

Indirect Representation in European Contract Law

D. Busch

KLUWER LAW

INTERNATIONAL

Indirect Representation in European Contract Law

An evaluation of Articles 3:301-304 of the Principles of European
Contract Law concerning some contractual aspects of indirect
representation against the background of
Dutch, German and English law

D. Busch

KLUWER LAW
INTERNATIONAL

ISBN 90 411 2342 3

Published by Kluwer Law International,
P.O. Box 85889, 2508 CN The Hague, The Netherlands.
sales@kluwerlaw.com
http://www.kluwerlaw.com

Sold and distributed in North, Central and South America
by Aspen Publishers, Inc.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Extenza-Turpin
Stratton Business Park
Pegasus Drive, Biggleswade, Bedfordshire
SG18 8 TQ, United Kingdom

This work is a translation of a dissertation in Dutch which was defended at the University of Utrecht on 15 May 2002 (supervisors: Professor Dr A.S. Hartkamp and Professor Dr E.H. Hondius). The original manuscript was completed on 15 November 2001. No account has been taken of developments since then. The author is much indebted to Mr P.J. Kell for translating this work into English. The English translation was made possible by financial support from the Netherlands Organisation for Scientific Research (Nederlandse Organisatie voor Wetenschappelijk Onderzoek) and De Brauw Blackstone Westbroek. Text formatting by: the G.J. Wiarda Institute (Utrecht Institute of Legal Studies), Booth-straat 6, 3512 BW Utrecht, the Netherlands.

Printed on acid-free paper

All Rights Reserved
© 2005 Kluwer Law International

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner. Please apply to: Kluwer Law International, Rights and Permissions Department, P.O. Box 85889, 2508 CN The Hague, The Netherlands. E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

Printed in The Netherlands

'[...] Kompliziertheit eines Rechts, so sehr sie selbstverständlich nach Möglichkeit zu vermeiden ist, [ist] noch kein Fehler [...]. Die Forderung, das Recht auch dem Verständnis des Laien überall zugänglich zu machen, ist eine utopistische, und der Richter, der selbst geschäftsgewandten Laien gegenüber von der Annahme ausgehen würde, dass ihnen bei ihren Handlungen das positive Recht bekannt gewesen sei, würde in vielen Fällen zum Schaden der Rechtspflege sich mit den Tatsachen in Widerspruch setzen. Notwendig ist vielmehr nur, dass das Recht überall der Interessenlage entspricht. Dann mag es so kompliziert sein wie es will, der Laie wird auch ohne Kenntnis des positiven Rechts, falls er nur der Interessenlage entsprechend handelt, stets das Recht auf seiner Seite haben. Man darf deshalb keinen Vorwurf gegen die Kompliziertheit eines Rechtes erheben, wenn wie hier, wo drei Personen miteinander in Beziehung treten, die verwickelte Interessenlage sie nicht vermeiden lässt.'

Rudolf Müller-Erbach, Die Grundsätze der mittelbaren
Stellvertretung aus der Interessenlage entwickelt, Berlin
1905 (pp. 41-42)

Preface

There are few areas of law which do not benefit from being studied comparatively. Whether or not comparative studies can lead to the formulation of compromise legal regimes which are acceptable in several countries, which is obviously more doubtful, they certainly shed powerful light on any one particular legal system and often point the way to change within the framework of that system.

The law of agency however has not proved an easy vehicle for such studies. There are significant differences of basic approach between what may loosely be called the civil law and common law systems. Within each of these categories the differences in civil law between the Code Civil countries and countries following the Germanic tradition (with Nordic law is a special position), and in common law between the approach in the United States and that in most other common law countries, create more opportunities for variation. This is an area where, in my experience, direct questions between parties of one tradition and those of another do not always clarify issues. Sometimes their different but unspoken presuppositions simply result in ships passing in the night. At other times the questioner may tend to formulate the question in a way that he or she conceives likely to be more easily comprehensible to the other party, and the other party may try to help by formulating an answer in terms believed to accommodate the presuppositions of the questioner, resulting only in misunderstandings. More important, in this area the fact situations analysed are often extremely elusive and imprecise. Many people deal in business and commerce not consciously knowing whether or not their counterparties are acting as independent contracting parties, or as some form of representative and if so how that form of representation operates legally. The counterparties do not make it clear and often do not know themselves. Phrases such as ‘on behalf of’ ‘for’ ‘on account of’ ‘in the name of’ are imprecise and in the English language at least have no agreed legal meaning; and I would assume that similar expressions in other languages may raise difficulties too.

Against this background the careful work of Dr Busch is bound to be of considerable value internationally. The legal position as to direct representation is probably fairly uniform, subject to well-known problems connected with the notions of ratification, with what common lawyers call apparent authority, with the liability of an unauthorised agent or *falsus procurator*, and in respect of the interaction with company law. Dr Busch, however, has addressed himself to the more difficult topic of indirect representation, where the whole position is much less clear. For all that the notion appears as part of a central division in the *Principles of European Contract Law* it is not known as a legal technique in common law countries at all, a fact which Dr Busch, who demon-

Preface

strates almost an insider's familiarity with common law techniques, well understands. Even in civil law countries its definition and its consequences appear to vary. The careful discriminations between fact situations, even more essential in this area, and between the possible responses to them made by Dr Busch in this valuable study should shed much light on the issues which require consideration and on the solutions which might be adopted for them.

F.M.B. REYNOLDS, Q.C. (Hon.), D.C.L., F.B.A.

Honorary Bencher of Inner Temple

Professor of Law Emeritus in the University of Oxford and

Emeritus Fellow of Worcester College Oxford

Selected List of Abbreviations

AA	Ars Aequi
A.C.	Law Reports, Appeal Cases, 1891-present
AcP	Archiv für die civilistische Praxis
ADHGB	Allgemeines Deutsches Handelsgesetzbuch
AJCL	American Journal of Comparative Law
All E.R.	All England Law Reports, 1936-present
Anglo-Am. L. Rev.	Anglo-American Law Review
App. Cas.	Law Reports, Appeal Cases, 1876-1890
Art.	Article
art.	artikel
B. & Ad.	Barnewall and Adolphus, King's Bench Reports, 1830-1834 (reprinted in English Reports, vols. 109-110)
BAG	Bundesarbeitsgericht
BB	Betriebs-Berater
Bb	Bedrijfsjuridische berichten
B. & C.	Barnewall and Cresswell, King's Bench Reports, 1822-1830 (reprinted in English Reports, vols. 107-109)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen
bijv.	bijvoorbeeld
BV	Besloten Vennootschap
BW	Dutch Civil Code
Calif.L.Rev.	California Law Review
Camp.	Campbell, Nisi Prius Reports, 1807-1816 (reprinted in English Reports, vols. 170, 171)
Can.B.R.	Canadian Bar Review
C.B. (N.S.)	Common Bench Reports, New Series, 1856-1865 (reprinted in English Reports, vols. 140-144)
C. & E.	Nisi Prius Reports, by Cababe and Ellis
Ch.	Law Reports, Chancery division; also: chapter
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
C.L.R.	Commonwealth Law Reports, Australië

Selected List of Abbreviations

Col.L.Rev.	Columbia Law Review
ConLR	Construction Law Reports
Constr.L.J.	Construction Law Journal
diss.	dissertation
D.L.R.	Dominion Law Reports, Canada
D.L.R. (4th)	Dominion Law Reports (Fourth Series), Canada
DM	Deutschmark
Draft Commission Convention	The Draft Convention Providing a Uniform Law on the Contract of Commission on the International Sale or Purchase of Goods
Draft Agency Convention	The Draft Convention Providing a Uniform Law on Agency in Private Law Relations of an International Character
DRiZ	Deutsche Richterzeitung
e.a.	en anderen
Ed.	Edition
Eds.	Editors
E. & E.	Ellis and Ellis, Queen's Bench Reports, 1858-1861 (reprinted in English Reports, vols. 120, 121)
E.G.L.R.	Estate Gazette Law Reports
ERPL	European Review of Private Law
et al.	and others
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
<i>f</i>	Dutch Guilder
F. & F.	Foster and Finlason, Nisi Prius Reports, 1856-1867 (reprinted in English Reports, vols. 175, 176)
GrünhutsZ	Zeitschrift für das Privat- und öffentliche Recht der Gegenwart [founded by Grünhut]
Harv.L.Rev.	Harvard Law Review
H. & C.	Hurlstone and Coltman, Exchequer Reports, 1862-1866 (reprinted in English Reports, vols. 158, 159)
HGB	Handelsgesetzbuch
HR	Hoge Raad (Dutch Supreme Court)
Hrg.	Herausgeber
ibid.	ibidem
ICC	International Chamber of Commerce
ICLQ	International and Comparative Law Quarterly
IECL	International Encyclopedia of Comparative Law
ICSID	International Convention on the Settlement of International Disputes
InsO	Insolvenzordnung
J.Bus.L.	Journal of Business Law

Selected List of Abbreviations

JCL	Journal of Contract Law
JFT	Juridiska Föreningens i Finland tidskrift
J.Maritime Law and Commerce	Journal of Maritime Law and Commerce
JOR	Jurisprudentie Ondernemingsrecht
Jura	Juristische Ausbildung
JurUp	Juridisch Up to Date
JuS	Juristische Schulung
Justicia	tijdschrift voor antilliaans recht-justicia
JW	Juristische Wochenschrift
JZ	Juristen Zeitung
K.B.	Law Reports, King's Bench division, 1891-present
Kwartaalbericht NBW	Kwartaalbericht Nieuw BW
KO	Konkursordnung
Lando Principles	Principles of European Contract Law
L.J. Exch.	Law Journal Reports, Exchequer cases
L.J.Q.B.	Law Journal reports, Queen's Bench cases
Lloyd's Rep.	Lloyd's List Law Reports, 1919-present
LQR	Law Quarterly Review
L.R.C.P.	Law Reports, Common Pleas Reports, 1865-1875
L.R.H.L.	Law Reports, English and Irish Appeals, House of Lords, 1865-1875
L.R.P.C.	Law Reports, Privy Council Appeals, 1865-1875
L.R.Q.B.	Law Reports, Queen's Bench Reports, 1865-1875
L.R.Q.B.D.	Law Reports, Queen's Bench Division
L.T.	Law Times Reports, 1859-1947
McGill LJ	McGill Law Journal
MDR	Monatsschrift für Deutsches Recht
MJ	Maastricht Journal of European and Comparative Law
MLR	The Modern Law Review
M. & W.	Meeson and Welsby, Exchequer Reports, 1836-1847 (reprinted in English Reports, vols. 150-153)
NbBW	Nieuwsbrief BW
NJ	Nederlandse Jurisprudentie
NJB	Nederlands Juristenblad
NJW	Neue Juristische Wochenschrift
NJW-RR	NJW-Rechtsprechungs-Report, Zivilrecht
No.	Number
no.	number
nos.	numbers
NTBR	Nederlands Tijdschrift voor Burgerlijk Recht

Selected List of Abbreviations

N.Z.L.R.	New Zealand Law Reports
OLG	Oberlandesgericht
OUCLJ	Oxford University Commonwealth Law Journal
p.	page
PIL	Private International Law
pp.	pages
PECL	Principles of European Contract Law
Principles	Principles of European Contract Law
[year] Q.B.	Law Reports, Queen's Bench division, 1891-present
(year) Q.B.	Queen's Bench Reports, new series, by Adolphus and Ellis, 1841-1852 (reprinted in English Reports, vols. 113-118)
Q.B.D.	Law Reports, Queen's Bench Division, 1876-1890
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Recueil des Cours	Académie de Droit International, Recueil des Cours, Collected Courses
Red.	Redaktion
red.	redactie
Rev.crit.dr.internat.privé	Revue critique de droit international privé
Rev.int.dr.comp.	Revue internationale de droit comparé
RM Themis	Rechtsgeleerd Magazijn Themis
Rn.	Randnummer
Rv	Wetboek van Burgerlijke Rechtsvordering
RvdW	Rechtspraak van de Week
RG	Reichsgericht
RGZ	Amtliche Sammlung von Entscheidungen des Reichsgerichts in Zivilsachen
S.C.	Scottish Session cases
SeuffA	Seufferts Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten
S.L.T.	Scots Law Times
Sonderbeil.	Sonderbeilage
S.R. (N.S.W.)	State Reports, New South Wales, Australië
S & S	Schip & Schade
Stra.	King's Bench Reports, by J. Strange, ed., by Nolan, 1716-1747 (reprinted in English Reports, vol. 93)
Taunt.	Taunton, Common Pleas Reports, 1808-1819 (reprinted in English Reports, vols. 127-129)
T.L.R.	Times Law Reports, 1884-1950
TPR	Tijdschrift voor Privaatrecht

Selected List of Abbreviations

T.R.	Term Reports, by Durnford and East, King's Bench Reports (reprinted in English Reports, vols. 99-101)
TranspR	Transport- und Speditionsrecht
UAC	Geneva Convention on Agency in the International Sale of Goods
ULR	Uniform Law Review
UNIDROIT	Institut International pour l'Unification du Droit Privé
UNIDROIT Agency Convention	Geneva Convention on Agency in the International Sale of Goods
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts
VersR	Versicherungsrecht, Juristische Rundschau für die Individualversicherung
v.o.f.	vennootschap onder firma
Vol.	Volume
Vorbem.	Vorbemerkung
Vrb	Verzekeringsrechtelijke berichten
W.	Weekblad van het Recht
Wet RO	Wet op de rechterlijke organisatie
Willes	Willes, Common Pleas Reports, edited by Durnford (reprinted in English Reports, vol. 125)
WIPO	World Intellectual Property Organization
W.L.R.	Weekly Law Reports
WM	Wertpapier-Mitteilungen
WPNR	Weekblad voor Privaatrecht, Notariaat en Registratie
W.R.	Weekly Reporter, 1853-1906
WvhN	Weekblad voor het Notariaat
WvK	Wetboek van Koophandel
Yale L.J.	Yale Law Journal
ZAkDR	Zeitschrift der Akademie für Deutsches Recht
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfRV	Zeitschrift für Rechtsvergleichung
ZHR	Zeitschrift für das Gesamte Handelsrecht und Wirtschaftsrecht
ZIP	Zeitschrift für Wirtschaftsrecht

Contents

Preface	vii
Selected List of Abbreviations	xvii
Chapter 1 Introduction	1
I A European contract law	1
II Indirect representation in European contract law	2
III Research method	3
IV Structure of the thesis	4
Chapter 2 Dutch law	5
I Introduction	5
II Direct and indirect representation	5
A General	5
B Direct representation	5
C Indirect representation	10
D Analogous application of procuration provisions to indirect representation	15
III The ‘in the name of’ requirement	18
A General	18
B The prevailing view	18
C Schoordijk’s inaugural lecture at the University of Tilburg and Van Schilfgaarde’s doctrine of concealed representation	21
1 General	21
2 Schoordijk’s inaugural lecture	23
3 Van Schilfgaarde’s dissertation	26
4 Schoordijk versus Van Schilfgaarde	28
D The case law of the Dutch Supreme Court	28
E Doctrine of concealed representation explicitly rejected by the legislator	32
IV Articles 7:419-421 DCC: general provisions on indirect representation?	33
V The problem of the <i>Drittschaden</i>	37
VI Direct actions	43
A General	43

Contents

B	In what situations are direct actions available?	44
1	‘Actio directa’	44
2	‘Actio contraria’	48
C	Legal basis	49
1	‘Actio directa’	49
2	‘Actio contraria’	50
D	Performance in relation to the intermediary	50
1	‘Actio directa’	50
2	‘Actio contraria’	51
E	Defences and set-off	53
1	‘Actio directa’	53
2	‘Actio contraria’	56
F	Limitations	60
1	General	60
2	‘Actio directa’	61
(a)	The principal cannot exercise against the third party rights acquired by the intermediary for his own benefit against the third party	61
(b)	Cases in which the principal cannot exercise his ‘actio directa’ despite non-performance by the third party	61
(c)	Exercise of the ‘actio directa’ is precluded by law or by the nature of the right	63
(d)	Contractual exclusion of ‘actio directa’	63
(e)	The rights relating to the contract between the third party and the intermediary as a whole may also be exercised by the principal	66
3	‘Actio contraria’	67
(a)	The nature of the obligation is incompatible with the exercise of the ‘actio contraria’	67
(b)	Contractual exclusion of the ‘actio contraria’	68
(c)	The rights which relate to the contract between the third party and the intermediary as a whole may also be exercised by the third party	69
G	Joint and several liability of the principal and the intermediary	70
H	Two or more indirect representatives	70
1	‘Actio directa’	70
2	‘Actio contraria’	71
VII	Summary	72

Chapter 3	German law	75
I	Introduction	75
II	<i>Direkte and mittelbare Stellvertretung</i>	75
	A General	75
	B Direkte Stellvertretung	75
	C Mittelbare Stellvertretung	79
III	The <i>Offenkundigkeitsprinzip</i>	84
	A General	84
	B Prevailing view	84
	C The views of Müller-Erbach	86
IV	The problem of the <i>Drittschaden</i>	88
V	Direct actions	93
	A General	93
	B ‘Das verdeckte Geschäft für den, den es angeht’	94
	C A direct action of the third party against the principal on the basis of § 826 BGB (‘Sittenwidrige vorsätzliche Schädigung’)	95
	D ‘Abtretung’ and ‘Vorausabtretung’	97
	E ‘Kommissionsgeschäft’ and § 392 II HGB	100
	F ‘Speditionsgeschäft’ and § 457 HGB	105
	G In what cases are direct actions available?	108
	H Legal basis	109
	I Performance in relation to the intermediary	109
	J Defences and set-off	115
	1 § 404 BGB	115
	2 § 406 BGB	116
	K Limitations	120
	L Joint and several liability?	123
VI	Summary	124
Chapter 4	English law	127
I	Introduction	127
II	Disclosed and undisclosed agency	127
	A General	127
	B Disclosed agency	128
	C Undisclosed agency	133
III	Third party loss	137
IV	The doctrine of the undisclosed principal	139
	A General	139
	B In what situations is the doctrine of the undisclosed principal applicable?	140

Contents

C	Legal basis	141
D	Settlement with the agent	146
1	Performance by the third party	146
2	Performance by an undisclosed principal	147
E	Defences and set-off	149
1	Direct action against the third party	149
2	Direct actions against the undisclosed principal	156
F	Limitations	158
1	General	158
2	Implied and express terms of the contract	158
3	Personal rights and duties	160
4	Personality of the parties	161
5	Misrepresentation	164
6	Deeds and negotiable instruments	164
G	The alternative liability of the undisclosed principal and the agent	165
V	The position of the commission agent in English law	168
A	General	168
B	Case law which supports the notion that commission agency exists as an independent legal concept	169
C	Case law which denies the existence of commission agency as a separate legal concept	171
1	Maspons y Hermano v. Mildred, Goyeneche & Co.	171
2	Anglo-African Shipping Co. of New York Inc. v. J. Mortner Ltd	172
D	The implications of this analysis of the case law	173
VI	Summary	173
Chapter 5 The UNIDROIT Agency Convention		175
I	Introduction	175
II	Brief history	175
III	Scope of the Convention	178
IV	The concept of agency examined more closely	180
A	General	180
B	Direct representation	181
C	Indirect representation	183
V	The problem of <i>Drittschaden</i>	184
VI	The possibility of direct actions between principal and third party under Article 13 UAC	185
A	General	185

B	In what situations are direct actions available?	186
1	‘Actio directa’	186
2	‘Actio contraria’	186
C	Legal basis	187
1	‘Actio directa’	187
2	‘Actio contraria’	188
D	Performance in relation to the agent	189
1	‘Actio directa’	189
2	‘Actio contraria’	189
E	Defences and set-off	190
1	‘Actio directa’	190
2	‘Actio contraria’	190
F	Limitations	191
1.	‘Actio directa’	191
2	‘Actio contraria’	193
G	Joint and several liability?	194
VII	Summary	194
Chapter 6	The Principles of European Contract Law	197
I	Introduction	197
II	Brief history, composition and procedure of the Lando Commission	198
III	Purposes of the Principles	200
A	General	200
B	Agreement by parties to apply the Principles to their contract	202
C	Application of the Principles by arbitrators and judges in the absence of a choice of law by the parties	206
IV	Criticism of the Principles	207
V	Authority of Agents	210
VI	Direct and indirect representation	211
A	General	211
B	Direct representation	211
C	Indirect representation	213
VII	The problem of <i>Drittschaden</i>	214
VIII	Direct actions	215
A	General	215
B	In what situations are direct actions available?	215
1	‘Actio directa’	215
2	‘Actio contraria’	218
C	Legal basis	218
1	‘Actio directa’	218
2	‘Actio contraria’	219

Contents

D	Performance to the ‘intermediary’	220
1	‘Actio directa’	220
2	‘Actio contraria’	220
E	Defences and set-off	221
1	‘Actio directa’	221
2	‘Actio contraria’	221
F	Limitations	222
1	‘Actio directa’	222
2	‘Actio contraria’	222
G	Joint and several liability?	222
IX	Summary	223
Chapter 7	Comparative law evaluation	225
I	Introduction	225
II	The scope of Chapter 3 (Authority of Agents)	225
III	The structure of Chapter 3 (Authority of Agents)	226
IV	Indirect representation: the application requirements	227
A	In own name	227
B	For the account and risk of the principal	229
C	Authority for indirect representation	229
1	Nature of the authority	229
2	Granting of the authority for indirect representation	232
3	Unauthorised indirect representation	232
a	General	232
b	In his own name	233
c	‘Intent’ to act for the account and at the risk of the principal	233
d	No authority or insufficient authority for indirect representation	234
4	Apparent authority for indirect representation	235
5	Ratification of unauthorised indirect representation	236
6	Confirmation of authority for indirect representation	237
7	Duration of an authority for indirect representation, despite its ending	238
8	Liability of the pseudo-intermediary for unauthorised indirect representation?	239
9	Liability of an intermediary or pseudo-intermediary if he does not reveal within a reasonable time the identity of the principal whom he is representing (with or without authority)?	240
10	Two or more (direct or indirect) representatives	241
V	The primary legal consequence of indirect representation: a contractual connection between the third party and the intermediary	242