ESSAY*

THE LAW OF AGENCY IN COMPARISON: A LOOK AT THE CIVIL LAW JURISDICTIONS OF THE STATE OF LOUISIANA AND THE FEDERAL REPUBLIC OF GERMANY

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If law be a science, and really deserve so sublime a name, it must be founded on principle and claim an exalted rank in the empire of reason.[1]

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* This essay was selected for publication following a call for papers from LLM students at Benjamin N. Cardozo School of Law. The CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW hopes to continue this initiative in an effort enrich our publication by engaging our LLM students, many of whom hail from outside of the United States. Many thanks to Amy Sugin for her assistance.

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1 WILLIAM JONES, AN ESSAY ON THE LAW OF BAILMENTS 144 (1781).

I. INTRODUCTION

The aim of this Essay is to analyze the law of agency in the state of Louisiana and compare it to its German equivalent. In contrast to other states in the United States, which have primarily common law systems, Louisiana has a legal system marked by extensive codifications.[2] As a result, Louisiana—a rather small state with 4.3 million inhabitants[3]—can be considered a "mixed jurisdiction"[4]: a hybrid where codified civil law and common law have merged. Because of this rare and specific characteristic and including the fact that the "old" European law has been confounded with "new" Anglo-American law, the Louisiana legal system lends itself to a comparative law analysis.[5]

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2 29 THE NEW ENCYCLOPEDIA BRITANNICA 329 (15th ed. 1995).

3 13 BROCKHAUS DIE ENZYKLOPÄDIE IN VIERUNDZWANZIG BÄNDEN 578 (20th ed. 1998) (encyclopedia in twenty-four volumes).

4 T.B. Smith, *The Preservation of the Civilian Tradition in "Mixed Jurisdictions"*, *in* CIVIL LAW IN THE MODERN WORLD 3 (Athanassios N. Yiannopoulos ed., 1965); Michael B. North, *Quit Facit Per Alium, Facit Per Se: Representation, Mandate and Principles of Agency in Louisiana at the Turn of the Twenty-First Century*, 72 TUL. L. REV. 279, 281 (1997). *See also* Vernon V. Palmer, *Mixed Jurisdictions*, *in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 467, 467-75 (Jan M. Smits, 1st ed. 2006).

5 *See* Wolfram Müller-Freienfels, *The Law of Agency*, *in* CIVIL LAW IN THE MODERN WORLD 77, 78 (Athanassios N. Yiannopoulos ed., 1965) (stating "[t]he manner in which Louisiana has combined much of the best from European and Anglo-American systems and has created indigenous institutions makes it clear that any reform proposed and adopted by Louisiana will be of *special interest for both the civil-law and the common-law world.*") (emphasis added).

Even though the Spanish discovered Louisiana's territory in 1539, the French colonized and claimed it in 1702.[6] In 1763, Louisiana was divided partly between the Spanish and the English, who ruled and shaped it for the next forty years.[7] Around 1800, Louisiana reverted to French control.[8] A mere three years later, Napoléon I ceded his former territories to the United States, a deal that was recorded in history as the Louisiana Purchase.[9] Thus, the state of Louisiana was born.

The Louisiana Civil Code regulates civil law within the state. The Code came into effect in 1808, only five years after the Louisiana Purchase and was titled the *Digest of the Civil Laws Now in Force in the Territory of Orleans* (the Digest).[10] A short time later, the Digest became the primary source of civil law in the state.[11] The primary and unique feature of the Digest was that it constituted, as its title indicates, a compendium and codification of the law already in practice.[12] It is debatable whether the Spanish or French more heavily influenced the practice of law and the civil code in Louisiana.[13] Most commentators argue that the Louisiana system is primarily inspired by the French,[14] as the authors of the Digest had a copy of the Code Napoléon, the famous French Civil Code), on hand, which served as a model of structure and, especially, of content.[15] Particularly, the Digest was initially split into three (today, four) books, as was the Code Napoléon.[16] Moreover, commentators are able to name a specific and substantial number of articles that are said to originate directly

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6 13 BROCKHAUS, *supra* note 3, at 579.

7 *Id.*

8 *Id.*

9 29 ENCYCLOPEDIA BRITANNICA, *supra* note 2, at 330. The Louisiana Purchase constitutes the biggest acquisition of territory in the history of the United States. *See* 7 ENCYCLOPEDIA BRITANNICA, *supra* note 2, at 511. *See also* 13 BROCKHAUS, *supra* note 3, at 579.

10 GEORGE DARGO, JEFFERSON'S LOUISIANA 156 (1975).

11 *Id.* at 156-57.

12 VERNON V. PALMER, LOUISIANA: MICROCOSM OF A MIXED JURISDICTION 4 (1999). The legislature instructed the authors of the Digest to make the currently prevailing civil law the foundation of the codification. *Id.*

13 *Id.* at 51-83.

14 *Id.* at 53. For a contrasting view, see DARGO, *supra* note 11, at 158-64.

15 PALMER, *supra* note 12, at 54-55. The attorneys James Brown and Louis C. Moreau Lislet were the authors of the Digest. *See* EDWARD F. HAAS, LOUISIANA'S LEGAL HERITAGE 4 (1983).

16 PALMER, *supra* note 12, at 54.

from the Code Napoléon.[17] The civil code of Louisiana was revised in 1870 and has been continuously updated since.[18] Further, the courts—with regard to the processes of unification and modernization—acted to adapt the Code to the common law, which also affected the law of agency.[19]

Germany, like most European countries, is a traditional civil law country.[20] Because there was no united German nation for most of the 18th and 19th centuries,[21] many German states enacted their own civil law statutes,[22] leading to a fragmented German civil law.[23] After the foundation of the German Reich in 1871,[24] German legislators began to create a unified and universal civil code.[25] After more than twenty years of deliberation and drafting, the German Civil Code (*Bürgerliches Gesetzbuch*) went into effect on January 1, 1900.[26] One of its main sources was Roman law, which existed prior to the German Civil Code in the form of a *jus commune*.[27] Today, the code consists of more than 2,385 sections.[28]

Upon examination of the status and importance of agency law in legal education, it can be concluded that agency constitutes a firm element in the German legal curriculum. In German law schools, agency is dealt with at length within the first semester and later on, is resurrected constantly in other modules. However, in

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17 *Id.*

18 *See* WIN-SHIN S. CHIANG, LOUISIANA LEGAL RESEARCH 33-42 (1985). *See also* Richard H. KILBOURNE JR., A HISTORY OF THE LOUISIANA CIVIL CODE (1987).

19 *See* Sentell v. Richardson, 211 La. 288 (La. 1947). *See also* Jana L. Grauberger, *From Mere Intrusion to General Confusion: Agency and Mandate in Louisiana*, 72 TUL. L. REV. 257, 266–75 (1997).

20 5 BROCKHAUS, *supra* note 3, at 405-06.

21 *Id.*; 13 BROCKHAUS, *supra* note 3, at 306-12.

22 *See, e.g.*, Bavaria (1756), Prussia (1794) and Saxony (1863); *compare* Hartwig Sprau, *in* BÜRGERLICHES GESETZBUCH MIT NEBENGESETZEN [GERMAN CIVIL CODE WITH SUPPLEMENTARY LAW] 1 (Otto Paland ed., 70th ed. 2007).

23 *Id.*

24 13 BROCKHAUS, *supra* note 3, at 312–14.

25 Sprau, *supra* note 22, at 2.

26 Helmut Coing & Heinrich Honsell, *in* KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNG UND NEBENGESETZEN: EINLEITUNG ZUM BGB [COMMENTARY OF THE GERMAN CIVIL CODE WITH INTRODUCTION AND SUPPLEMENTARY LAW: INTRODUCTION TO THE BGB] 47-48, 56 (Julius von Staudinger ed., 2004).

27 Sprau, *supra* note 22, at 2.

28 BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] (Ger.) [hereinafter German Civil Code], *available at* http://www.gesetze-im-internet.de/englisch_bgb/.

Louisiana and the United States, the situation is quite different. In general, it seems agency is not taught in combination with the law of obligations or contract law, as practiced in Germany. Rather, it is discussed in courses such as Business Associations or Corporations[29] and seems to play only a minor part in these lectures. In 1981, a scholar anxiously noted that Louisiana State University dropped agency completely from its compulsory curriculum and offered it only as part of the optional course of Business Associations.[30] He considered this, arguably with good reason, *capitis diminutio maxima* (a maximum loss of status).[31] Consequently, it can be noted that both Louisiana and Germany attach different levels of importance to the status of agency in law school education.

This Essay will compare the statutory systems of Louisiana and Germany, as well as the following, particularly relevant, topics in the law of agency. First, the requirements of an effective agency and its legal consequences will be examined. Of special interest are the principle of disclosure, the power of agency, and the consequences that follow when the power of agency is restricted in the internal relationship. Second, authority by legal appearance and the consequences of a lack of power of agency will be examined. Third, the areas of the agent's conflict of interest and the principal's protection of abuse will be surveyed. This Essay is structured in the following manner: for each subject area, there will be an examination of the Louisiana Civil Code, followed by a discussion of the corresponding provisions of the German Civil Code, and lastly, a comparative legal analysis of each theme.

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29 *See, e.g.*, MELVIN A. EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 1-26 (10th ed. 2011). *See also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 63-70 (9th ed. 2012).

30 JOSÉ R. CORTINA, THE LAW OF AGENCY 1 (1981) (unpublished) (on file with the Arthur W. Diamond Law Library, Columbia University). Likewise, the sole remarks on agency in the extensive and important series Louisiana Civil Law Treatise are found in its 7th and 8th volumes, under the title Business Organizations. *See* GLENN G. MORRIS & WENDELL H. HOLMES, 7 LA. CIV. L. TREATISE § 21 (West 2012); 8 LA. CIV. L. TREATISE § 33 (West 2012). These sections of the treatise discuss officers and agents, as well as other theories of liability, respectively.

31 CORTINA, *supra* note 30, at 2.

II. THE LAW OF AGENCY IN LOUISIANA AND GERMANY

A. The Structure and System of the Statutes on Agency

In its current version, enacted in 1991,[32] the Louisiana Civil Code is divided into four books and includes 3,556 articles.[33] The law of agency is regulated in Book III, *Of the Different Modes of Acquiring the Ownership of Things*, under Title XV, *Representation and Mandate*. Title XV of the Louisiana Civil Code has been subject to extensive revision since 1997 and has also been harmonized with the common law.[34] Title XV is further divided into two chapters and comprises forty-eight articles.[35] It is notable that both power of representation[36] (considered the "external relationship")[37] and mandate (considered the "internal relationship between agent and principal")[38] are detailed in the same title. Admittedly, Louisiana's legal system acknowledges the difference between the underlying legal transaction and the grant of power of agency.[39] Also, both of these concepts have been separated more strictly in the course of modernization—an important gain.[40] Nonetheless, and in contrast to the German system described below, the authors of the reform clearly did not pursue the goal of regulating representation (agency) and mandate as completely separate and distinct from each other.

In the Federal Republic of Germany, by contrast, the law of agency is placed in the General Part (*Allgemeinen Teil*) and in the first book of the German Civil Code.[41] Title 5, *Agency and Power*

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32 Athanassios N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay*, 78 TUL. L. REV. 379, 399 (2003).

33 *See generally* LA. CIV. CODE ANN. (West 2012) [hereinafter LCC]. The law of agency is detailed in the latter part of the LCC.

34 *See* H.B. Act No. 261 (La. 1997). *See also* Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087, 1089 (1999) [hereinafter *Representation*]. The revised version of the law of agency is generally praised as "a well-crafted and progressive framework." *See* North, *supra* note 4, at 321.

35 LCC, arts. 2985-3032 (West 2012).

36 See *infra* text accompanying note 66 for details on the use of the terms "power of representation" and "authority."

37 North, *supra* note 4, at 283.

38 *Id.* This is the underlying legal transaction in most cases.

39 Nonetheless, it has to be remarked that Louisiana's courts and the LCC itself have failed to distinguish between mandate and power of authority. *See id.* at 290.

40 *Representation*, *supra* note 34, at 1107.

41 *See generally* German Civil Code.

of Representation, of the Third Division, *Legal Transactions*, deals with the law of agency and contains only eighteen sections.[42] Mandate is discussed in the third Book, *Law of Obligations*.[43] The law of agency has been an important initiative since the works of *Laband*[44] in 1866. This initiative was effectuated in 1900[45] with the enactment of the German Civil Code, which strictly distinguished the underlying legal transaction and the power of agency.

Due to the framework function of the General Part—particularly, that its sections are applicable to all other books of the German Civil Code[46]—it is only logical that agency is regulated in this part of the legislation. Even the authors of the Louisiana Civil Code describe this system as "systematic and efficient."[47] The Louisiana Civil Code, which does not have a General Part, assigns agency to Book III.[48] Also, mandate and power of representation are regulated in the same provision within the Louisiana Civil Code, whereas in Germany, they are strictly separated. It is doubtful whether the Louisiana approach is preferable in terms of clarity, logic, and systematization.

B. The Requirements of an Effective Agency and its Legal Consequences

1. Louisiana

The Louisiana Civil Code does not contain a specific article that lists the requirements of an effective agent.[49] Instead, the interaction of several articles and related case law can provide insight into what is required to act as an agent.

First, according to Article 2990, the articles regarding the law

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42 *Id.* §§ 164–181.

43 *Id.* §§ 662–674.

44 Paul Laband, *Die Stellvertretung bei dem Abschluss von Rechtsgeschäften nach dem Allgemeinen Deutschen Handelsgesetzbuch* [*Agency at the Conclusion of Legal Transactions According to the General German Commercial Code*], 10 ZEITSCHRIFT FÜR HANDELSRECHT 183 (1866). *See* North, *supra* note 4, at 286–87.

45 Müller-Freienfels, *supra* note 5, at 82 (offering further evidence). Given the importance Germany placed on the law of agency, it is located at the beginning of the German Civil Code.

46 *See Representation*, *supra* note 34, at 1093–94.

47 *Id.* at 1094.

48 LCC, arts. 2985–3032 (West 2012).

49 Similarly, related scholarship also fails to provide an express enumeration of the requirements.

of obligations are applicable to the law of agency.[50] Thus, in reading Articles 2990 and 1766 together, it is determined that agency is not applicable to strictly personal acts or legal transactions.[51]

Second, it is not clear whether agency law in Louisiana requires the agent to submit an individual declaration of intent or if the transmission of someone else's declaration of intent is sufficient. This characteristic is usually required to distinguish agency from the mere delivery of a declaration of intent,[52] but does not seem to find any authority in case law or literature. Because it is the nature of an agent to act alone and independently for someone else—though in a predefined framework described implicitly in Articles 2985 and 2987[53]—one should assume that agency in Louisiana requires the submission of an individual declaration of intent by the agent.

Third, the introductory articles of the Title XV do not explicitly require the agent to act in the name of the principal or for this to be inferred from the circumstances, thus not asking for any of the two possible ways of disclosure. According to Article 3020, which describes the legal consequences of an effective agency, it can be concluded by implication that disclosure is not required.[54] As a result, the agent legally binds the principal, even if the latter does not act in the principal's name and if this fact does not arise from the circumstances either.[55] Moreover, it is important to emphasize that the legislature intended this result, as it removed the words "and in his name" from former Article 2985 when revising the law of agency in 1947.[56]

The adoption of "nonrepresentative"[57] or "undisclosed"[58] agency is derived from *Sentell v. Richardson*,[59] where the Louisiana Supreme Court applied the common law principle of

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50 LCC, art. 2990 (West 2012).

51 *Representation*, *supra* note 34, at 1118–19.

52 *See, e.g.*, BERND RÜTHERS & ASTRID STADLER, ALLGEMEINER TEIL DES BGB [General Part of the BGB] 445 (17th ed. 2011).

53 LCC, arts. 2985, 2987 (West 2012).

54 *Id.* art. 3020 (West 2012).

55 *See Representation*, *supra* note 34, at 1151. *See also* LCC, art. 3020, rev. cmt. (b) (West 1997).

56 *See* Grauberger, *supra* note 19, at 276; Müller-Freienfels, *supra* note 5, at 80.

57 *See* Grauberger, *supra* note 19, at 265.

58 *See* MORRIS & HOLMES, 8 LA. CIV. L. TREATISE, § 33.04.

59 *Sentell*, 211 La. at 288. *See Representation*, *supra* note 34, at 1118-19.

undisclosed agency to Louisiana law.[60] This result has been affirmed by the Louisiana Supreme Court in subsequent cases[61] and supported by commentators.[62] One might conclude from this that an effective agency does not necessitate the criterion of disclosure. However, it should be noted that in *Sentell*, the agent[63] binds himself personally for the performance of the contract.[64] One might argue that it is not a "true" form of agency if the agent is bound too. However, the most important feature of agency is the power of the agent to legally bind his principal. As shown above, this is provided even if the agency is undisclosed. Thus, disclosure is, indeed, not required under Louisiana law; both representative and nonrepresentative agency relationships are covered by the Louisiana Civil Code.[65]

Fourthly and most important, the agent must have acted with and within his power of representation.[66] This is derived from Article 3020, which allows only the legal consequences of agency to eventuate in this case. The conferment of authority or "procuration"[67] on the agent can be addressed directly to the latter or to the future business partners of the agent.[68] Authority may also be conferred by law; for example, where a parent is legally authorized to represent a minor child.[69]

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60 Grauberger, *supra* note 19, at 266-68.

61 *See, e.g.*, Woodlawn Park Ltd. P'ship v. Doster Constr. Co., Inc., 623 So. 2d 645, 647-48 (La. 1993); *see also* Grauberger, *supra* note 19, at 268-69.

62 Grauberger, *supra* note 19, at 267.

63 From a German perspective, this surely is to be expected as the German Civil Code does not acknowledge "nonrepresentative" or "undisclosed" agency and thus would hold liable the agent alone in cases like *Sentell*.

64 *Representation*, *supra* note 34, at 1142; LCC, art. 3017 (West 2012).

65 Grauberger, *supra* note 19, at 276.

66 Article 2985 is captioned "representation." *See* LCC, art. 2985 (West 1997). As Holmes and Symeonides point out, "power of representation" is broader than "authority" or "power of attorney" as it also includes a power to represent the principal, which is conferred by law and not by the principal. *See Representation*, *supra* note 34, at 1091-92. Most of the time however, the law of agency deals with "authority," which is conferred by the principal. This is validated by the fact that the LCC speaks of "authority" in most cases. Thus, the term "authority" is used exclusively in this Essay, even where "authority" would be included in the term "power or representation." *See also* ROBERT HERBST, 2 DICTIONARY OF COMMERCIAL, FINANCIAL AND LEGAL TERMS 896 (3d ed. 1979).

67 *Representation*, *supra* note 34, at 1103-12, 1122 (noting that procuration does not require any specific form: only when the law prescribes a certain form for a legal transaction must the procuration for this transaction fulfill this requirement.).

68 LCC, art. 2987 (West 1997).

69 North, *supra* note 4, at 306.

Further, it must be noted that the principal may limit or extend the authority in any way he deems appropriate and can give authority for only specific legal acts or even general authority.[70] Thus, it must be examined whether in Louisiana, as in Germany, the principal can restrict the agent by instructions—only in the internal relationship between the parties—in a way that the extent of the agent's authority in relation to third parties is not affected.[71] If this question should be answered in the affirmative, a difference between legal potency (in the external relationship) and legal allowance (in the internal relationship) of the agent can arise. This, in turn, is important when considering abuse of authority.

The Louisiana Civil Code does not contain any express provision in this respect.[72] Thus, one might *prima facie* assume that the Louisiana Civil Code does not provide for a situation in which authority covers a contract, but in which the agent was internally not allowed to act a certain way (a situation in which an agent can abuse his authority). It is the general rule that if the agent exceeds his authority and acts outside the limits of the internal relationship, he does not bind the principal, but rather is liable himself.[73] Post-1997 literature seems to remain silent on this issue.

However, since the 19th century both American authors[74] and courts[75] have recognized such a form of internal instructions. In

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70 *See* North, *supra* note 4, at 310. *Cf.* LCC, arts. 2987, 2994 (West 1997).

71 Under German and Swedish law such a restriction exists. *See* Müller-Freienfels, *supra* note 5, at 85.

72 *See* LCC arts. 2985-3032 (West 1997).

73 *Id.* arts. 3019, 3020 (West 1997).

74 JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE, WITH OCCASIONAL ILLUSTRATIONS FROM THE CIVIL AND FOREIGN LAW, ch. 2 § 2 at 70 (6th ed. 1863); *see also* Müller-Freienfels, *supra* note 5, at 86.

75 See Hatch v. Taylor, 10 N.H. 538, 546-547 (N.H. 1840), stating:

> [These instructions] shall be regarded and adhered to, in the execution of the agency; and should the agent depart from them he would *violate* the instructions given him by the principal . . . *And yet,* in such case he may have acted entirely *within the scope* of the authority given him, and the principal *be bound by his acts.* This could not be so, if those communications were *limitations upon the authority* of the agent. It is only because they are *not* to be regarded as part of the authority given, or a limitation upon that authority, that the act of the agent is *valid,* although done in violation of them; and the matter depends upon the character of the communications thus made by the principal, and disregarded by the agent.

Id. (emphasis added).

addition and much more importantly, Article 3008 Paragraph 1 can be construed to mean that the Louisiana Civil Code now acknowledges instructions that only limit the legal allowance of the agent.[76] The Article provides that "[i]f the mandatory exceeds his authority, he is answerable to the principal for resulting loss that the principal sustains."[77] As discussed above, if the principal exceeds his authority, he is generally not bound and therefore, is seemingly unable to suffer any loss. Thus, the drafters of Article 3008 Paragraph 1 must have envisaged a situation where the agent violates his instructions (exceeds his authority) and binds the principal, resulting in a loss sustained by the latter. The view advocated here is supported by the fact that Article 3008 was incorporated in the Louisiana Civil Code during the course of the 1997-revision.[78] Before that, unauthorized acts were declared "null and void with regard to the principal."[79] Thus, the sheer existence of the newly drafted article suggests the correctness of this position because otherwise, the provision would be legally superfluous.

One might challenge this consequence, especially from a German perspective, as the plain language of the code includes the phrase "exceeds his authority" which, arguably, is not the case because the agent still binds the principal.[80] Nevertheless, as Müller-Freienfels[81] and Morris and Holmes[82] persuasively point out, when an agent acts contrary to his instructions, he does not act with *authority* (which implies the principal allows him to act this way in the internal relationship) but only with *power*, defined as "the legal ability by which a person may create, change or extinguish legal relations."[83] Using this interpretation as a basis to understand Paragraph 1 of Article 3008, it can be concluded that Louisiana does, in fact, acknowledge a difference between legal allowance and legal potency.

Termination of authority must be examined, as authority can

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76 *See* LCC, art. 3008, para. 1 (West 1997).

77 *Id.*

78 *See* LCC, art. 3008, rev. cmt. (West 1997).

79 MORRIS & HOLMES, 8 LA. CIV. L. TREATISE, § 33.08.

80 *See* LCC, art. 3008 (West 1997).

81 Müller-Freienfels, *supra* note 5, at 87. *See also id.* at 93. *Cf* Arthur L. Corbin, *The 'Authority' of an Agent–Definition*, 34 YALE L. J. 788, 794 (1925).

82 MORRIS & HOLMES, *supra* note 79.

83 Müller-Freienfels, *supra* note 5, at 87, 93.

be terminated in various ways.[84] First and foremost, authority terminates upon the death of either the principal or agent.[85] Authority also terminates after a lapse of time and the fulfillment of a condition or a purpose.[86] These rules are part of the law of obligations,[87] which are applicable to agency.[88]

Furthermore, authority can be terminated by acts of the parties, especially by a mutual agreement between the principal and agent.[89] In addition, the agent can terminate his authority by his own will if he notifies the principal accordingly.[90] In this regard, *Moss* demands the agent refrain from damaging the principal through his resignation or renunciation, because otherwise, he can be held liable by the principal.[91] Finally, the principal can terminate authority at any time.[92] The revocation can take place either expressly or it can arise from the circumstances.[93]

A consequence of an effective agency is that the principal is bound to perform the contract that the agent made. As described previously, the principal is bound to perform the contract even when the agent does not act in the principal's name.[94] In this case, that agent binds himself as well.[95] According to case law, the other party has the right to choose whom to hold responsible.[96] The agent is also personally liable when he claims to act on another's behalf but does not identify his principal.[97] This situation is called

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84 *See* LCC, art. 3024-3026 (West 1997).

85 *Id.*

86 *See supra* note 88 and accompanying text.

87 In Louisiana, an obligation is defined as "a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee." *See* LCC, art. 1756 (West 1997). All types of obligations—such as sale (Book III, Title VII), lease (Title IX), or representation and mandate (Title XV)—are regulated, first, in the law of obligations in Book III and second, governed by the universal principles laid out in Title III of Book III (arts. 1756 through 1905).

88 *See* LCC, art. 3024, rev. cmt. (c) (West 1997). *See also* Clemens M. Moss Jr., *Termination of Powers of Attorney in Louisiana by Act of Parties*, 22 TUL. L. REV. 623, 623–625 (1948).

89 *See* Moss, *supra* note 88 at 626.

90 *See* LCC, art. 3029 (West 1997).

91 *See* Moss, *supra* note 88, at 626.

92 *See* LCC, art. 3025 (West 1997).

93 *See* Moss, *supra* note 88, at 629-630.

94 *See* LCC, arts. 3020, 3023 (West 1997); *Representation*, *supra* note 34, at 1139-51 (principle of "undisclosed agency").

95 *See supra* notes 54-65 and accompanying text.

96 De Soto Building Co, Ltd. v. M. L. Kohnstamm, 3 Pelt. 54, 62 (La. Ct. App. 1919).

97 *See* LCC, art. 3018 (West 1997).

"partially disclosed agency."[98] Once the agent discloses the identity of his principal, however, he is no longer liable.[99]

2. Germany

The requirements of an effective agency are enumerated in Section 164 of the German Civil Code.[100] A declaration of intent by the agent, the apparentness to act on behalf of someone else (which can either be stated explicitly or arise from the circumstances) and authority that covers the contract must exist.[101] Additionally, agency must be admissible in view of the specific legal transaction.[102]

First, the requirement of admissibility is not explicitly mentioned in Sections 164 through 181 of the German Civil Code.[103] The concept that agency is not admissible to strictly personal legal acts arises from special provisions, such as Section 1311 related to marriage and Section 2274 pertaining to contracts of inheritance.[104]

Secondly, the requirement of one's own declaration of intent serves to differentiate agency from a messenger or mere delivery of a declaration of intent.[105] The decisive benchmark for the demarcation is the appearance of the agent-offeror, observed in an objective view of the offeree.[106] If it is obvious that the offeror enjoys some autonomy of decision and submits his own declaration, he is an agent.[107] However, if the agent simply transmits a declaration, the content of which is already determined and therefore does not enjoy autonomy of decision, he is a messenger (*Bote*).[108] Further, the offeror has to be at least legally competent in order to be able to act as an agent.[109] Someone

98 *Representation*, *supra* note 34, at 1142–45.

99 *See* LCC, art. 3018 (West 1997).

100 German Civil Code, § 164.

101 RÜTHERS & STADLER, *supra* note 52, at 444.

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 445.

106 *Id.*

107 *Id.*

108 *Id.*

109 German Civil Code, § 165.

incapable of acting in law can only be a messenger.[110]

Thirdly, the contracting party must realize that the agent is acting on behalf of someone else (*Offenkundigkeit*). This requirement can either be fulfilled by express declaration or can arise from the circumstances.[111] Fourthly, the agent must act with and within his authority. Authority can be conferred by judicial act[112] or can be derived from the code itself.[113] Authority can be addressed to the agent[114] (the first variant or "inner-authority") or to the future contractual partner[115] (the second variant or "outer-authority").[116]

As under the Louisiana Civil Code, procuration does not require any specific form.[117] This principle is broken when formless procuration leads to an evasion of the purpose of the form provision (especially its function to warn the contracting parties).[118] That is the case when the principal binds himself definitively; for example, by granting an irrevocable authority.[119] Then, this purpose of the form provision demands that the authority is conferred in the specific form required of the main legal transaction.[120] Paragraph 2 Section 167 of the German Civil Code is "teleologically reduced" in this respect.[121]

The extent of authority can be limited by the grant of special types of authority. There is the special-authority (authorizing only one concrete legal transaction), the type-authority (authorizing only a specific type of contract or legal transaction) and the general authority (authorizing all legal transactions).[122] The extent of authority can also be limited through instructions.[123] There are

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110 RÜTHERS & STADLER, *supra* note 52, at 445-46.

111 German Civil Code, § 164. An example of the contracting party realizing that the agent is acting on behalf of the principal from the circumstances is when one is contracting with a person employed by a company, such as a cashier at a grocery. *See* RÜTHERS & STADLER, *supra* note 52, at 446-47.

112 RÜTHERS & STADLER, *supra* note 52, at 446-47.

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 451-52.

117 German Civil Code, § 167.

118 RÜTHERS & STADLER, *supra* note 52, at 452-53.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.* at 455

123 *See id.*

two types of instructions: The first type limits the extent of authority itself, the external relationship, and thus, the agent has less legal potency when acting with third parties.[124] The second type is issued in the underlying legal relationship, the mandate (internal relationship), and does not limit the extent of the authority itself because authority is abstract from the underlying legal relationship, which is based on the German principle of abstractness.[125]

Hence, a difference between the legal potency and legal allowance of the agent can arise.[126] A contract concluded contrary to the latter type of instruction binds the principal.[127] The agent still makes himself answerable for damages. A contract concluded contrary to the former type of instructions will not bind the principal, on the other hand, because the agent did not act within his authority.[128] In order to decide which type of instruction is on hand, one has to interpret the instruction.[129] In doing this, it is indicative of how the agent should have understood the authorization.[130]

With regard to termination of authority, it can be noted that authority either terminates because of its content or because of the underlying legal transaction. The former is the case when authority has been conditional,[131] temporary,[132] or for a specific purpose. Authority thus terminates with fulfillment of the condition, expiration of time, or achievement of the purpose.[133]

Authority also terminates with the conclusion of the underlying legal transaction.[134] Additionally, authority can be revoked anytime[135] and the revocation can be addressed to the agent or to the business partner.[136] Also, the procuration itself can

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124 *Id.*

125 *Id.*

126 *Id.* at 456-58.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 German Civil Code, §158.

132 *Id.* § 163.

133 RÜTHERS & STADLER, *supra* note 52, 459-60.

134 *Id.* at 460 (relating to the first sentence of § 168 of the German Civil Code).

135 German Civil Code, §168.

136 RÜTHERS & STADLER, *supra* note 52, at 461.

be contested, which leads to an *ex tunc* termination.[137] Lastly, authority terminates if the agent renounces or becomes incapable of acting in law.[138] The legal consequence is that the agent is eligible to represent the principal in legal matters.[139] The principal becomes a party to the contract.[140] He is treated as if he had acted himself,[141] in accordance with the maxim of agency law: *qui facit per alium, facit per se.*[142]

3. Comparative Analysis

Both legal systems do not apply agency to strictly personal legal transactions. Also, acting with and within authority is clearly required in the two systems. The fact that the agent must submit his own declaration of intent is much more emphasized in Germany than in Louisiana. Nevertheless, one can assume that, even in Louisiana, a mere messenger does not constitute an agent. The primary differences between the two codes are apparent when looking at disclosure. In Germany, the *Offenkundigkeit* is a fixed prerequisite of agency whereas, in Louisiana, the opposite is the case: the principal is still bound by the agent, even when the latter does not disclose his agency. However, the agent is also personally liable and, according to Louisiana case law, the other party can choose whom to hold responsible.[143] Most times, this will be the principal, as the third party also owes him performance of the contract.[144] In Germany, the consequences of agency would not come into effect and only the agent would be liable.

In sum, it can be held that the German Civil Code states more clearly the exact requirements of an effective agent. Also, it is questionable that the agent can even bind the principal when he does not disclose the agency under the Louisiana Civil Code. The consequence is that the contracting party is bound to the principal even when it never knew of the principal's existence and only

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137 *Id.* at 461-63.

138 *Id.* at 463.

139 German Civil Code, § 164.

140 RÜTHERS & STADLER, *supra* note 52, at 483.

141 *Id.*

142 This Latin phrase translates to: "whoever acts through another acts as if he were doing it himself."

143 *See supra* note 96 and accompanying text.

144 *See* LCC, art. 3023 (West 1997).

wanted to contract with the agent himself.[145]

Furthermore and with regard to authority, in both legal systems, authority generally does not require a specific form. However, the Louisiana Civil Code expressly dictates a specific form if the main legal transaction requires one. The German Civil Code reaches a similar result, but cannot quote any express provision in doing so. German law further provides the possibility to create a discrepancy between legal potency and legal allowance of the agent by acknowledging instructions that do not restrict the authority itself. As a result, contracts concluded contrary to these instructions still bind the principal. It is submitted that this possibility also exists in Louisiana.[146] Even though this feature might appear peculiar at first sight, it is the logical and inevitable consequence of the principle of abstractness.[147] Furthermore, it is suggested that both codes generate greater legal certainty for third parties, as the latter do not have to fear that internal instructions—of which they are unaware—narrow the scope of authority, resulting in voidance of the contract.

In Louisiana, authority terminates according to its content or because of unilateral action (such as revocation by the principal or renunciation by the agent) or bilateral action (such as mutual agreement). In Germany, authority terminates according to its content or because of the underlying legal transaction. Also, revocation and renunciation lead to the same result. Thus, one can conclude that there are few differences with respect to authority. It should be noted, however, that German law places a stronger emphasis on the distinction between the underlying legal transaction and authority. This is preferable because it allows the German Civil Code to maintain a clear, systematic structure without mixing mandate (an obligation) and authority (a granted power to act for someone else).

C. Authority by Legal Appearance

1. Louisiana

First, a third party can rely on the continued existence of

145 *See id. See also* North, *supra* note 4, at 319.

146 *See supra* notes 71-84 and accompanying text.

147 *See* Müller-Freienfels, *supra* note 5, at 93.

authority until the revocation is filed for recordation.[148] This only applies to authorities that must be publicly recorded in order to come into effect.[149] Furthermore, third parties can rely on the continued existence of an authority if the principal revoked authority but did not notify the third party of this fact.[150] In these cases, the good faith of third parties is protected and the principal is bound to perform contracts concluded by his former agent. Nonetheless, in such a situation the agent is also personally bound to the third party himself.[151]

Second, in accordance with Article 3021, the principal is bound to a third person if he causes him to believe, in good faith, that another person is his agent and has the necessary authority.[152] Article 3021 thus describes the principle of apparent authority, even when the code uses the term "putative" instead of "apparent."[153] It is not quite clear what good faith means in this specific situation. Under the Louisiana Civil Code,[154] there are different definitions of good faith.[155] Accordingly, the question must be asked whether good faith, in the case of Article 3021, should be assessed only subjectively or also objectively (including a test of reasonableness). The author—alongside Carr[156] and Holmes and Symeonides[157]—proposes to assess good faith in second manner, as in this way the principal receives the necessary protection by not being liable if the belief of the third person is abstruse. This requires the subjective belief of a person that another person does have authority and an objective

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148 LCC, art. 3027 (West 1997).

149 *Id.* rev. cmts. (b).

150 LCC, art. 3028 (West 1997).

151 LCC, art. 3028, rev. cmts. (b) (West 1997). *See also* LCC, arts. 3001, 3019 (West 1997).

152 *See* LCC, art. 3028 (West 1997).

153 By implementing Article 3021, the Louisiana legislature has now clearly incorporated apparent authority into the LCC. *See* B.L. Carr Jr., *Apparently Not: The Status of Apparent Authority After Holloway v. Shelter Mutual Insurance*, 66 LA. L. REV. 289, 297–302 (2005). By doing this, the legislature codified the governing pre-revision law created by the Supreme Court in Tedesco v. Gentry, 540 So. 2d 960 (La. 1989), where the court first acknowledged the principle of apparent authority. Almost all courts accept Article 3021 as the implementation of apparent authority. *See* Carr, *supra* note 154, at 302–04. However, at least one intermediate decision incomprehensibly rejects it. *See id.* at 289–91, 304–11.

154 *See* LCC, arts. 487, 3480 (West 1997).

155 Carr, *supra* note 153, at 300.

156 *Id.*

157 *Representation*, *supra* note 34, at 1153–54.

reasonableness for this belief.[158] It may also be noted that the Louisiana Civil Code, before the revision of agency law, contained two articles implicitly rejecting the principle of apparent authority.[159] However, these articles were entirely ignored by the courts, which adopted the common law principle of apparent authority.[160]

2. *Germany*

Under the German Civil Code, when a legal appearance of authority exists, third parties are protected if the third party trusts in the continued existence of authority.[161] To begin, the code contains three express instances of authority by legal appearance: Section 170 governs situations where authority has been declared and addressed to a third party and the third party has not been notified on the authority's expiry.[162] Section 171 controls when procuration has been announced—publicly or to a third party—until authority has been revoked in the same manner in which it was made.[163] Lastly, Section 172 governs when the principal has delivered a letter of authorization to the agent and the agent presents it to a third party.[164]

Because Sections 170 through 173 of the German Civil Code do not cover all cases in which the appearance of authority is aroused, the judiciary protects the trust of third parties in two more case groups.[165] On the one hand, the authority by toleration (*Duldungsvollmacht*) has to be mentioned. Authority by toleration is provided: (1) if an unauthorized person behaves as an agent, an objective element of the legal appearance, (2) the principal knows and tolerates this behavior, a subjective element related to the accountability of the legal appearance, (3) the third party is in good faith regarding the authority, a subjective element, and lastly, (4) if the legal appearance is the cause for the third

158 *Id.* at 1154.

159 LCC, arts. 3010, 3021 (West 1997).

160 *Representation*, *supra* note 34, at 1151. *See also* North, *supra* note 4, at 292–305. For the situation prior to the 1997 revision, see *id.* at 299–305.

161 RÜTHERS & STADLER, *supra* note 52, at 464.

162 *Id.*

163 *Id.* 464-65.

164 *Id.* at 465.

165 *Id.* at 467; Eberhard Schilken, *in* KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH MIT EINFÜHRUNG UND NEBENGESETZEN 118-31 (Julius von Staudinger ed., 2009).

party to contract with the seeming agent, touching on causality.[166]

However, apparent authority (*Anscheinsvollmacht*) is a judicial creation in Germany.[167] Apparent authority is granted if: (1) an unauthorized person behaves as an agent (an objective element), (2) the principal acting with due diligence should have realized the agent's behavior (a subjective element touching upon the accountability of the legal appearance), and (3) the third party acted in good faith (a subjective element) and causality is given.[168]

3. Comparative Analysis

In Germany, the only mention of authority is found in Sections 170 through 173. By contrast, in Louisiana, authority has been codified since the modernization of agency law.[169] Authority itself appears in Articles 3027 and 3028 and apparent authority, specifically, is detailed in Article 3012. In both Germany and Louisiana, the legal appearance of authority does cover situations in which authority has been announced publicly. The provisions of the German and Louisiana codes protect the good faith of a third party to an internal or external authority. Additionally, German law protects good faith regarding deeds of agency, while such protection is nonexistent in the Louisiana Civil Code.

Also, both legal systems recognize the concept of apparent authority. Nonetheless, some differences become manifest: Louisiana demands that the principal causes the third person to believe that authority exists, while in Germany it is sufficient if the agent induces the third party to believe the authority exists. One might think that German law is too far-reaching, in this respect. However, this extensiveness is likely compensated by the fact that the principal must be able to realize the agent's behavior had he acted with dutiful diligence. It thus can be concluded that both the German and Louisiana provisions reach equivalent results and neither is too far-reaching.

Lastly, in Germany the authority by toleration is acknowledged. Surprisingly, the Louisiana Civil Code does not contain an equivalent, even though this figure seems to be of some practical importance. However, one might suppose that Louisiana

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166 RÜTHERS & STADLER, *supra* note 52, at 467.

167 *Id*; Schilken, *supra* note 165, at 122-24.

168 RÜTHERS & STADLER, *supra* note 52, at 467; Schilken, *supra* note 165, at 122-24.

169 *Representation*, *supra* note 34, at 1151.

courts would construe this as an implied or conclusive authority (as even some German commentators do)[170] and treat it as equal to actual authority.

D. Acting Without Authority

1. Louisiana

If an agent contracts without authority (or apparent authority) or otherwise exceeds his authority, the requirements of an effective agency are not fulfilled. Accordingly, the legal consequences[171] do not come into effect, which follows, by implication, from Article 3020.[172] The principal, on the other hand, has the opportunity to subsequently approve, or ratify, the contract, which can take place either expressively or conclusively.[173] In this regard, the Louisiana Civil Code does not state until which moment in time the principal can ratify the contract.[174]

If the principal does not ratify the contract, the agent is generally liable.[175] The author assumes that this provision is not only applicable in cases where the agent "exceeds his authority" (as one might expect if one construes the provision literally), but also when the agent does not have any authority. After all, exceeding the scope of a non-existent authority is the strongest breach of authority.

The plain language of Article 3019, which states that the agent "is personally bound to the third person with whom he contracts," may be interpreted to mean that the agent is actually becoming the contracting party of the third party.[176] However, most authors, in accordance with the common law, support an interpretation of the statute such that the agent is only answerable for damages.[177] The wording of Article 3019 ("is personally bound")[178] compared to that of Article 3017 ("binds himself personally for the performance

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170 *See* Schilken, *supra* note 165, at 120-21.

171 *See* discussion *supra* Part II.B.1.

172 *Cf.* LCC, art. 3020, rev. cmt. (b) (West 1997).

173 *See* LCC, art. 3020 (West 1997).

174 *Id.*

175 *See* LCC, art. 3019 (West 1997).

176 *See id.*

177 *Representation*, *supra* note 34, at 1149.

178 LCC, art. 3019 (West 1997).

of the contract," meaning that the agent becomes a contracting party)[179] indicates the accuracy of this interpretation. Court decisions assuming that the agent can be held liable for performance should not be given too much weight, as they date prior to the 1997 revision of the Louisiana Civil Code.[180]

Further, the agent is not liable, according to Article 3019, if the third "person *knew* at the time the contract was made that the [agent] had exceeded his authority."[181] It is uncertain what degree of knowledge is required in this regard; in particular, whether only actual knowledge suffices or if it is enough that the third party ought to have known of the lack of authority.[182] A broad interpretation, including both meanings, is favorable as the third party is not worthy of protection in both cases.[183]

2. *Germany*

If an agent contracts without authority or exceeds his authority, the requirements of an effective agency are not fulfilled. Therefore, the legal consequences[184] do not come into effect, which follows (by implication) from Paragraph 1 of Section 164 of the German Civil Code. The principal then has the opportunity to ratify the legal act,[185] with the consequence that he becomes the contracting party.[186] However, this applies to contracts only.[187] Unilateral legal acts are generally not approvable.[188] A contract concluded without authority is initially "pending void."[189] It comes into effect through ratification, which can also take place conclusively.[190] The abeyance, which exists before the ratification,

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179 LCC, art. 3017 (West 1997).

180 *See, e.g.*, Vordenbaumen v. Gray, 189 So. 342, 348 (La. App. 2d Cir. 1939). *See also* MORRIS & HOLMES, 8 LA. CIV. L. TREATISE § 33.09 n.6 (2012).

181 *See* LCC, art. 3019 (West 1997) (emphasis added).

182 *Representation*, *supra* note 34, at 1149-50.

183 *Id. See also* MORRIS & HOLMES, 8 LA. CIV. L. TREATISE § 33.09 (assuming that actual knowledge is required *de lege lata*, but stating all the same that broader interpretation would be preferable). Case law is unclear on this point, see, e.g., Boutin v. Rodrigue, 969 So. 2d 713, 717 (La. App. 3d Cir. 2007).

184 *See* discussion *supra* Part II.B.2.

185 German Civil Code, §§ 182, 184.

186 *Id.* § 177, para. 1.

187 RÜTHERS & STADLER, *supra* note 52, at 488-90.

188 *Id.* at 489-90.

189 German Civil Code, § 177, para. 1.

190 RÜTHERS & STADLER, *supra* note 52, at 488-89.

can also be resolved by the third party: first, the third party has the right to revoke the contract under Section 178 if it was in good faith regarding the lack of authority; second, the third party can demand a declaration by the principal whether he will ratify the contract.[191] In this case, the principal has two weeks' time to either ratify or disallow the contract. If he fails to act at all, the ratification is considered to have been refused.[192] In this case, as in the case of the actually refused ratification, the contract is ultimately void.[193]

If the contract is ultimately void, the third party has claims against the so-called *falsus procurator*.[194] It has to be determined whether the agent was aware of the lack of authority. In the first case, the third party can either demand performance or the payment of damages.[195] This provision constitutes a liability under guarantee, regardless of culpability.[196] If the agent, by contrast, did not know of the lack of authority, "he is obliged to make compensation only for the damage which the other party suffers as a result of relying on the authority."[197] Furthermore, the agent cannot be held liable at all, if the other party knew or ought to have known of the lack of authority.[198] Moreover, a restricted, legally competent agent is relieved of his liability if he acted without the approval of this legal representative.[199]

3. Comparative Analysis

In both Louisiana and Germany, a *falsus procurator* does not bind his principal. The latter can, instead, ratify the contract and become a contracting party as a result. Under German law, after the conclusion of the contract but before ratification, an abeyance occurs. However, the third party can resolve this state of uncertainty.[200] The Louisiana Civil Code does not expressively provide for the occurrence of such an abeyance. Rather, the

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191 German Civil Code, § 177, para. 2.

192 *Id.*

193 RÜTHERS & STADLER, *supra* note 52, at 489.

194 *Id.* at 490.

195 German Civil Code, § 179, para. 1.

196 RÜTHERS & STADLER, *supra* note 52, at 490-91.

197 *Id.* at 491-92. This is considered a damage of trust.

198 *Compare* German Civil Code, § 179, para. 3, sent. 1 *and* § 122, para. 2.

199 RÜTHERS & STADLER, *supra* note 52, at 492.

200 *See supra* notes 189-193 and accompanying text.

contract seems to be void but can be brought back into effect by the principal's ratification.[201] The result in both Louisiana and Germany is the same; however, the German solution appears to be more dogmatic and compelling, as it consistently and clearly demonstrates to all parties which state the contract is in and how long it will potentially last.

Both jurisdictions resemble each other with regard to the liability of the *falsus procurator.* The systems each differentiate situations in which the third party was, and was not, aware of the lack of authority. In the latter situation, the Louisiana Civil Code only allows the third party to hold the agent liable for damages,[202] whereas the German Civil Code gives the third party a choice to either demand damages or performance.[203]

Furthermore, the German Civil Code merely restricts liability when the agent did not know of the lack of authority. However, in Louisiana the agent is, at least in his relationship to third parties, not liable at all (which follows by implication from Article 3031).[204] In fact, the contract is enforceable with the principal.[205] Lastly, both codes deny liability if the third party knew of the lack of authority.[206]

Overall, it can be stated that the German Civil Code regulates the case of the *falsus procurator* with slightly more detail and with a different emphasis. It provides more enhanced rights to the third party than the Louisiana Civil Code does in that the third party can demand performance (instead of merely damages) and can hold the agent liable even if he is unaware of the lack of authority. The primary difference between the German Civil Code and the Louisiana Civil Code is that, in Louisiana, the principal—in a situation where the agent is unaware of the lack of authority—is bound to perform, and the agent is not liable. It is obvious that the Louisiana Civil Code, in not holding the agent liable, strengthens his rights, even if he acts without authority. On the other hand, in Germany the rights of the principal are reinforced by not compelling him to perform.

It is difficult to determine which solution is preferable. One

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201 *See supra* note 173 and accompanying text.

202 *See supra* notes 176-180 and accompanying text.

203 *See supra* notes 194-195 and accompanying text.

204 *See* North, *supra* note 4, at 322.

205 *Id. See also* LCC, art. 3031 (West 1997).

206 *See supra* note 198 and accompanying text.

might argue that in most situations the agent could have known that the authority has been terminated. Nevertheless, one must also take into account that it is the principal's duty to inform the agent of the authority's termination. More importantly, the principal intentionally broadens his legal sphere by granting authority to the agent. He is the main beneficiary of the division of labor. Thus, it seems reasonable to suppose that he should also bear the risks and possible disadvantages of this division. Therefore, the author deems it more appropriate to hold the principal liable than the agent. In sum, Louisiana's solution seems slightly preferable, even though there are reasonable arguments for the German alternative.

E. The Agent's Conflicts of Interests and the Principal's Protection from Abuse

1. Louisiana

Article 2998 contains a prohibition against contracting with oneself and thus, serves to prevent potential conflicts of interests.[207] However, multiple representations, a subset of self-dealing where an agent represents two different parties other than himself and concludes a contract between them, are not covered by Article 2998. On the contrary, multiple representations are expressly allowed under the condition that the agent notifies both parties of the multiple representations.[208] In this regard, scholars have demanded that the agent support the causes of both parties with the same loyalty and not favor either of the two.[209] This norm appears reasonable even though it reaches beyond the code's provisions. Lastly, the legal consequence of a contract made in violation of Article 2998 must be established. The contract may either be void or just voidable by the principal. As Article 2998 is intended to protect the principal, the latter solution is preferable, as it gives the principal the ability to choose between invalidity and effectiveness of the contract.[210]

As expected, Article 2998 contains two exceptions to the

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207 LCC, art. 2998 (West 1997).

208 *See* LCC, art. 3000 (West 1997).

209 *Representation*, *supra* note 34, at 1134–35.

210 *See* North, *supra* note 4, at 310–11.

prohibition to contract with oneself[211]: (1) self-dealing,[212] so long as the principal authorizes it, is allowed[213] or (2) if the agent is merely fulfilling a duty to the principal in making such contract.[214] Thus, the settlement of a money debt that the principal owes the agent is subsumed under the latter exception found in Article 2998.[215]

Under Louisiana law, an abuse[216]—a situation in which a legal transaction is covered by the authority (legal potency) but in which the agent was not allowed to act this way in the internal relationship (legal allowance)—of authority does exist, as the code distinguishes between instructions in the internal or the external relationship.[217] In such a case, the agent is not a *falsus procurator*, but rather, the principal is legally bound by the agent's actions. The risk of abuse is thus borne by the principal. Exceptions to this rule do not appear in the code, judicial interpretation and action, or related scholarship. The agent, on the other hand, is answerable to the principal for the resulting loss.[218]

2. Germany

According to Section 181 of the German Civil Code, contracting with oneself is prohibited.[219] It can be differentiated from self-dealing and multiple representations.[220] The provision serves to protect the different principals from conflicts of interests of the agent.[221] A violation of Section 181 leads, dogmatically, to a breach of the authority, thus the transaction is pending void and can either be ratified[222] by the principal or not.[223]

Self-dealing is only permitted, in accordance with Section 181, if the principal consents[224] or if "the legal transaction consists

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211 LCC, art. 2998 (West 2012).

212 Self-dealing occurs when the agent contracts in name of the principal and himself in his own name.

213 *Representation*, *supra* note 34, at 1132; LCC, art. 2998 (West 2012).

214 *Representation*, *supra* note 34, at 1132–33; LCC, art. 2998 (West 2012).

215 *Representation*, *supra* note 34, at 1133.

216 *See* discussion *supra* Part II.B.1.

217 *Id.*

218 LCC, art. 3008, para. 1 (West 2012).

219 German Civil Code, § 181.

220 RÜTHERS & STADLER, *supra* note 52, at 474.

221 *Id.* at 475.

222 *See* discussion *supra* Part II.D.2.

223 RÜTHERS & STADLER, *supra* note 52, at 475.

224 *Id.* at 475.

solely in the performance of an obligation."[225] Lastly, it is widely assumed that the prohibition does not come into effect—in the way of a "teleogical reduction" of the provision[226]—if the legal transaction solely gives the principal a legal advantage.[227]

Like the Louisiana Civil Code, under the German Civil Code, the principal bears the risk of abuse.[228] The agent, as is expected, usually makes himself answerable for damages.[229] However, if the third party recognizes that the agent abused his authority, he is not worthy of protection.[230] This raises the issue of collusion, where the agent and third person act with mutual consent to the harm of the principal.[231] Such a legal transaction is void as it is contrary to public policy.[232] Similarly, evidentness must also be addressed, which occurs when the third party has actual knowledge of the abuse of authority or the abuse is otherwise evident. In such a situation, the agent acts without authority and the legal transaction is either voidable under Section 242 (according to the *Bundesgerichtshof*)[233] or void under Section 177 (according to most commentators).[234]

3. Comparative Analysis

In both legal systems, contracting with oneself is generally prohibited. In Louisiana, however, multiple representations are allowed if the agent notifies both parties, whereas in Germany they are forbidden. However, this difference is not significant because the respective principals may revoke authorization upon notification. Further, both codifications provide similar exceptions to the prohibition of self-dealing: permission and acting to perform

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225 *Id.*

226 *See supra* note 121 and accompanying text.

227 RÜTHERS & STADLER, *supra* note 52, at 476.

228 *Id.* at 477-78. For example, he is bound to the third party when the agent exceeds his internal instructions. *See* discussion *supra* Part II.E.1.

229 RÜTHERS & STADLER, *supra* note 52, at 477-78.

230 *Id.* at 478.

231 Schilken, *supra* note 165, at 157-58.

232 RÜTHERS & STADLER, *supra* note 52, at 478.

233 Bundesgerichtshof [BGH] [Federal Court of Justice] 1999, NJW [Neue Juristische Wochenzeitschrift] [New Legal Weekly Review] 2283, (2284), 1999 (Ger.); BGH NJW-RR [NJW-Rechtsprechungs-Report Zivilrecht] [NJW Civil Law Reporter] 247, 248 (2004); 50 BGHZ [Entscheidungen des Bundesgerichtshofes in Zivilsachen] [Decisions of the BGH in civil law matters] 112. *See also* Schilken, *supra* note 165, at 161-62.

234 *Id.*

an obligation of the principal.[235] Germany goes a little further by allowing self-dealing if the legal transaction solely gives the principal a legal advantage.

Furthermore, the codes are similar with regard to abuse of authority: in both jurisdictions, the principal bears the risk of abuse and the agent is merely answerable to damages in the internal relationship. Moreover, the German jurisdiction provides a different legal consequence if the third party knows that the agent abuses his authority. Then, the contract is void and the principal is not legally bound. Apparently, such an exception does not exist in Louisiana.

III. COMMONALITIES AND DIVERGENCES IN THE TWO REGIMES

A. Structural and Contextual Similarities

The law of agency in both Louisiana and Germany contain many commonalities. Both jurisdictions recognize the difference between the underlying legal transaction and authority, demand similar criteria of an effective agency, and resemble each other as to the legal consequences of an agency. In both cases, the form requirements of the authority are similar. Authority can also be terminated in the same way. Further, both systems acknowledge authority by legal appearance and apparent authority.

Both jurisdictions have enacted statutes that ensure that a *falsus procurator* does not bind his principal, but rather gives the latter the opportunity to ratify the legal transaction. If ratification is not granted, the agent is liable to the third party. Also, both regimes emphasize whether the third party possessed actual knowledge of the lack of authority. Moreover, both legal systems prohibit contracting with oneself and provide similar exceptions to this rule. Lastly, both jurisdictions acknowledge the possibility of creating a discrepancy between legal allowance and legal potency through instructions in the internal relationship, letting the principal bear the risk of abuse.

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235 The exception "acting to perform an obligation of the principal" in Article 2998, as well as the whole provision, is based upon its Greek, German, and Italian predecessors. *See Representation*, *supra* note 34, at 1132–33. *See also* LCC, art. 2998, rev. cmts. (West 1997).

B. Structural and Contextual Differences

However, analysis of the Louisiana and German codes unearths some significant differences, as well. First, the actual placement of agency regulations and the varying degrees of separation of underlying legal transactions and agency must be noted. Louisiana, in contrast to Germany, regulates agency and mandate jointly. In doing so, it is more difficult to strictly separate the two. This becomes self-evident, as many provisions that one would expect to find in Chapter 1, *Representation*, of Title XV are found in Chapter 2, *Mandate*. In short, the Louisiana Civil Code conflates both legal regimes, intertwining provisions related to mandate and authority.

Secondly, disclosure is not a requirement of an effective agency in Louisiana. Thus, the principal, alongside the agent, is bound by the agent's actions even if the latter does not act in the former's name. In Germany, however, disclosed agency (also called indirect representation) only binds the agent. It is not easy to determine the better or more reasonable approach at this point. German law reaches a result similar to that of Louisiana: the agent can act as a commissionaire,[236] contracting in his own name but being obliged to cede the arising claims to the consignor. Thus, the German solution seems preferable as it distinguishes more clearly between agency and indirect representation, allowing the principal to choose whether he wants to be bound if the agent does not disclose his status.

Thirdly, the authority by toleration is surprisingly not acknowledged by the Louisiana Civil Code. It is submitted that Louisiana courts would construe such an authority as an implied authority and treat in the same fashion as actual authority. Additionally, under Louisiana law multiple representations are, in contrast to German law, basically permitted. This fact, though, only leads to marginal differences. Also, exceptions (such as collusion and evidentness)[237] to the general rule that the principal bears the risk of abuse, do not exist in the Louisiana Civil Code. On that account, the author proposes to apply the German exceptions to Louisiana's legal civil system, as they are highly reasonable and would constitute a suitable completion of the Louisiana Civil Code's law of agency.

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236 Handelsgesetzbuch [HGB] [Commercial Code] §§ 383–406 (Ger.).

237 *See supra* notes 230-234 and accompanying text.

Lastly, some important differences can be found when an agent acts without authority. Here, the German Civil Code grants more rights to the third party against the agent, whereas in Louisiana the liability of the principal is emphasized. As detailed above, there are valid arguments for both statutory schemes, with Louisiana's solution seeming slightly preferable, as the principal should bear both advantages and disadvantages of the division of labor in this regard.

IV. CONCLUSION

Among a multitude of similarities, there are nevertheless some striking differences between German and Louisiana agency law. Both codifications are in rich in detail, but, as lies in their nature, require some concretization in order to gain the necessary clarity and to contribute to a complete and workable legal system. Courts and commentators have successfully supplemented and built upon existing enactments. Nonetheless, it would add to the coherency and substance of the codes if some of the creations, constructions, and interpretations of the courts and scholars were adopted by the legislatures.

In Germany, it may be helpful to include the authority by toleration and the apparent authority in the Civil Code, as these constructions of the *Bundesgerichtshof* seem to play a very significant role in the practice of law. In light of the fact that Germany is a country characterized by a high degree of legislation, it is questionable that only some forms of authority by legal appearance are codified in the German Civil Code, while the most important forms remain uncodified. Even though such adoptions may not "change" the law, they would clarify it and help courts and litigants find solutions based directly on the code (rather than merely case law) for contemporary problems, such as apparent authority when purchasing on the auction site eBay using another individual's account.[238]

In Louisiana, the Louisiana Civil Code should be amended so as to exclude undisclosed agency. While proposition seems drastic upon first glance, German law demonstrates that a practical solution exists: an agent can act as a commissionaire, contracting in

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238 *See, e.g.*, BGH VuR [Verbraucher und Recht] [Consumer and Law] 347 (2011); Georg Borges, *Rechtsscheinhaftung im Internet [Liability for authority by legal appearance in the internet]*, NJW 2400 (2011).

his own name while still being obliged to cede the arising claims to the consignor. By doing this, the principal maintains the ability to choose whether he wants to be bound if the agent does not disclose his status. Also, the third party will not be unpleasantly surprised (as its direct contractor would always be) when dealing with the commissionaire-agent.

Furthermore, Louisiana may consider implementing the above-mentioned exceptions to the risk of abuse and also might find a regulation for authority by toleration. Lastly, legislators could decide on a timeframe as to how long the principal can ratify a contract pending void, a rule that might lower the uncertainty of the third party.

Both codes—with the help of courts and commentators —are capable of providing a thorough system of agency law, though the German Civil Code seems to be, arguably, more coherent and persuasive than the Louisiana Civil Code.