Agency in Japanese Private International Law

Nishi, Masaru

(Citation)
Kobe University law review,3:69-88

(Issue Date)
1963

(Resource Type)
departmental bulletin paper

(Version)
Version of Record

(JaLCDOI)
https://doi.org/10.24546/00166856

(URL)
https://hdl.handle.net/20.500.14094/00166856

Agency in Japanese Private International Law

Masaru NISHI*

1 Introduction

It is generally known that attempts to unify the substantive law and private international law concerning agency or representation have been made by international organizations in order to eliminate the inconvenience caused by the differences of agency systems in various countries and to make smooth international commercial relations. As to the unification of substantive law, the International Institute for the Unification of Private Law prepared, between 1946–1950, the Preliminary Draft of a Uniform Law in Agency in International Relations concerning Private Law Matters of a Patrimonial Character[1]. As to the unification of private international law, Institut de Droit International and International Law Association independently have dealt with this problem. Institut de Droit International treated the commission, brokerage and commercial mandate in private international law at the eighteenth committee meeting in the Conference held at Bath in 1950, and made a Final Draft of Resolutions concerning Contract of Commission, which contains sixteen articles and regulates the relation between a commission agent and his principal in the contract of commission[2]. At the Copenhagen Conference held in 1950 the Conflict of Laws Committee of International Law Association presented the Draft International Convention on the Conflict of Laws arising out of Private Law Agency, which contained eleven articles concerning indirect agency[3]. Then, the Draft International

* Assist. Professor of Private International Law.

1) *L'Unification du Droit, Apercu Général des Travaux pour l'Unification du Droit Privé, 1947-1952,* (1954), pp. 78 & 178.

2) Annuaire de l'Institut de Droit International, 43, II, Session de Bath, (1950), pp. 74 & 153.

3) International Law Association: *Report of the 44th Conference, Copenhagen,* (1950), pp. 179 & 192.

Convention on the Conflict of Laws arising out of Agency in Sales of Goods, proposed likewise at the Lucerne Conference of the International Law Association, also contains eleven articles, regulating direct and indirect agency in the sale of goods, to which the Convention on the Law Applicable in Matters of International Sales of Goods is to be applied.[4] Furthermore, at the eighth session in 1956 the Hague Conference of Private International Law organized a special commission to examine the choice of law problems concerning agency.

In unification of private international law, as is the case with other sections of this law, it is possible to extract the common principle by comparing substantive and private international laws of different countries and contrasting the common or particular features of this law in each country. For this purpose, we must begin with clarifying the principle of private international law in each country. It is in an attempt to unify private international law concerning agency as mentioned above that we want to examine how agency is treated in Japanese private international law. It would be convenient to deal with voluntary representation, excepting, as in the draft conventions mentioned above, agencies in matters of family relationship, on behalf of those not of full legal capacity by their legal representatives, and in matters of litigation.

In Japanese substantive law, legal system concerning agency is contained both in Civil Code and in Commercial Code. Representation involves both voluntary representation where an agent has his principal's confidence and legal representation where there exist no such circumstances as the former. Representation has quite different situation from internal relations like mandate or others. In civil law, it is characteristic of representation that a juristic act made by a representative on behalf of the principal takes effect directly on the latter (Article 99, Civil Code), while a transaction by an agent for effecting commercial transactions shall be effective as against his principal even though the agent has not disclosed the fact that he is acting for the principal (Article 504, Commercial Code). Our civil law also recognizes the specific character of agency relationship, the tripartite structure that the contract between an agent and a third party causes the obligatory relation between the third party and the principal: internal or underlying relation between the principal and the agent, transaction by an agent or the third party contract relation between the agent and a third party and external relation, between the principal and a third party, caused by

4) International Law Association: *Report of the 45th Conference, Lucerne,* (1952), pp. 303 & 309.

the authority of the agent to act for the principal. Authority of an agent, the substance of agency, comes from authorization by the principal which is recognized to be independent of the underlying relation. As to its nature, some interprete it as a unilateral act and others as a kind of nameless contracts.[5] Representation without authority, in a broader sense, involves both a case where an agent acts in excess of his authority and where there exists no authority whatever. Implied representation is a case where there exists a specific close relation between an agent without authority and the principal; where the principal holds out a person to a thrid party as his representative though factually he has not authorized him to be his agent (Article 109, Civil Code); where an agent acts in excess of his authority (Article 110); and where the authority which has been given becomes extinct (Article 112); the same effect shall be given to the *bona fide* third party as if there exists true authority. An act made by a representative without authority in a narrower sense, naturally does not produce effect on the principal unless the principal ratifies it (Article 113, Paragraph 1, Civil Code).

In commercial law there exist trade employees and commercial agents as assistants in business of a trader. Under the head of trade employee (Articles 37–45, Commercial Code) a trade agent is provided as an agent who stands in the subordinate relation with the principal such as manager, senior clerk and junior clerk.[6] The legal relation between the trader and the trade employee is employment contract. A commerical agent is an independent trader and is active in his own place of business. And he habitually acts on behalf of a particular trader as agent or intermediary in commercial transactions of the kind carried on by such trader (Article 46, Commercial Code). His relation with the principal is mandate or quasi-mandate. Furthermore, Commercial Code provides the so-called indirect agency. A commission agent is a person who makes it his business to effect sales or purchases of goods in his own name for other persons (Article 551, Commercial Code). The relation between a commission agent and a third party is that between seller and purchaser in ordinary sales. To the relation between a commission agent and his principal the provisions relating to mandate and agency shall be applied with necessary modifications (Article 552, Paragraph 2, Commercial Code), the purpose of which is to protect the principal. And it is interpreted that the principal cannot assert his

5) Cf. Sakae Wagatsuma: *General Part of Civil Law, Lectures on Civil Law*, Vol. 1, (1951), p. 271.

6) Ken-ichiro Osumi: *General Part of Commercial Law, Works on Jurispudence*, Vol. 27, p. 142.

claim acquired by his commission agent against other party, while he can assert it against the creditor of his commission agent.[7] Similar to a commission agent a broker is a person who makes it his business to act as intermediary in commercial transactions between two parties (Article 543, Commercial Code), while he himself does not become a party in the transaction and he is not an agent of either party at all.

While in our substantive law voluntary representation contains agency in civil law and agency in commercial law, agency is understood to be direct agency as we mentioned above. Then how the concept of agency is to be considered in the light of our private international law? The *Horei* (Law for the Application of Laws, Law no. 10, June 21, 1898), regulates the general principle of conflict of laws problems and is applicable not only to civil matters, but also to commercial matters unless there exist special provisions. The *Horei* contains provisions concerning formation and effect of juristic acts in Article 7, but there is no direct provision concerning agency, and so the determination of the governing law of agency is to be referred to judicial theories and court decisions. How to determine the concept of agency in private international law is after all an interpretation of private internatianal law and is no more than the problem of classification. With respect to the solution of the classification problems, theories to resolve it on *lex fori* or *lex causae* were offered, but nowadays, the independence of the private international law from the substantive law is advocated, and the prevailing opinion is that the classification is determined autonomously from the viewpoint of private international law on the basis of comparing legal systems of various countries.[8] Needless to say, the concept in domestic substantive law cannot be disregarded, but ,taking into account of the fact that agency in Anglo-American law involves not only direct agency but also indirect agency where an agent is active as an undisclosed agent, and further, regarding the circumstances of international commercial transactions where both the terms of Continental law and those of Anglo-American law are used in complexity, it is necessary for the concept of agency in private international law to have wide scope enough to involve all the terms expressing agency relationship without adhering to the concept in domestic substantive law. Therefore, the concept of agency in our private international law should be construed as involving not only direct agency

7) Kan-ichi Nishihara: *Law of Commercial Transaction, Works on Jurispudence*, Vol. 29, (1960), p. 266.

8) Hidebumi Egawa: *Private International Law*, (rev. ed), (1957), p. 60; Iwataro Kubo: *The Structure of Private International Law*, (1955), p. 97.

in our substantive law but also indirect agency, and the authority is understood as the power of an agent to act on behalf of or on account of the principal. As an example of legislative provisions that seem to have taken into account such circumstances, reference may be given to Article 22, Paragraph 2 of the Private International Law Convention among Benelux countries, which extends the governing law of authority to a person who acts in his own name for others.

The tripartite structure of agency recognized in domestic law is also admitted in private international law and thus governing law is divided into three: the governing laws of underlying relation between principal and agent, that of authority which brings out the external relation between a principal and a third party and that of relation between an agent and a third party; but the three may coincide with one another. In the following part of this article, of the tripartite relation of agency, the relation between principal and agent and that between a principal and a third party are treated with particular emphasis, making references to judicial theories and court decisions. The relation between an agent and a third party is not treated in detail here and only referred to in examining the relation between a principal and a third party, because it involves no important problem to be considered in connection with agency, and is governed by the law applicable to each transaction on the part of an agent. The relation between principal and agent is an underlying relation, where, in the light of authority, an inner effect is involved, while in the relation between a principal and a third party is involved the problem of the power of an agent, which is the problem of external effect of authority.

2 Relation between Principal and Agent

The relation between principal and agent in voluntary representation is an underlying relationship and according to the nature of each underlying relation, it is governed by the law applicable to the contract of mandate, employment, association or commission. Article 7 of the *Horei* recognizes the doctrine of autonomy of the intention as to the formation and effect of juristic acts and establishes the provision of presumption where the intention of the parties is uncertain, as follows:

"The intention of the parties determines what conntry's law is to govern the formation and effect of a juristic act.

"When the intention of the parties is uncertain, the law of the place of acting governs."

As to the determination of the place of acting in Paragraph 2, in respect to juristic acts between persons in different countries Article 9 provides as follows:

"An expression of intention made to a person in a place governed by a different law is deemed complete upon the dispatch of notification of intention.

"The formation and effect of a contract are governed by the law of the place from which the offer is made. When, at the time of his acceptance, an offeree does not know the place from which the offer is made, the place of the offerer's domicile is deemed the place of acting."[9]

The obligatory juristic acts are the concerns of the provision of these articles. According to the intent of the legislator,[10] the autonomy of intention is applicable not only to contracts but also to unilateral acts, and whether the place of contracting or acting is at home or abroad does not matter. The reason why the place of acting governs when the intention of the parties is uncertain is that the place of acting is always definite, easy to be known and common to the parties. In determining the place of acting between persons living under different laws, the dispatch of an expression of intention is accepted as a criterion, and the place where the offer is made is taken to be the place of acting because in contract the offer is principal and the acceptance is subordinate.

So, when the parties of an obligatory contract explicitly or implicitly designate a particular law as the governing law, the formation and effect of the contract are determined in principle by that law. The designation of the governing law by the parties is of course an act of choice of law. The freedom of choosing a governing law is not permitted when it is against the domestic public order (Article 30, the *Horei*). In regard to the freedom of the choice of law by the parties, opposing theories exist between those limiting it within the laws of the place where their contractual relation has any substantial connection with the

---

9) Article 7 and 9 of the existing *Horei* are amendments of Article 5 of the old *Horei* which was promulgated on October 6, 1890. The old provision was as follows:

"Express or implied intention of the parties determines what country's law is to govern the agreement made in a foreign country.

"When the intention of the parties is uncertain, the law of the parties' home-country governs if they are of the same country; and if they are not of the same country, the law of the place which has factually the most intimate connection to the agreement governs." Cf. Tatsuo Kishimoto: *Lecture on the "Horei"*, p. 106.

10) Cf. *Explanatory Notes of a Draft Amendment of the "Horei"*, (1898), p. 18.

11) Masao Sanekata: "The Principle of Party Autonomy in Private International Law", *Jurisprudence*, Vol. 1, (1932), p. 700; Taro Kawakami: *Outline of Lecture on Private International Law*, (1953), p. 99.

contract[11] and those denying such limitation.[12] An unlimited recognition of the designation by the intention of the parties, however, might foster a chance of evading the law. It is considered that the connection of the contractual relation with the place is determined by seeking the centre of gravity of the contract and the designation by the parties is a symbol of the substantial connection in determining the governing law of the contract, so it seems reasonable to limit the choice by the intention of the parties to the laws of the place which has the substantial connection with the contract. As to the problem of validity of the act designating the governing law made by the parties, one asserts to subject it to the governing law of the contract,[13] and another refers to the law of the place of acting on the basis of Article 7, Paragraph 2 of the *Horei*.[14] This problem, however, being the determination of the connecting factor, the prevailing view is to resolve it from an autonomous standpoint of private international law. And it is construed that if the designating act is made under mistake, it is void, while if it is procured by fraud or duress, it may be rescinded.[15]

Then, if the explicit or implicit intention of the parties is not definitely expressed, how the governing law is to be determined? At first view, it is likely to come under the provision "when the intention of the parties is uncertain..." provided by Article 7, Paragraph 2 of the *Horei*, and the law of the place of acting is to be applicable. It is true that the Supreme Court once held in such a way.[16] Almost all theories, however, are opposed to the view to rely on the law of the place of acting when the intention of the parties is not expressed: they assert that the principle of autonomy of the intention provided by the *Horei* views it improper to determime uniformly the applicable law to the contractual obligation, so even if the intention of the parties respecting a choice of law is not expressed, it is inevitable, after taking into account the concrete surrounding

12) Yutaka Orimo: *Private International Law (Particular Part)*, *Works on Jurisprudence*, Vol. 60, (1959), p. 96; Egawa: *op. cit.*, p. 213.

13) Koichi Yamaguchi: *Treatise on Private International Law*, (1929), p. 360.

14) Kawakami: *op. cit.*, p. 99.

15) Orimo: *op. cit.*, p. 102; Masao Sanekata: *Introduction to Private International Law*, (1953), p. 211.

16) The Supreme Court held in a decsion on December 21, 1934, where one point at issue was how to determine the applicable law to the legal relation caused by the bonds which were issued in France by the Municipality of Tokyo, as follows: "As the clause contained in the bonds at issue does not provide for the governing law and no mention is made as to this point in a notice for the prospectus of the issue, it is to be considered that the intention of the parties is uncertain, therefore, it is reasonable to construe that the legal relation caused by the bonds is subject to the French law, or the law of the place where the bonds were issued." *A Collection of Cases Relating to Private International Law*, (1958), p. 438 f.

circumstances such as the content, the nature, the parties and the object of the contract, to determine some law which would be most appropriate to the intention of the parties as the applicable law. This is a presumption of the implied intention of the parties respecting the governing law of the contractual obligation. It is only when such implied intention is not ascertained that the law of the place of acting is considered applicable.

It is evident that the provision laid down for the obligatory contract is applicable to contracts which are no more than underlying relations between principal and agent. Therefore, the governing law of the relation between principal and agent is determined by the intention of the parties. When the intention of the parties is not expressly manifested, to what law the relation is to be subject? It is not subject to the law of the place of acting provided by Paragraph 2 as mentioned above; it is to be governed by the law of the place with which the contractual relation has the most intimate connection by presuming the intention of the parties. The essential circumstances to be considered in the case are the economic and legal position of the parties: a case where an agent is independent of his principal and one where he is subordinate to his principal are to be distinguished, and the criterion to decide the independent character of an agent is whether he is directed and supervised from the place of business of the principal. And when an agent is independent of the principal, the governing law is the law of the place of business of an agent; when he is subordinate to the principal, *e.g.*, a servant of the principal, an employee at a fixed branch or a traveling salesman, an importance is given to the place of business of the principal. By this way the choice of the law with which the contract has the most intimate connection is a reasonable solution which is in compliance with the intention of the parties. Only when such presumption of the implied intention is not attainable, the law of the place of acting governs as provided in Article 7, Paragraph 2.

The decision of Tokyo Court of Appeal on August 5, 1935, dealt with the ralation betwen principal and agent.[17] It gave a court decision upon the governing law of a contract of general agency between a foreign company having a branch office in Japan and a Japanese company. In 1923 the appellant P, a foreign company making a business of fire insurance with a branch office in Japan, concluded with the appellee A a contract of general agency in Japan,

17) "The Continental Insurance Company v. Fuji Firm", *A Collection of Cases Relating to Private International Law*, p. 1728 f.

which contained stipulations that A should perform P's business of fire insurance on behalf of P and A should pay to P the balance of premiums collected from insurers after taking away the commission of agency. Then P rescinded the contract of general agency in 1931 on the ground of A's non performance of contract or disobedience to his direction and order, and claimed the balance of premiums collected by A with deduction of the commissions, and against this claim A made a plea of arbitration contract. Finding the fact that the said contract of general agency was made in Japan, the court held as follows: "As to the formation and effect of the said contract the intention of the parties is not presumed from any evidence of the issue, after all, it comes under the case in which their intention is uncertain, so it is to be governed by Japanese law, or the law of the place of acting." As to the governing law of the arbitration contract, which was concluded at the same time as the contract of general agency between P and A respecting the litigation which might happen between them in future in connection with the legal relation caused by the latter contract, it was held that, "in compliance with the principle respecting the general juristic act it is first to be determined by the intention of the parties, and, when their intention is uncertain, by the law of the place of acting," in this case it was to be determined by Japanese law as the law of the place of acting, for the intention of the parties was uncertain. And it was decided that when the contract of general agency was rescinded, the legal relation between the parties, in so far as the existence of arbitration contract is presupposed, is to be subject to the arbitration contract, permitting the plea of arbitration contract to exclude the judgment by ordinary court.

In this holding both the governing law of the contract of agency and that of the arbitration contract is subject to the doctrine of the autonomy by the parties and is decided to be Japanese law as the law of the place of acting provided by Article 7, Paragraph 2 of the *Horei* concerning the case when the intention of the parties is uncertain. The governing law of the arbitration contract, though it is remarkable that the autonomy of the intention is recognized for the contract, need not be dealt with here. In this case the applicable law to the contract of general agency between principal and agent was immediately decided to be Japanese law as the law of the place of acting when the intention of the parties is uncertain, but, this is a case as mentioned above to presume the intention of the parties by taking account of the surrounding circumstances connected with the contract of agency without making a direct reference to the law of the place of

acting when the governing law is not explicitly expressed by the parties. Viewed from the fact of the case that the agent was an independent and permanent Japanese company, the contract of agency had its centre of gravity in the place of business of the agent, so the governing law of the contract between principal and agent was submitted to be the law of the place of business of the agent. Though the result may be the same with this judgment, the difference of the process of thinking was mentioned here.

It is a generally recognized trend in the world that the relation between principal and agent is subject to the governing law of the contract, and that when the governing law is not designated by the parties, the position of principal and agent or the independent or subordinate feature of an agent being considered, it is governed by the law of the place of business of an agent when the independence of the agent is recognized, and by the law of the place of business of the principal when the agent is subordinate to the principal.[18] Furthermore, Article 3 of the Final Draft of the Resolution concerning the Contract of Commisssion at the Bath Conference of the Institut de Droit International in 1950, Article 4 of the Draft International Convention on the Conflict of Laws arising out of Private Law Agency by the Conflict of Laws Committee of the International Law Association at the Copenhagen Conference in 1950 and Article 4 of the Draft Convention on the Conflict of Laws arising out of Agency in Sale of Goods at the Lucerne Conference of the Association in 1952, despite of the rather detailed provisions, are to be mentioned here, considering the interests of the parties and in accordance with the independent or subordinate circumstance of the agent, as determining the said relation, either by the law of the place where the agent has his habitual residence or his branch of business, or by the law of the place where the principal has his habitual residence or his branch of business. This may be considered to correspond to the trend in our private international law.

3 Relation between Principal and Third Party

The relation between a principal and a third party is an external relationship of agency and is caused by an authority of an agent to act on behalf or on account of the principal, the authority being the substance of agency relationship. Therefore, the relation between a principal and a third party is to be considered

18) Cf. Breslauer: "Agency in Private International Law," *The Juridical Review*, Vol. 50, (1938), p. 293; Arminjon: *Précis de Droit International Commercial*, (1948), pp. 408 & 410; Rabel: "Agency", *Lectures on the Conflict of Laws and International Contracts*, (1951), p. 87; Reese: "Agency in Conflict of Laws", *Legal Essays in Honor of H. Yntema*, (1961), p. 411.

here with a special emphasis on authority. In legal representation the effect of an expression of intention by a particular person extends to the principal in order to attain the object of legal relationship which is established between the principal and the particular person, so there is no objection to an authority in legal representation being governed by the law of the legal relation which has caused the authority. As to the determination of governing law of authority in voluntary representation, however, opinions are opposed between those viewing the authorization from the underlying relation and those attending to the contract between an agent and a third party or the effect of authority. This opposition is based on the difference of policy in determining the governing law of authority, whether the legal sphere of principal or that of the third party with whom an agent acts is to be emphasized.

With respect to the determination of the governing law of an authority in voluntary repersentation, in our country no one asserts the personal law of the principal, but, as a theory which is connected with the view emphasizing the interests of the principal, there is an opinion which considers the problem of authorization as that of an internal effect between a principal and an agent and recognizes the autonomy of the intention of the parties.[19] According to this opinion, the governing law of an authority is determined as that of authorization by Article 7 of the *Horei*, and if the governing law of authorization is not designated, it is subject to the governing law of an underlying relationship. Therefore, the governing law of authority, in so far as it is not expressly designated between principal and agent, coincides with the governing law of an underlying relation between principal and agent mentioned above. This opinion formally recognizes the independence of authority, but it confuses it with the underlying relation, and misunderstands the substance of authority, because it considers the effect of authority not against the third party but as internal effect between principal and agent.

Among views emphasizing the legal sphere of the third party, there are some which emphasize the governing law of the contract between an agent and the third party or other transaction by an agent, and others which support the law of the place where the authority produces its effect, or where the authority is exercised.

The theory which asserts the governing law of the third party contract con-

19) Iwataro Kubo: *Introduction to Private International Law*, (rev. ed.), (1954), p. 141; Egawa: *op. cit.*, p. 185.

siders that the problem of authority is whether the effect of the acts by an agent extends to the principal, so it is determined by the governing law of the act between an agent and the third party by Article 7 of the *Horei.*[20] Although this view also formally presupposes the independence of authority, it dissolves the authority into the third party contract. And this may be considered as an opinion which disregards the interests of the principal, because, as the governing law is determined by the autonomy of the parties, the agent may exceed the limits of authority by choosing the governing law of the contract and may give to the authority the effect, which the principal would never wish to confer.

Against this, from the standpoint of protecting the *bona fide* third party in transactions, by recognizing the independence of authority, the law asserted is that of the place where the authority produces its effect, or of the place where the authority is exercised.[21] This opinion regards the authority from the viewpoint of the effect against the third party and limits the doctrine of autonomy of the parties in respect to authority. That is, the choice of the governing law by the parties substantially is concerned with the legal relation which is obtained only between the parties, while the real meaning of the authority is that it should be active against the third party and the *bona fide* third party in transactions should not be expected to refer to the law which the principal would wish to apply to the effect of authority. Therefore, the governing law of authority should be objectively determined, notwithstanding the relation between the principal and the agent, and it is the law of the place where the authority produces its effect. This law may coincide with the governing law of the third party contract, though there may be cases in which it does not. The place where the authority produces its effect is individually determined in concrete circumstances. For instance, the authority of a professional agent holds effect where he has established his place of business; the authority of an agent who is not permanent, where he stays; and the authority to a juristic act concerning immovable, where the immovable is situated. We should like to support the law of the place where the authority produces its effect as the right view concerning the governing law of the authority, from the nature of authority as well as for the protection of the third party, although the protection of the third party is considered to be limited to a *bona fide* party, and as to a *mala fide* third party who notices the

20) Kozo Onishi: *Research on Representation*, (1928), p. 296.

21) Takeo Saito: "Juristic Acts," *Lectures on Private International Law*, Vol. 2 (1955), p. 356; Kawakami: *op. cit.*, p. 83; Orimo: *op. cit.*, p. 46; Masaru Nishi: "An Agent's Authority in Private International Law," *Kobe Law Journal*, Vol. 9 (1959) p. 226.

abuse of agent's authority exceeding the limits of the place to exercise authority prescribed by the principal, the governing law is that of the place where the authority should be exercised. And the governing law of authority is, in principle, applicable to the formation and existence of authority, the scope of authority, the ratification of agency without authority, the implied authority, the relation between principal and third party in agency without authority, the right of an agent to appoint his substitute and the termination of authority.

Thus, we find different theories concerning the governing law of the authority which causes the relation between principal and third party: some recognizing the autonomy of the intention of the parties and others not recognizing the autonomy; some emphasizing relatively the interests of the principal and others considering rather the interests of the third party. Court decisions dealing with the problem are now to be examined:

The first is the decision by Harbin Consulate-General on September 9, 1927.[22] This is a rather particular case based on the consular jurisdiction which Japan once had in China (cf. Articles 3 and 20 of the Sino-Japanese Treaty of Commerce and Navigation concluded on July 21, 1896). The plaintiff asserted that the contract of sale of lease which she had on the land in Harbin made between her agent and the defendant in 1918 was void, for it was an act exceeding the scope of authority, and claimed its delivery. The plaintiff argued that the authorization by the power of attorney or the certificate of authority is concerned with the particular matter enumerated there, that the scope of authority was not permitted to be extended by presumption, and that, according to the law of the Russian Empire or the local customary law as the governing law of authorization, the said agent had no authority to sell this object. The defendant opposed to this argument by asserting that the agent had a lawful authority and, even if he exceeded the authority, the defendant had a just reason to believe that the agent had authority, because the Russian Consul-General and the Director of the East China Railway acknowledged the existence of authority on the basis of the certificate. The decision, finding the power of attorney to be a valid expression of intention in the light of Russion law and considering that the issue was after all the interpretation of the expression of intention, held that the plaintiff entrusted the agent to manage and control all her immovables and dispose of all matters relating to her property, that the agent had the power to sell them as

22) "Sofiya Mikhairovna Sokoroskaya v. Korean Bank", *A Collection of Cases Relating to Private International Law*, p. 421 f.

an agent of the plaintiff and that the limitation of authority between the principal and the agent being an internal condition between them, externally it sufficed to prove abstractly that the sale was not contrary to the prohibitive limitation. It was true that then the enforcement of Russian law was no more than a factual one. In mainland Russia, the law of the Czardom had no effect after the Revolution, but in the special area of the East China Province it was maintained in so far as it affected international relations. The defendant had referred to the Director of the East China Railway and the Russian Consul-General according to whose opinion only he might know the enforcement of the Russian law for the existence of authority, and the two officials acknowledged that the power of attorney certificated the authority. The validity of this power of attorney may be doubted in our civil law. In Russian law, however, the authorization is not limited to act of management when the general authority is given enumerately, and is interpreted to be conferred at the same time to the power to make an act of disposing. Thus it was held that the plaintiff should be liable for the act which the agent made to the third party as her agent.

In this case the underlying relation is a contract of mandate between the principal and the agent, while the contract between the agent and the third party is a contract of sale of lease on land. The governing law of the authority is the Russian law and it coincides with the governing law of the contract of mandate between the principapal and the agent and with that of the contract between the agent and the third party. As the existence of authority is concerned with the transfer of rights on land, it would be reasonable to consider that the governing law of authority is the law of the place where the object is situated or the law of the place where the authority produces its effect. In this case it is worthy of mention that the authority and so the relation between the principal and the third party is governed by the *lex rei sitae* as the law of the place where the authority produces its effect and the governing Russian law was enforced in a special international relation.

The next judgment of Tokyo District Court on February 25, 1956, dealt with the problem of ratification in agency without authority.[23] The plaintiff is a company with limited liability establishing its head office in Hamburg and incorporated by the German law for the purpose of making business of a commer-

23) "Gilbert J. Macall und Kompanie Gesellschaft mit beschränkter Haftung v. Central Enterprise Company Limited", *Collections of Decisions on Civil Matters by Lower Courts*, Vol. 7, p. 429 f.

cial agent dealing in scrap iron and others. The defendant is a company limited by shares having its head office in Japan and incorporated by the Japanese law for trading business. The plaintiff made in Germany in 1952 with A, representing the Central Enterprise Company Limited in Tokyo and Cental Enterprise Incorporated in Kobe, a contract that the parties would make business as agents of each other in each country and take a half of profits as commissions and so forth. In this case the plaintiff asserted that on the basis of the contract the defendant sold and delivered steel sheets to firms in Germany by the intermediary of the plaintiff, but the defendant did not pay the half of his profits as commissions, and so the plaintiff claimed the payment thereof. There was a dispute in regard to the party in the contract of agency, and the defendant asserted that the party was the company in Kobe, while the plaintiff asserted that A had a power to represent the defendant company and even if he had no power, the defendant ratified the act of the agent without authority, for the agent later became representative director of the defendant company.

Finding that on the basis of contractual clauses and other documents the Central Enterprise Company Limited is the defendant company, and A made a contract as a representative of the company, the Court held that "the said contract was concluded at Hamburg in Germany between the plaintiff, a German corporation, and the defendant, a Japanese corporation. As the intention of the parties is uncertain, the formation and effect of the said contract is to be governed by German law, or the law of the place of acting provided by the *Horei*." And according to the finding of the court, when A made the contract he was not a represnetative or an agent of the defendant company. The defendant, however, on the basis of the contract, performed transactions with German firms and notified the profits which the plaintiff is to receive, and also notified the settlement of obligation based on the contract after A became representative director of the defendant company, so it was held that at least when the document of settlement arrived, the defendant had, as provided by Article 184 of the German Civil Code, ratified the act made by A without authority, and the contract had effect over the principal or the defendant company back to the date when the contract was concluded.

It seems that this decision regards the governing law of ratification by the defendant of the act made by A without authority in the same light with the governing law of the contract between A and the plaintiff. In this case the two governing laws may coincide in the result, but theoretically this view may be consider-

ed to have confused the tripartite structure of agency. The ratification of the act made by a person without authority produces as an effect retroactively the authority, so it is reasonable to consider that as is true of the coming-into-effect of authority, it is subject to the governing law of authority, or the law of the place where authority produces effect if the authority exists. The governing law of the contract of agency between the plaintiff and the defendant should be independently examined in the tripartite structure among the plaintiff, the defendant and the firms in Germany.

Tokyo High Court on January 28, 1957, passed a judgment upon whether a foreign buyer comes under a commercial agent provided in the Commercial Code,[24] but did not expressly determine the governing law of agency.

The appellee is a Japanese company for trading and selling of goods, and the appellant a foreign buyer in Japan who is an American citizen. In 1951, between the parties was concluded a contract of sale of drain cocks for water service, free on board a Japanese port, payment to be made on shipment with U. S. dollars. The appellee took the transfer from the appellant of a letter of credit issued by an American bank for account of P firm, not the litigant, in favour of a beneficiary, the appellant, and completed shipment of part of goods to the P firm and received payment by the letter of credit. In this case the appellee claims to the appellant for payment of the unpaid price of the sale. Against this the appellant argued that the contract of sale came into existence between the appellee and the P firm when the letter of credit was transferred from the appellant to the appellee, so the appellant was only an agent of the P firm. As to whether the foreign buyer in Japan comes under a commercial agent mentioned in the Commercial Code, the Court simply held that, as an agent may signify a person who really acts on behalf of another person, *e.g.*, a commercial agent, a commission agent in the Commercial Code as well as a land or house agent, a servant, a messenger and so on, it was impossible to conclude that the appellant was a commercial agent in the Commercial Code from the expression and notice of "agent" in the order sheet of goods and at the entrance door of the office of the appellant. The Court dismissed the appeal on reason that the buyer in Japan was not a representative or intermediary in transactions of firms in America, and that there existed no evidence proving that the beneficiary in the letter of credit became an agent of the opener and directly a contract came into existence

24) "James W. Boswell v. New Nomura Trading Company Limited", *Collections of Decisions on Civil Matters by Lower Courts*, Vol. 8, p. 135 f.

between the transferee and the opener, when the letter of credit was transferred as a means of payment of the price in transactions.

In this case the governing law of the contract of sale between the appellant and the appellee is not determined either, but it may be considered to be the Japanese law by Article 7 of the *Horei* as a case where there is no designation of the governing law. Whether the appellant comes under a commercial agent in the Commercial Code is determined also by Japanese law, and this may be understood as a case where the judgemnt on the existence of authority of the buyer is decided by the governing law of authority, that is, the law of the place where the alleged agent is active. In this case the governing law of the third party contract coincides with that of authority.

Finally, Kobe District Court on September 2, 1959, decided the formation and effect of authorization.[25] The fact is as follows: The applicant is a shipping company having its branch in Pusan; a ship owned by the applicant was compelled to stay in Kobe Port because of an engine trouble; the opponent, asserting that he has the preferential right over the ship connecting with the claim of restitution of the amount of loans made to the applicant, asked for the sale of the ship by official auction and in 1958 the decision on the commencement of the proceeding of the sale of the ship by official auction was given by Kobe District Court. The applicant objected to the decision and required the revocation of the decision, arguing that the said loan was obtained from the opponent by A, who pretended to be the representative of the applicant, so the obligation was illusory and the official auction was not to be permitted for lack of the preferential right which is the basis of the proceeding. Against this, the opponent asserted that, as the authority was conferred on A by a contract of mandate with the applicant or A is an implied agent of the applicant, the obligation lies upon the applicant to restitute the amount.

The Court decided on the governing law of authority as follows: "As to the determination of the governing law of the legal relationship between the principal and the third party caused by the act of an agent or alleged agent in our private international law, the governing law of authorization or other expression of conferring authority is to be determined by the intention of the parties, because it is reasonable to consider that the legal relationship which is caused by the voluntary representation is, by the application or analogous application

25) "Kanyo Shipping Company Ltd. v. Homare International Trading Company Ltd.," *Collections of Decisions on Civil Matters by Lower Courts*, Vol. 10, p. 1849 f.

of Article 7 of the *Horei*, determined by the governing law of the juristic act to confer the authority, or that of the act of expression in regard to the responsibility of a person who holds out to a third party that he has conferred an authority to another. In such cases, however, it is not always easy for the third party or the party of the transaction with an agent to know the existence of a valid authority, and the smooth carrying-on of extraterritorial transaction is inevitably threatened, and the results will be contrary to the spirit of private international law. Therefore, it is reasonable to consider that, in order to protect the third party in transactions, Article 3, Paragraph 2 of the *Horei* is further to be applied with the necessary modifications, and if it is provided by the law of the place where the act by an agent is made that the principal is liable for the act by an agent to the third party, the relation between the principal and the third party is to be governed by the law of the place of agent's transaction. And the relation between the principal and the third party in the case where the principal gives consent to another to use his name is considered, like the above case, subject to the governing law of the act of consent to use his name and the governing law where the transaction using his name is made". Now the facts that the applicant conferred authority to A, that he held out to confer authority to A and that he gave consent to A to make business by the ship in his name, are not proved, so the legal relationship between the applicant or the principal and the third party to be caused by the transaction by A with the third party is not to be determined by applying Article 7 of the *Horei* directly or with the necessary modifications, but is to be decided solely by the law of the place of the agent's activity. And according to Japanese law, which is considered to be the law of the place where the act is made in the light of the fact that A concluded with the third party a contract of loan for consumption in the latter half of 1957 in connection with the ship, and borrowed some money, the authorization is not recognized to be made between the applicant and A, so it is decided that the applicant is not liable for the agent's transaction with the third party.

This decision holds that the relation between the principal and the third party caused by the transaction by an agent is subject to the autonomy of the intention of the parties by Article 7 of the *Horei*, but, from the viewpoint of protecting the third party, Article 3, Parapraph 2 being applied with necessary modifications, the said relation is subject to the law of the place where the transaction by an agent is made when the law of the place of acting by an agent recognizes the liability of the principal. It formally refers to the theory asserting that,

with respect to the authority as its internal effect, the autonomy of the parties is to be recognized between principal and agent, but, supports the theory viewing that the external effect of the authority is governed by the law of the place where the act by an agent is made, or where the authority is exercised. It should be frankly held that, as the effect of authority is a matter in connection with the third party in the light of protecting the third party, the law of the place where the authority produces its effect governs, In regard to authority it is not necessarily proper to apply Article 3, Paragraph 2 concerning capacity analogically to the authority with the necessary modifications. Article 3, Paragraph 1 provides, as the general principle concerning capacity, that: "The capacity of a person is determined by the law of the country of his nationality," application of which Paragraph 2 limits from the view of protecting the so-called domestic transaction by providing as follows: "An alien who does a juristic act in Japan and who is incapacitated under the law of the country of his nationality but who under Japanese law has the capacity to act, is deemed a person of full capacity notwithstanding the provisions of the preceeding paragraph." To apply the provision concerning capacity analogically to the authority means that the authority is in principle to be determined by the law of the principal's nationality in the light of the general relation between representation and capacity. There is, however, a decisive difference with regard to the position of the principal between capacity and voluntary representation, and it is impossible to find such correspondence between them. Furthermore, Article 3, Paragraph 2 is a provision concerning a juristic act made in Japan so as to protect the so-called domestic interests, and it cannot be considered to provide the general application of the law of the place of acting. On the contrary, the authority is to be governed by the law of the place where an agent acts even though the place be in foreign lands. So it is unreasonable to apply Article 3, Pragraph 2 by analogy to the effect of the authority. In this case, moreover, the law of the place of acting of an agent coincides with the governing law of the contract of loan for consumption, although the law of the place of acting as the governing law of the authority and that of the third party transaction should be separately considered.

When we examine cases dealing with the relation between the principal and the third party it is evident that the trend of our court decisions is emphasizing the interests of the *bona fide* third party in the matter and it is worthy of notice that the external effect of authority, therefore, the relation between a principal and the third party is always judged under the law of the place where

the authority produces its effect, notwithstanding the variety of reasons for judgment; even though it may coincide either with the governing law of the underlying relation or with that of the third party contract. In the case cited above, after all it was not determined on the basis of the doctrine of the autonomy of the intention. We should like to say that the trend of court decisions supports the theory asserting that the relation between a principal and the third party is governed by the law of the place where the authority produces its effect, the place being considered to be an independent connecting factor as to the authority.

It is generally recognized in various countries, including Germany, that the relation between a principal and the third party is governed by the law of the place where the authority produces its effect, as it is the problem of external effect of authority.[26] Furthermore, Article 7 of the Draft International Convention on the Conflict of Laws arising out of Private Law Agency by the Conflict of Laws Committee of the International Law Association at the Copenhagen Conference in 1951 and Article 8 of the Draft International Convention on the Conflict of Laws arising out of Agency in Sale of Goods at the Lucerne Conference in 1952, provide the law of the place where the act of agency has been carried out to be the governing law of the effect of the act done by an agent on behalf of the principal, as between a principal and the third party. In view of Article 9 of the 1950 Draft and Article 10 of the 1952 Draft which make the place from which an agent has sent the letter or telegram, a criterion for determining the place of acting of the agent with an absent third party, the law of the place where the act of agency has been carried out is to be considered the law of the place where the authority produces its effect in the light of the exercise of the power of the agent. At any rate, we should like to consider that the solution adopted by the Conflict of Laws Committee of the International Law Association may coincide with the trend in our private international law.

26) Rabel: *The Conflict of Laws*, Vol. 3 (1950), p. 143; Makarov: "Die Vollmacht im internationalen Privatrecht," *Scritti di diritto internazionale in Onore di Tomaso Perassi*, Vol. 2 (1957), p. 37; Caemmerer: "Die Vollmacht für schuldrechtliche Geschäfte im deutschen internationalen Privatrecht", *Zeitschrift für Ausländisches und Internationales Privatrecht*, 24 Jg. (1959), S. 201.