reflect the breadth of ratification's scope. If the object of the ratification is a tort or other wrongful act committed by the agent, it may be unlikely that acts indicating consent to the agent's act would result in communication beyond the principal's organization. In contrast, German and South African law, like the PECL, require communication to either the agent or the third party.<sup>16</sup> To be effective

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<sup>15</sup> D. BUSCH & L. MACGREGOR, 'Comparative law evaluation,' in *The Unauthorised Agent*, p 416.

<sup>16</sup> *Ibid.* p 415.

under Dutch law, a ratification must be communicated to the third party.<sup>17</sup> So to require communication may reflect a focus on ratification's operation and effects as applied to transactions entered into by an agent, as opposed to ratification as a basis on which an agent's tortious or other wrongful acts may be ascribed to the principal. Requiring that the principal communicate its ratification also reflects concern that the third party with whom the principal has dealt not be treated unfairly. Thus, the co-editors of *The Unauthorised Agent* comment that "[i]t is obviously unsatisfactory for the third party to be unaware of whether ratification has actually taken place."<sup>18</sup> Direct communication from the principal to the third party constitutes the strongest assurance that the third party has ratified; communication from the principal to the agent would often result in the agent—the third party's point of contact, after all—informing the third party.

However, what is also unsatisfactory to the third party is the prospect that the principal, not having communicated its consent to the transaction—its consent provable, let us assume, by the third party through the principal's internal records—would be able to defeat enforcement of the transaction on the basis that it did not communicate its ratification to the third party or the agent. Requiring external communication as a distinct element of ratification seems to give the principal an additional option to be exercised further out in time. That is, added to the principal's right to determine whether to be bound by the agent's unauthorized action is a subsidiary right to determine when (and

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<sup>17</sup> *Ibid.* p 416.

<sup>18</sup> *Ibid.* p 417.

whether) to inform the third party or the agent that the principal has, at a particular time, consented to be bound.

#### **4.4 “Tailored” or Partial Ratification**

Were the principal's consent the sole principle animating ratification doctrine, it should be possible for the principal to tailor the scope of its ratification to encompass only those elements of a transaction or its agent's acts by which the principal wishes to be bound. Such tailoring, while consistent with the principal's consent at the time of ratification, would result in the third party becoming bound, in transactional contexts, to a contract with terms differing from those to which the third party originally agreed.<sup>19</sup> Thus, most but not all systems reject “tailored” ratifications when the position of the third party is at issue.<sup>20</sup> Likewise, by ratifying a transaction the principal also becomes subject to liability for the means used by the agent to effect the transaction, such as

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<sup>19</sup> CHEN-HAN T., ‘Unauthorised agency in English law, in *The Unauthorised Agent*, p 200.

<sup>20</sup> S SAINTIER, ‘Unauthorizsd agency in French law,’ in *The Unauthorised Agent*, p 49 (referring to ability of principal “to ‘tailor’ the act of ratification according to his needs” in relation to agent but not third party); I. SAMOY, ‘Unauthorised agency in Belgian law,’ *ibid.* p 83; CHEN-HAN T., ‘Unauthorised agency in English law,’ *ibid.* p 204.

misrepresentations made to the third party.<sup>21</sup> In contrast, in Dutch law a third party may be obliged to accept a principal's partial ratification when consistent with the third party's duty to mitigate damages.<sup>22</sup> To be sure, the third party would retain claims against the agent for loss stemming from the portions of the transaction not ratified by the principal. However, the third party then also bears the risk of non-collection from the agent, for example if the agent has insufficient assets to compensate the third party, or has dissolved itself, or has otherwise disappeared.

On the other hand, when its focus is the principals position vis-à-vis the agent, tailored ratification has more scope. In English law, a principal may ratify for one purpose but not another, for example to permit the principal to pursue legal claims against a misfeasant agent.<sup>23</sup> In the United States, a principal's ratification is ineffective in favor of the agent when the principal ratifies to avoid a loss, typically when the

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<sup>21</sup> See, e.g, D. YUILL, 'Unauthorised Agency in South African law,' in *The Unauthorised Agent*, p 321; *Restatement (Third) of Agency* § 4.07, cmt b ("if unauthorized representations induce a third party's assent to a contract, ratification of the contract binds the ratifier to the legal consequences of the representations that induced assent to it").

<sup>22</sup> D. BUSCH, 'Unauthorised agency in Dutch law,' in *The Unauthorised Agent*, p 160.

<sup>23</sup> CHENG-HAN T., 'Unauthorised agency in English law,' in *The Unauthorised Agent*, p 200-201.

agent's unauthorized acts have placed the principal in a position requiring affirmative steps to avoid loss.<sup>24</sup> Otherwise, ratification operates in favor of the agent, waiving the principal's claims against the agent and restoring the agent's claims against the principal. In contrast, French and Belgian law reflect greater commitment to the specifics of the principal's consent because a principal who ratifies may do so with an express reservation of rights against the agent.<sup>25</sup>

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<sup>24</sup> *Restatement (Third) of Agency* § 4.02 & Illus 3 ("Acting without actual or apparent authority, A lends P's money to T. T becomes insolvent, and P files a claim in T's bankruptcy proceeding for the money lent by A. By filing the claim, P does not release A from liability to P). This illustration is based on *Pacific Vinegar & Pickle Works v. Smith*, 93 P. 85 (Cal. 1907).

<sup>25</sup> S. SAINTIER, 'Unauthorised agency in French law,' in *The Unauthorised Agent*, p 47; I. SAMOY, 'Unauthorised agency in Belgian law,' *ibid.*, p 83.

#### **4.5 Forcing the Principal's Hand: Time Limits on Ratification and Third Party Demands for Clarification**

Viewing ratification solely as an expression of the principal's consent, when to ratify should be a decision for the principal alone, not one coerced by the third party or by timing limits imposed by the law. On the other hand, once one takes into account the potential unfairness and cost to third parties (and, for that matter, agents) that stem from uncertainty about the principal's wishes, constraints on the principal's autonomy seem justifiable. Such constraints restrict the extent to which ratification reflects only what the principal would wish to happen, but by choosing to act through an agent the principal may be argued to have accepted the consequences and limitations associated by the law with legally-effective representation.

The systems surveyed by *The Unauthorised Agent* differ markedly in how tradeoffs between the consent and the fairness principles are resolved on these points, implying that the principles may be given different weight and interpretations across the systems. For example, Belgian law imposes no restriction on the time within which a principal may ratify.<sup>26</sup> Although this relatively extreme position is mitigated by the possibility of inferred or tacit ratification, the third party may be uncertain for a long time. Other systems limit the time in which a principal may ratify to a general limitations

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<sup>26</sup> I. SAMOY, 'Unauthorised agency in Belgian law' in *The Unauthorised Agent*, p 85 (noting that "a long period of silence on the part of the principal is considered to be an implied ratification").

period, which, again, may leave the third party uncertain for a relatively long time.<sup>27</sup>

Other systems, less specifically, require that ratification occur within a reasonable time, a restriction that permits the court to take into account all relevant circumstances.<sup>28</sup>

Beyond time limits on ratification, the third party's hand is strengthened and the fairness principle vindicated by systems in which the third party has the right to force the principal to clarify their respective positions. German law, for example, permits the third party to demand that the principal declare whether or not a contract made by the agent is ratified; the principal's failure to reply within two weeks is deemed to refuse ratification and any later attempt to ratify is ineffectual.<sup>29</sup> Similarly, Dutch law permits the third party or any other interested party to demand ratification within a reasonable period of time; by failing to ratify within that time the principal forfeits its right to ratify.<sup>30</sup> Interestingly,

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<sup>27</sup> D. BUSCH & L. MACGREGOR, 'Comparative law evaluation,' in *The Unauthorised Agent*, p 415 (citing the Netherlands, the PECL, and the UNIDROIT principles).

<sup>28</sup> *Ibid.* (citing England, South Africa, and Scotland). See also *Restatement (Third) of Agency* § 4.05 (ratification is ineffective unless it precedes the occurrence of circumstances "that would cause the ratification to have adverse and inequitable effects on the rights of third parties").

<sup>29</sup> M. SCHMIDT-KESSEL & A. BAIDE, 'Unauthorised agency in German law,' in *The Unauthorised Agent*, p 123.

<sup>30</sup> D. BUSCH, 'Unauthorised agency in Dutch law,' in *The Unauthorised Agent*, p 159-60.

an earlier version of the PECL reversed the default, such that a principal's failure to reply in a timely fashion to a third party's request to ratify would effect ratification.<sup>31</sup> A later version reversed the rule again.<sup>32</sup>

By analogy these mechanisms operate comparably to the commercial law principle that entitles a party to a contract to demand an assurance of the other party's due performance. As articulated in United States law in the context of contracts for the sale of goods, Uniform Commercial Code § 2-609 permits a party with reasonable grounds for insecurity about receiving the other party's due performance to demand an adequate assurance of performance and, if commercially reasonable, to suspend performance. The right to demand reasonable assurance of performance enables the party to whom performance is due to force the hand of the party from whom performance is due even when the terms of their agreement do not create such a right. Likewise, clarification procedures and time limits for ratification, by forcing the principal's

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<sup>31</sup> D. BUSCH, 'Unauthorised agency in the Principles of European Contract Law, in *The Unauthorised Agent*, p 353.

<sup>32</sup> Draft Common Frame of Reference ("DCFR") Art. ii-6.111(3). The DCFR is available at [http://www.stone.be/2009\\_02\\_DCFR\\_outline\\_edition.pdf](http://www.stone.be/2009_02_DCFR_outline_edition.pdf)

hand, diminish the force of the consent principle. Their justification—like the justification for the right to demand reasonable assurance of performance—stems from their ability to facilitate clarity and reduce long-running uncertainty.

#### **4.6 *Withdrawal By Third Party***

Whether the third party may withdraw from a transaction prior to the principal's ratification is characterized by the editors of *The Unauthorised Agent* as “possibly the most contentious issue”<sup>33</sup> surrounding ratification. In contrast to the clarification mechanisms discussed above, if a third party may withdraw, it holds a unilateral right comparable in its one-sided structure to the principal's power to ratify. Clarification mechanisms, in contrast, operate bilaterally but sequentially in that the third party's request or demand triggers a right held by the principal to exercise its ratification power, albeit within time constraints.

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<sup>33</sup> D. BUSCH & L. MACGREGOR, ‘Comparative law evaluation,’ in *The Unauthorised Agent*, p 408.

What makes this issue more visibly contentious is that the answer has long differed among common-law systems. Under English law, a third party does not have a unilateral right of withdrawal because the principal's subsequent ratification is given retroactive effect, reaching back to the agent's unauthorized act and skipping over the third party's interim attempt to withdraw.<sup>34</sup> In the United States, the *Restatements of Agency* permit withdrawal by the third party prior to the principal's ratification.<sup>35</sup> That the third party knew or had reason to know that the agent lacked authority appears not to defeat the third party's ability to withdraw.<sup>36</sup> In other systems, the third party's reasons for attempting to withdraw may be relevant; for example under Dutch law a third party's to attempt to withdraw to secure a better deal with another party would be null and void, or contrary to good faith and fair dealing.<sup>37</sup> These considerations, of course, focus on

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<sup>34</sup> Ibid at 408.

<sup>35</sup> *Restatement (Third) of Agency* § 4.05 (1); *Restatement (Second) of Agency* § 88.

<sup>36</sup> *Restatement (Third) of Agency* situates the third party's attempt to withdraw within a section that limits the principal's power of ratification by providing it is not effective unless it precedes "the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties," including "any manifestation of intention to withdraw from the transaction made by the third party ...."

<sup>37</sup> D. BUSCH & L. MACGREGOR, 'Comparative law evaluation,' in *The Unauthorised*

what motivates the third party's attempted withdrawal, not the third party's awareness at an earlier time that the agent's authority did not encompass the transaction to which the agent purported to commit the principal.

What these various answers perhaps illustrate most strongly is that ratification, characterized as *sui generis* by the leading authority on English law,<sup>38</sup> is a complex doctrine that eludes theoretical simplification. Viewing the question from the sole perspective of the consent principle is unsatisfactory because analysis leads to indeterminate results. That is, one might argue that the principal, not having exercised its power of ratification as of the time the third party notifies its withdrawal, has not expressed its consent to the agent's unauthorized action during the time its consent would be operative. On the other hand, one might also argue that the principal's

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*Agent*, p 410. And in German law, the third party's right to withdraw depends on absence of knowledge that the agent lacked authority. See M. SCHMIDT-KESSEL & A. BAIDE, 'Unauthorised agency in German law,' *ibid.*, p 123.

<sup>38</sup> *Bowstead & Reynolds* (n. 3 above) p 62.

expression of consent must be consent to something, as explored above in section 2, and that by ratifying the principal expresses consent to becoming bound by the legal consequences of the agent's unauthorized act. Thus, on this point ratification's retroactive effect destabilizes the guidance afforded by the consent principle on other issues.

The third party's right to withdraw might better be viewed as a less nuanced (and unilateral) tactic toward the fairness objectives served by the clarification mechanisms discussed in section 4.5. All constitute self-help measures available to a third party when the presence or scope of an agent's authority is doubtful. If the power to ratify places the principal in the position of a holder of a unilaterally-exercisable option to bind the third party after the fact of the agent's unauthorized action—an option exercisable with the benefit of knowledge as of the time of exercise—a unilateral right to withdraw situates the third party in a roughly parallel position as an option-holder, but of an option to withdraw not to bind, and an option that is ineffectual unless exercised prior to any ratification by the principal. Thereby situated, the third party may well enjoy opportunities to speculate but ones likely subordinate to those available to the principal.

#### ***4.7 Ratification By Undisclosed Principals***

Another contentious point within common-law systems is whether an undisclosed principal has power to ratify its agent's unauthorized actions.<sup>39</sup> This point is directly

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<sup>39</sup> The theory underlying the doctrine in English law remains uncertain. See B.

salient only within systems recognizing the concept of the undisclosed principal, that is, situations in which a third party has no notice that the party with which it deals is an agent.<sup>40</sup> *Restatement (Third) of Agency* states that an undisclosed principal may ratify its agent's prior unauthorized actions although the agent did not "purport" to act on behalf of a principal<sup>41</sup> in contrast to its predecessor *Restatement (Second) of Agency*, which limited ratification to situations in which an actor purported to act as an agent.<sup>42</sup>

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FERNÁNDEZ GREGORACI & S. SANTIER, 'Indirect Representation and Undisclosed Agency in English, French and Spanish Law: A Comparative Analysis,' 17 *Eur. Rev. Priv. L.* p 25 at 47-49 (2009). A recent account suggests that when a third party contracts with another person, the third party implicitly agrees to contract with any principal that the person may represent. C H TAN, 'Undisclosed Principals and Contract,' 120 *L.Q.R.* p 480 at 486 (2004). A limitation of this theory is that it plausibly applies only to contractual settings and not the broader range of instances in which an agent's actions may carry legal consequences for the principal.

<sup>40</sup> If the third party has notice the person with which it deals acts on behalf of some principal but not that principal's identity, the principal is "unidentified," not "undisclosed," for purposes of common-law agency doctrine. See *Restatement (Third) of Agency* § 1.04(2); *Bowstead & Reynolds* (n 3 above), p 31. Synonyms for "unidentified" are "unnamed" and "partially disclosed."

<sup>41</sup> *Restatement (Third) of Agency* § 4.03

<sup>42</sup> *Restatement (Second) of Agency* § 85(1).

The rationale for the shift is the consent principle; as the comment to *Restatement (Third)* states, “[w]hether to ratify is a choice that an undisclosed principal should be free to make.”<sup>43</sup> That an undisclosed principal’s ratification creates rights and obligations unexpected by the third party is no different from the consequences of recognizing that an agent of an undisclosed principal who acts with actual authority will create rights and obligations—ones held by the principal—that the third party did not expect.

In contrast, English, South African, and perhaps Scottish law<sup>44</sup> do not recognize the possibility of ratification by an undisclosed principal. One consequence of this limitation is that ratification becomes unavailable to third parties as a basis on which to hold an undisclosed principal; an undisclosed principal’s hand appears strengthened further than that of disclosed or unidentified principals because an undisclosed principal might express consent to be bound by an agent’s unauthorized action but delay communicating the consent to the third party, while awaiting further developments.

## 5. Ratification and Other Agency Doctrines

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<sup>43</sup> *Restatement (Third) of Agency* § 4.03, cmt b.

<sup>44</sup> D. BUSCH & L. MACGREGOR, ‘Comparative law evaluation,’ in *The Unauthorised Agent*, p 420.

Agency may be unusual if not unique as a body of legal doctrine because it is so reticulated. That is, its doctrines and the principles that underlie them often intersect in complex and intertwined patterns. Thus, any account of ratification in isolation is incomplete and potentially misleading. Some of the variations across systems discussed in this paper stem, not so much from differences at the level of underlying principle, but from differences in the role that ratification plays relative to other doctrines and within the system's overall body of agency doctrine.

In the United States, both ratification and agency doctrine more generally have long been cast in broadly-applicable terms. Their prototypical application has long been understood not to be limited to contractual contexts but to encompass the bases on which an employer or other principal is accountable to third parties for the legal consequences of torts and other wrongful conduct committed by employees and other agents.<sup>45</sup> Focusing more narrowly on ratification, formulations of doctrine in the United

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<sup>45</sup> For example, the doctrine of *respondeat superior* has always been articulated in the Restatements of Agency, not the successive Restatements of Torts. See *Restatement (Third) of Agency* § 2.04 (*respondeat superior* as a principle on the basis of which legal consequences of an employee's tortious acts may be attributed to the employer); § 7.07 (stating specifics of doctrine). When an agent, whether or not an employee, uses apparent authority to enable the commission or concealment of a tort, the basis for the principal's vicarious liability is apparent authority. See *ibid* § 7.08. Most cases on which this doctrine is based involve fraudulent misstatement or conversion of

States may tend to anticipate the breadth of this application and to reflect the fact that, whatever the specific context, ratification is almost always a doctrine to which third parties resort, not principals.<sup>46</sup> That an employer or other principal ratified its agent's

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property that a third party entrusts to an agent, or, to a lesser extent, other "speaking torts" such as defamation.

<sup>46</sup> For a relatively rare example of a principal's reliance on ratification to bind the third party, see S. SAINTIER, 'Unauthorised agency in French law,' in *The Unauthorised Agent*, p 50. In the case cited, *Société Tastevin et Co.*, in breach of his authority the

wrongdoing is often asserted as a basis on which the principal is subject to liability by third parties injured by the agent. Tellingly, ratification is a basis on which an employer or other principal could be vicariously subject to punitive damages awarded against an agent.<sup>47</sup> Elsewhere, with the exception of English law, the prototypical application of ratification doctrine appears to be limited to establishing liability in contract.<sup>48</sup>

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company's agent bought shares in it at the third party's request and the company's director purported to ratify the purchase, making the third party a 'sleeping partner.' After the company went into liquidation, payment for the shares was demanded from the third party. The court held that the third party was obliged to pay on the basis of ratification, effective as of the time the company's agent accepted the third party's offer. See *Cass Req 14-3 1860* .

<sup>47</sup> *Restatement (Third) of Agency* § 7.03, cmt e.

<sup>48</sup> See *Bowstead & Reynolds* at 65-66.

Ratification's significance may also be a function of its fit with other agency-law doctrines within any particular system. Here another contrast between the United States and England is telling. Under English law, the doctrine of apparent authority operates only against the principal; it does not furnish a basis on which a principal may hold a third party to a commitment purportedly made on the principal's behalf by an agent who lacked actual authority to do so.<sup>49</sup> To hold the third party, the principal must ratify. In contrast, the *Restatements* in the United States have long treated an agent's apparent authority as a basis on which a principal might bind a third party. Despite its long tenure, very few reported cases apply this doctrine,<sup>50</sup> suggesting that the practical stakes may not be high.<sup>51</sup> In any event, a broadened scope for the operation of apparent authority necessarily diminishes the scope of ratification on both the level of practical import as well as theoretical significance.

## 6. Conclusion

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<sup>49</sup> F. REYNOLDS, 'Unauthorised agency, the American *Restatements* and other common law countries,' in *The Unauthorised Agent*, pp 247–248.

<sup>50</sup> *Ibid.*, referring to *Restatement (Third) of Agency* § 2.03, cmt. e.

<sup>51</sup> Even taking into account the importance of legal doctrine to advice lawyers give their clients, and distinguishing it from significance as measured by reported cases, this dimension of apparent authority still seems relatively obscure.

The comparative project so successfully undertaken by the editors of *The Unauthorised Agent* is a powerful illustration of the novel illumination that comparative analysis can generate. When its light is cast on ratification, comparative analysis reveals it as a doctrine with many unresolved tensions at the level of basic principle and much unevenness in doctrinal specifics across systems. Within individual systems, the functions that the doctrine appears to serve vary, as do the particular accommodations struck to resolve tensions among competing principles.