A Comparative Study in the Law of the Ostensible: Apparent Agency in the U.S. and Russia

Sergey Budylin

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I. INTRODUCTION

The law of agency is very important to modern commerce, because, for obvious reasons, corporations do not act “by themselves” but rather via their agents. This article is devoted to comparison of certain U.S. and Russian law-of-agency provisions. Specifically, it deals with the issue of whether a concept similar to U.S. “apparent agency” exists in Russian law.

In the U.S., agency is a fundamental legal concept. Besides relations of “actual” agency where the principal is liable for his agent’s actions, there can be also cases where the principal is liable for actions of a person who is not the principal’s agent, but rather a person who is believed by a third party to be such an agent. This concept is called “apparent agency,” or “agency by estoppel.”

In Russian law, the concept of agency is generally much narrower than in U.S. law. Apparent agency and agency by estoppel do not exist as separate legal doctrines. However, certain provisions of Russian law are parallel to the relevant provisions of U.S. law.

II. U.S. LAW OF AGENCY

In the U.S. legal system, agency is an area governed by common law. The American Law Institute (ALI) compiled common law provisions into a series of Restatements, including one devoted entirely to agency law. The current Restatement version on agency was released in 1958.

The following is a short list of important terms related to agency:

Authority is the power of an agent to bind the principal, originating from principal’s manifestation to the agent. Apparent authority is the power of a non-agent to bind the purported principal, originating from principal’s manifestation to a third party. Estoppel is an equitable concept which holds the purported principal liable for actions of a non-agent where the purported principal is responsible for a third party’s believing that the non-agent is an agent.

The concept of estoppel is somewhat broader than the concept of apparent authority: where apparent authority exists, estoppel is normally applicable; however, there are cases where power is created by estoppel without apparent authority.

A. AGENCY

We begin with the definition of agency offered by the Restatement.

Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.

Mutual consent is needed to create agency relations between the principal and the agent. When agency relations are created, the agent receives something termed “authority” from the principal. That is, the agent has the power to bind the principal through agent’s actions.

A power is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act.

Authority is the power of the agent to affect the legal relations of the principal by acts done in accordance with the principal’s manifestations of consent to him.

Authority may be either express (explicitly stated) or implied (inferred from the circumstances). For example, if I say to
X: “Would you sell my mobile phone to somebody?” and X replies “OK,” she is now my agent. X has express authority to contract with Y to sell my mobile and probably also implied authority to deliver the phone and collect the money. Normally no written power of attorney is needed.

B. APPARENT AUTHORITY

There are, however, situations where a person is not my agent and does not have authority from me, but still has the power to bind me. Such relations are often broadly referred to as “apparent agency” or “agency by estoppel.” However, this terminology may be misleading, and the Restatement consistently avoids it. Instead, it refers to “apparent authority” and “estoppel.”

Speaking generally, both concepts are based on the same idea: if I am somehow responsible for a third party believing that X is my agent, then I am liable for X’s actions to that third party.

Apparent authority is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other’s manifestations to such third persons.

Therefore, apparent authority is not authority. It originates from a manifestation to a third party rather than to a would-be agent. (It is important to distinguish apparent authority and implied authority described above.) For example, X is not my agent. However, I say to Y seeking to buy my mobile: “Talk to X, she is my agent.” Y goes to X and they sign a contract of sale of my mobile. X does not have authority (either express or implied), but she has apparent authority, hence, the power to bind me. The contract is valid and I am bound by it.

C. ESTOPPEL

The concept of power by estoppel is very close to the concept of apparent authority. In fact, many courts use the terms interchangeably. However, the authors of the Restatement insist that there is a difference. The concept of estoppel is somewhat broader than the concept of apparent authority: where apparent authority exists, estoppel is normally applicable; however, there are cases where power is created by estoppel without apparent authority:

(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if:
   (a) he intentionally or carelessly caused such belief; or
   (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts. …

While the apparent authority concept originates from the law of contracts (I am bound by my words said to a contractual partner), estoppel is a doctrine of the law of torts (protecting innocent third parties). Estoppel operates in a very peculiar procedural way: a defendant is prevented (“estopped”) from asserting the truth. Specifically, the would-be principal is estopped from saying: “X is not my agent.”

D. RATIFICATION

Even where a pseudo-agent does not have any grounds to bind a purported principal, the latter is still able to give the full force to the pseudo-agent’s actions by way of ratification.

Ratification is the affirmation by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

Note that in this case, neither authority, nor apparent authority, nor estoppel is needed. The binding effect is created by a later action of the purported principal. In particular, a company may post factum permit its agent to carry out acts beyond the scope of the agent’s express or implied authority; or may post factum permit a person without any position in a company to act as if she had had the requisite authority. For example, X, who is not my agent, signs a contract with...
Y to sell my mobile. I have no idea why she did it. The contract is not binding for me. However, I like the contract. So I say to Y: “OK, I agree,” or, alternatively, just deliver the phone and collect the money. The contract is thus ratified.

E. PRACTICAL IMPORTANCE

Agency law is especially important in corporate matters because legal entities always act through their agents. In particular, a corporation’s CEO is its agent. Where a corporate agent is not authorized to enter into a particular transaction (e.g., powers of the CEO are limited by the corporation by-laws), he or she still might have apparent authority to do so, and the transaction is still valid. For example, the Minnesota Court of Appeals held in Powell v. MVE Holdings, Inc. that a corporation’s president has apparent authority to enter into most contracts.12

In that case, the corporation’s president wanted to replace the CEO of the corporation’s subsidiary.13 The CEO resigned in exchange for a promise that the corporation would pay $3.45 million for CEO’s stock in the subsidiary, far greater than the market value.14 Soon after, the president himself was fired and the corporation refused to buy his stock in the company; the disappointed CEO sued.15 The trial court found that a contract existed and ordered the corporation to pay the money.16 The corporation appealed, arguing that the former president did not have authority to enter into such a contract.17 The Court of Appeals affirmed, finding that the president had apparent authority to enter into the contract.18 As the court observed, “unless there is contrary evidence, contracts made by a corporation’s president in the ordinary course of business are presumed to be within the president’s authority.”19

Another practically important issue is the apparent authority of lawyers representing their clients, as exemplified in Hannington v. Trustees of the University of Pennsylvania.20 In this case, a student believed that in exchange for organizing a conference, the university had agreed to waive his tuition obligations.21 After he had been expelled for failure to pay outstanding fees, the student sued the university, which counterclaimed for the alleged amounts due.22 The parties’ attorneys reached a settlement and notified the court.23 However, before paperwork was completed, the student refused to sign the agreement, hired a new attorney, and wanted to proceed with trial.24 The trial court disagreed, holding that the student’s attorney had authority to settle the dispute, and the student appealed.25 The reviewing court affirmed, relying on the apparent authority doctrine.26 The innocent party, the university, was entitled to rely on counsel’s representations.27 “The doctrine of apparent authority permits a settlement agreement to be enforced where a third party reasonably believes that the principal’s lawyer, the agent, had the authority to settle the case….28 The student still has a right to sue the attorney for exceeding authority.”29

III. RUSSIAN LAW OF AGENCY

Unlike the U.S., Russia is a civil-law country, which generally means that all Russian law is created by statutes. The most important provisions of Russian private law are stipulated by the Civil Code of the Russian Federation30 (“Civil Code”). Unlike the U.S. Code (being a comprehensive compilation of all federal statutes currently in force), the Russian Civil Code is not supposed to contain all statutory civil-law provisions: it is only one of the statutes, albeit the most important one, controlling private law matters.

A. “AGENCY CONTRACT” V. “REPRESENTATION”

Browsing the Civil Code for the word “agency,” one discovers Chapter 52, entitled “Agenting” (this is the best translation I am able to provide; yes, it sounds awkward in Russian, too). A U.S. lawyer will be surprised to realize that “agency” here is understood as only a type of a contract.

Article 1005. Agency Contract

Under an agency contract one party (the agent) undertakes for a compensation to perform on the instruction of the other party (the principal) juristic and other acts in the agent’s name but at the expense of the principal, or in the name and at the expense of the principal….31

The two above-mentioned options are known in the U.S. as the “undisclosed principal” and “disclosed principal” agency.32 There are also two other types of contracts in Russia covered by Chapter 49 (“Mandate”) and Chapter 51 (“Commission”). They are implicit subtypes of the agency contract (though the Civil Code does not explicitly...
say so) exclusively covering the cases of a disclosed and undisclosed principal, respectively. The Chapter 52 (as well as 49 and 51) governs relations between the agent and the principal (compensation, reporting, etc.), but not those between the agent and third parties. It is noteworthy that Chapter 52 contains only seven articles (an “article” is a quantum of Russian law similar to a “section” of a U.S. statute).

All these may leave a reader familiar with common-law traditions in a state of confusion regarding exactly what agency is under Russian law. “Agency” in Russia is not nearly as fundamental as it is in the U.S. In fact, Russia has a close concept of similar fundamentality, but it bears another name. This is something called “representation,” described in Chapter 10 (“Representation. Power of Attorney.”). In fact, many authors prefer to translate the Chapter 10 term “predstavitelstvo” (“representation”) into English as “agency.” I, however, use a more literal version of translation (“representation”), partly to avoid confusion with the terminology of the Chapter 52, partly to avoid confusion with the significantly different U.S. agency concept.

### Article 182. Representation

1. A transaction performed by one person (the representative) in the name of another person (the represented) by virtue of authority based on a power of attorney, on a stipulation of a law, or on an act of duly authorized state or municipal organ, shall directly create, alter and terminate civil rights and obligations of the represented.

The authority may also be manifest from the situation in which a representative operates (a salesman in retail trade, a cashier, etc.).

The concept of “representation” is fundamental, that is, not reducible to any contract. (Note, however, that all of Chapter 10 contains only eight articles, as compared with 528 sections of the Restatement.) Nevertheless, the concept is in a sense much narrower than the U.S. concept of agency. There is no such thing as “representation of an undisclosed principal.” The represented person is always visible to third parties. Further, while the Civil Code leaves open the list of cases where authority may be inferred from a situation, in fact the above-mentioned cases (a salesman and a cashier) are practically the only instances where such “inferred” or “implied” authority is recognized. Note that “implied authority” is not a Civil Code term.

Importantly, a power of attorney is understood as a written document. Normally, an oral manifestation does not create any authority or apparent authority, as it does in the U.S.

Therefore, the concept paralleling U.S. agency in Russia is “representation” rather than “agency contract,” as one would judge by the name.

### B. APPARENT AUTHORITY?

Because a power of attorney is always in writing, there is simply no place for anything like apparent authority. If a representative exceeds her powers under a power of attorney, the transaction is generally not binding for the person who is represented. (However, the represented person may later ratify ultra vires action of the representative.)

There are, however, some exceptions. In particular, suppose that the person who issued a power of attorney later revokes it, but the former representative nevertheless forms a contract on behalf of the represented party with an uninformed third party. In the U.S., this would fall into the rubric of apparent authority, and the contract would be enforceable. The Civil Code does not introduce any separate concept, but the result is similar.

#### Article 189. Consequences of Termination of a Power of Attorney

1. A person who has issued a power of attorney and thereafter revokes it is obligated to notify the person to whom the power of attorney was given about the revocation and also to notify third persons known to him for representation before whom the power of attorney was given…

3. Upon the termination of the power of attorney, the person to whom it was given or his legal successor is obligated to return the power of attorney immediately.

Thus, the represented person is obliged to notify third parties (those “known to him”) about power of attorney revocation. If he does not fulfill the obligation, he is liable for damages suffered by the third parties as a result. This roughly corresponds with U.S. law provisions. Of course, the former representative himself may be liable before the represented in such a situation, but this is another issue, that is not discussed here.

The rules applicable to representatives of companies are generally the same as for representative of individuals, with some minor variations (most importantly, a power of attorney issued by a company must be
There is, however, one substantial difference between Russian and U.S. law: the CEO of a Russian company (also known as the [sole] director, general director, or president) is not normally viewed as a representative or agent of the company; rather he is a company’s “governing body” controlled by corporate law.

Suppose a general director exceeds the powers granted to him by the company’s by-laws. As previously mentioned, in the U.S. he would still normally have apparent authority to perform most commercial transactions on behalf of the company. In Russia, such a transaction is voidable at the option of the company wherever the other party to the transaction “knew or certainly should have known” about the restrictions contained in the by-laws. Otherwise, the transaction is valid, and this may be said to parallel the U.S. apparent authority concept. However, Russian courts often presume that any commercial partner “certainly should have known” about the said restrictions (supposedly from reading the company’s by-laws), which makes much more room for invalidating such transactions than one would suggest from the Civil Code wording. This makes Russian law slightly less similar with U.S. law. It is also interesting to note that the Civil Code does not explicitly envision the possibility of ratification of the general director’s voidable ultra vires acts; nevertheless, such ratification is consistently allowed by courts. Therefore, while there is no direct correspondence between U.S. and Russian law in respect to apparent agency, certain parallels are still present.

C. ESTOPPEL IN RUSSIA?

There is also a noteworthy clause in the Civil Code article defining the “agency contract,” discussed above.

Where a written agency contract concluded in written form envisages general authority of the agent to perform transactions on behalf of the principal, the latter in relations with third parties does not have a right to assert that the agent lacks sufficient authority, unless the principal proves that the third party knew or should have known about the restrictions of the powers of the agent.

The language of the clause reminds us of the U.S. estoppel concept (here the principal may be viewed as being “estopped” from denying generality of the agent authority).

Therefore, estoppel as such does not exist in Russia, but certain equitable ideas are present in law . . .

Finally, there is an all-covering Article 10 in the Civil Code, generally prohibiting “abuse of right” (which is something left undefined).

In the event of [abuse of right] a court…may deny to the [abusing] person protection of the person’s right.

This clause allows the courts to “estop” (although this is not a Civil Code term) a party from any assertion that the court may consider unfair, even if the assertion is legally true. Essentially, the same idea underlies the equity doctrine in the U.S. system. However, generality of the clause leaves a lot of room for judicial abuse. Arguably, an example of such abuse is the Yukos corporate tax case. Yukos was punished not for breaching any specific provision of tax law, but for being a “bad-faith taxpayer”—a rather questionable non-codified concept ultimately originating from Article 10 of the Civil Code.

Therefore, estoppel as such does not exist in Russia, but certain equitable ideas are present in law, which sometimes may effectively result in “power by estoppel.”

D. COURT PRACTICE

Legally speaking, no Russian court judgment has more than persuasive value for any future judgment. However (temporarily limiting our view to the universe of economic or “arbitration” courts and putting aside the courts of general jurisdiction), while decisions of the first and second instant cases indeed have little importance for the future, decisions of the Federal Arbitration Courts (“FAC”, the third or cassation instance) have strong persuasive value for lower courts of the respective circuit; and the persuasive value of decisions of the Supreme Arbitration Court (“SAC”, the fourth and the last, or supervisory instance) is, in practice, absolute. Further, decisions of Plenary Sessions of the Supreme Arbitration Court relating to “issues of arbitration court practice” are legally binding for all arbitration courts, that is, for all practical purposes constitute judicially-made law (at least within the economic universe). Such decisions, however, are normally restricted to issues of ambiguity of statutes. The same story is true in the parallel universe of “general-jurisdiction” courts (certain decisions of the Supreme Court are binding for lower general-jurisdiction courts, all others are strongly persuasive).
Issues related to apparent agency are not often litigated in Russia, probably because of absence of the concept itself. Some examples, however, are present. We consider two cases of the Moscow Circuit Federal Arbitration Court.

In the first case a foreign company sued a Russian company asking for termination of a joint venture agreement and division of property. The court dismissed the claim on the merits. Then the foreign company appealed on procedural grounds arguing that the individual who filed the original suit on behalf of the foreign company was not properly authorized: his power of attorney had been revoked before the claim was filed. The second-instance court reversed the judgment and dismissed the original claim without prejudice (thus allowing the foreign company to resubmit the claim). Then the Russian company appealed to the Moscow Circuit (a third-instance court).

The Moscow Circuit reversed the second-instance court decision having commented as follows:

First, the foreign company by its duly authorized officers actively participated in the trial (paid state duties, requested various documents, etc.). Second, the foreign company did not timely notify the court of the revocation of the power of attorney, as prescribed by Art 189(1) GK RF. Instead, it declared that the representative was not properly authorized only after the negative judgment had been entered. Therefore, the second-instance court decision does not conform to the facts of the case. As a result, the Moscow Circuit remanded the case with directions back to the second-instance court.

In the second case a Russian company sued a law firm and a bank to invalidate a transfer of shares originally belonging to the company. Some time before the disputed transfer, the three parties had adopted a “protocol” (apparently, some kind of an escrow agreement) settling an earlier dispute. According to the protocol, the law firm was appointed company’s “representative (agent)” authorized to “prepare and pass to the registrar” (to the bank) share transfer documents. So the law firm did, and the bank recorded the transfer. However, in its claim the company argued that the law firm had not been in fact authorized to transfer shares, because no written power of attorney had ever been issued to the law firm. Courts in two instances upheld the claim. However, the Moscow Circuit in the third instance disagreed with the following comments.

First, according to Article 183 of the Civil Code, the company could ratify actions of the non-authorized person, in particular, by accepting performance of the other party in the transaction. The lower courts did not check whether or not this was the case. Second, according to Article 1005(2) of the Civil Code, the company could not assert that the law firm lacked authority where the law firm had been granted general agency powers (unless the bank knew or should have known of any limitation of power). The “protocol” effectively resulted in an agency contract without relevant limitation of power; the bank knew the contract terms. Moreover, in such a situation issuing a power of attorney was a duty of the company; failure to do it and disputing the ensued transfer constitutes an abuse of rights. As a result, the Moscow Circuit reversed and remanded the case.

IV. CONCLUSION

Authority is the power of an agent to bind the principal, originating from principal’s manifestation to the agent. Apparent authority is the power of a non-agent to bind the purported principal, originating from principal’s manifestation to a third party. Estoppel allows for the liability of the purported principal for actions of a non-agent if the purported principal is responsible for a third party’s believing that the non-agent is an agent. A purported principal may give full force to non-agent’s actions by way of later ratification.

In Russia, agency is a much less fundamental notion than it is in the U.S. “Apparent agency” and “agency by estoppel” are unknown to the Civil Code. However, certain provisions of Russian law parallel relevant provisions of U.S. law, sometimes effectively creating apparent agency power.
1. Restatement (Second) of Agency (1958).
2. Id. § 7.
3. Id. § 6.
4. Id. § 8B.
5. Id. § 8, comment d.
6. Id. § 1.
7. Id. § 6.
8. Id. § 7.
9. Id. § 8.
10. Id. § 8B.
11. Id. § 82.
13. Id. at 455.
14. Id.
15. Id.
16. Id. at 456.
17. Id.
18. Id. at 464.
19. Id. at 458.
21. Id.
22. Id.
23. Id.
24. Id. at 408.
25. Id.
26. Id. at 411.
27. Id. at 410.
28. Id. at 408.
29. Id. at 411.
30. Grazhdanski Kodeks RF [GK] [Civil Code] (Russ.) (hereinafter GK).
31. GK Art. 1005(1).
32. Restatement (Second) of Agency § 4.
33. GK Art. 182(1).
34. Id. Art. 185.
35. Id. Art. 183.
36. Id. Art. 183(2).
37. Id. Art. 189 (1), (3).
38. Id. Ch. 25.
39. Id. Art. 185.
40. Id. Art. 174.
42. Id. at 18.
43. GK supra note 16, at art. 1005(2).
44. GK Art. 10.
46. See, e.g., Sedukina O.N., K Voprosu o Nормотворческой Деятельности Vзысканий...