

Section 3: Indirect Representation

Article 3:301: Intermediaries not acting in the name of a Principal

- (1) *Where an intermediary acts:*
 - (a) *on instructions and on behalf, but not in the name, of a principal, or*
 - (b) *on instructions from a principal but the third party does not know and has no reason to know this,*
the intermediary and the third party are bound to each other.
- (2) *The principal and the third party are bound to each other only under the conditions set out in Articles 3:302 to 3:304.*

COMMENT

A. Indirect Representation in General

Indirect representation, as dealt with in Section 3, is defined in Article 3:301. The situations covered by this provision are distinguished from those treated in Section 2 on direct representation by one decisive criterion: the indirect “agent” does not act in the name of his principal, either expressly or impliedly or apparently (cf. Article 3:201). In order to mark clearly the difference, the indirect “agent” is designated as “intermediary”.

However, under the exceptional circumstances set out in Articles 3:302 to 3:304, indirect representation may acquire certain effects of direct representation.

B. Undisclosed “Agency”

In the case described in paragraph (1)(a), the third party may or may not know that the intermediary is acting on behalf of a principal. The contract concluded by the intermediary binds him personally to the third party, since the intermediary did not act in the name of the principal, as is required under Articles 3:202 and 3:201.

Illustration: Customer C instructs her bank B (or a dealer in securities D) to buy 1,000 shares. B (or D), acting in their own name, purchase the shares from seller S. In the eyes of the Civil Law countries, B (or D) is a commission agent. No direct relationship between C and S arises.

Under normal circumstances, the third party must be protected from the imposition of the principal, a stranger, as a contracting party.

The situation dealt with here is comparable to the case in which the agent fails to reveal the identity of his principal, regulated in a corresponding way by Article 3:203.

In the case described in paragraph (1)(b), the third party does not even know or have reason to know that the intermediary has acted on behalf of a principal.

C. Internal Intermediary-Principal Relationship

In both subparagraphs (a) and (b) it is, as a rule, left to the internal relationship between the intermediary and his principal as to how the intermediary transfers the benefits which he was instructed to obtain to the principal, or how he is to be relieved from the obligations which he has incurred vis-à-vis the third party.

NOTES

1. Intermediary and third party bound

The general rule that the agent and the third party are bound to each other in case of indirect representation is accepted everywhere in Europe. Differences exist, however, on the question of a contractual relationship between the principal and the third party.

2. Geneva Convention on Agency

Although the Geneva Convention on Agency does not provide a definition of indirect representation, it describes the conditions for a contractual relationship between agent and third party similarly to Article 3:301 (art. 13(1)).

3. Undisclosed principal: third party and principal bound

Under the undisclosed principal doctrine of the COMMON LAW the principal may sue the third party on a contract made by an agent on its behalf, if the agent was acting within the scope of his authority (*Siu Yin Kwan v. Eastern Insurance Co. Ltd.* [1994] 2 W.L.R. 370, 376 (P.C.)). Equally the third party may sue the undisclosed principal.

The Common Law does not prescribe any further conditions for the direct relationship between the undisclosed principal and the third party comparable to the requirements of Articles 3:302 - 3:304.

4. Indirect representation: principal and third party generally not bound

Comparable rules do not exist in the countries of Continental Europe. In ITALY and SPAIN the general rule is laid down that if the intermediary was acting in his own name there is no direct relationship between the third party and the principal (Italy: CC art. 1705(2) first sent.; Spain: CC art. 1717 (1)).

Nevertheless, in a number of specific situations direct relations between the principal and the third party are recognized also in Continental European countries. Except for THE NETHERLANDS (*infra* Article 3:302, note 2), however, no country provides a full set of conditions for direct relations between principal and third party. Typically the principal's right to sue the third party, on the one hand, and the third party's right to sue the principal, on the other, are regulated differently.

Article 3:302: Intermediary's Insolvency or Fundamental Non-performance to Principal

If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the principal, or if prior to the time for performance it is clear that there will be a fundamental non-performance:

- (a) on the principal's demand, the intermediary shall communicate the name and address of the third party to the principal; and
- (b) the principal may exercise against the third party the rights acquired on the principal's behalf by the intermediary, subject to any defences which the third party may set up against the intermediary.

For Comment, see Article 3:303.

NOTES

1. Geneva Convention on Agency

Generally speaking, Article 3:302 corresponds to the Geneva Convention on Agency (art. 13). Differing from Article 3:302 lit. a, under the Geneva Convention the intermediary's duty to reveal the third party's name is made dependent upon the third party's non-performance of its obligations towards the intermediary (art. 13(5)).

2. Principal may assume rights against third party if intermediary fails to perform

The law of THE NETHERLANDS comes closest to Articles 3:302 - 3:304. According to BW art. 7:420 the principal can assume the intermediary's rights under the main contract, if the intermediary does not perform his obligations towards the principal or goes bankrupt or if the third person does not perform its obligations. The duty to reveal the third party's name comparable to Article 3:302 lit. a is laid down by para. (3).

3. Principal may assume rights only if intermediary insolvent

BELGIAN and LUXEMBOURG law provide that in the case of the intermediary's bankruptcy the principal is entitled to proceed directly against the third party, but it may claim only any outstanding part of the purchase price of the goods which the intermediary had sold on the principal's behalf (Belgium: New Bankruptcy Code of 1997 art. 103 (2); Luxembourg: CCom art. 567 (2)).

If a DANISH or SWEDISH commission agent has acted in the course of his business (*handelskommission*), the principal may claim directly from the third party if the latter has failed to fulfil its obligations in due time or the commission agent has

failed to render due accounts or has acted fraudulently against the principal or has been adjudicated bankrupt (Statute on Commission Agents § 57 (2)).

In ITALY and PORTUGAL the principal is generally entitled to exercise the intermediary's claims arising from the execution of his mandate against third persons (Italy: CC art. 1705 par. 2 sent. 2; Portugal: CC art. 1181 par. 2).

4. Action oblique

In FRANCE, BELGIUM and LUXEMBOURG, the principal may sue the third party by an *action oblique* (CCs art. 1166). If the agent fails to proceed against the third party, the principal may exercise the agent's rights, but it may not acquire the results of that action for itself since such an action is for the benefit of the agent (Cass.civ. 16 June 1903, D.P. 1903.I.454; Cour Paris 12 June 1946, D. 1947.I.112).

In general, many French and Belgian legal writers are in favour of direct relations and corresponding direct actions (*action directe*) between the principal and the third party if the agent is a commission agent (*Starck* 164 ff.; *Ripert/Roblot* no. 2635, 2672; Belgium: *van Gerven* 488 ff.; *Simont* 129 ss.). The courts, however, explicitly disallow such actions (France: Cass.civ. 20 July 1871, D.P. 1871.I.232; Luxembourg: Cour Supérieure de Justice 19 March 1920, Pas. 11, 84).

5. Undisclosed principal

The undisclosed principal doctrine of the COMMON LAW enables the principal to sue the third party without any conditions (*supra* Article 3:301 no. 3). A similar rule applies in DENMARK and SWEDEN when a commission agent is not acting in the course of his business (i.e., in a *civilkommission*). The principal may then proceed against the third party whenever it wishes (Statute on Commission Agents § 57 (1)).

Article 3:303: Intermediary's Insolvency or Fundamental Non-performance to Third Party

If the intermediary becomes insolvent, or if it commits a fundamental non-performance towards the third party, or if prior to the time for performance it is clear that there will be a fundamental non-performance:

- (a) on the third party's demand, the intermediary shall communicate the name and address of the principal to the third party; and*
- (b) the third party may exercise against the principal the rights which the third party has against the intermediary, subject to any defences which the intermediary may set up against the third party and those which the principal may set up against the intermediary.*

COMMENT

Comments to Articles 3:302 and 3:303:

A. Exceptional Direct Relationship Between Principal and Third Party

Under certain narrow conditions, a direct relationship can exceptionally be established between the principal and the third party according to Articles 3:302 to 3:303. These provisions establish two rules which "disregard" the initial separation between principal and third party which results from Article 3:301. The distinction between Article 3:302 and Article 3:303 depends upon the fact to whom a performance by the intermediary is outstanding: if vis-à-vis the principal, Article 3:302 applies; if vis-à-vis the third party, Article 3:303 applies. If performances are outstanding to both principal and third party, both provisions apply.

B. Conditions for Direct Relationship

The conditions on which the application of Articles 3:302 and 3:303 depends are circumscribed by the opening words which are in substance identical in the two provisions. The first alternative is that the intermediary is insolvent. Then he can no longer (fully) perform his obligations to either the principal or the third party. The second ground for establishing a direct relationship between principal and third party is a fundamental non-performance by the intermediary. An anticipated future fundamental non-performance is to be treated in the same way. The reasons are in essence the same as in case of the intermediary's insolvency.

The intermediary's fundamental non-performance suffices; the intermediary's contracting party (be it his principal or the third party) need not take court action against the intermediary or even attempt enforcement of a judicial decision against him.

C. Two Major Consequences

Both Articles 3:302 and 3:303 provide for two measures. First, the intermediary must disclose to his principal or to the third party, respectively the name and address of the third party or of the principal, respectively, unless the name and address of the "economic opposite" is already known. Since the intermediary cannot and need not know whether this name and address is already known to the principal or the third party, respectively, the latter must make a request for disclosure.

Second, the principal or the third party may exercise against the respective "economic opposite" the rights which the intermediary has acquired against that "opposite". Of course, the exercise of these rights is subject to any defences which the "opposite" may have against the intermediary, cf. Comment E, below.

D. Remedy for Non-Disclosure of Name and Address

Which remedies are available to the principal and the third party if, in violation of subparagraphs (a) of Articles 3:302 and 3:303, the intermediary does not disclose the name and address of the "economic opposite"? Damages may be awarded but may not be recoverable from the intermediary, especially if he is insolvent. An order to disclose the name may be the only effective remedy.

E. Preservation of Defences

The establishment of a direct relationship between principal and third party comprises the transfer not only of the intermediary's rights vis-à-vis the third party and the principal. These latter parties must also be allowed to raise the defences which originally they had acquired, vis-à-vis the intermediary, against their economic opposite. This is provided for in subparagraphs (b) of both Articles 3:302 and 3:303.

The last phrase of Article 3:303 has no equivalent in Article 3:302. This is explained by the fact that the principal has a pre-existing underlying relationship with the intermediary, whereas the third party does not. If the intermediary has a claim against his principal, the principal may rely on defences against its intermediary. This position is to be preserved if under Article 3:303 the third party may raise claims against the principal.

NOTES

1. Geneva Convention on Agency

Under the Geneva Convention on Agency the third party's right to sue the principal is admitted under the same conditions as the corresponding right of the principal to sue the third party (art. 13 (2) lit. b, (3)). Again, however, the Geneva Convention differs from Article 3.303 as to the conditions under which the third party may demand to be informed about the principal's name. Under the Convention the agent has to reveal the

principal's identity only if his own non-performance is due to the principal's failure to perform (art. 13 (4)).

2. Third party may proceed against principal if agent has not performed

DUTCH law is closest to Article 3:303. The third party may exercise the intermediary's rights against the principal in case of the intermediary's bankruptcy or non-performance (BW art. 7:421 (1)). Paragraph 2 corresponds to Article 3:303 lit. a.

Under SPANISH commercial law the third party may be entitled to sue the principal in a very specific situation, namely if a factor, who according to CCom. art. 284 should act in the principal's name, did in fact act in his own name (CCom art. 287).

A similar, but more general rule prevails in FRANCE. Indirect representation is treated as a special case of simulation (*prête-nom*, cf. CC art. 1321). If the third party acquires knowledge of the fact that the intermediary, its contracting party, was acting on behalf of a principal, it may bring a declaratory action for a judicial statement of simulation (*action en déclaration de simulation*). On the strength of such a judicial decision, the third party has the choice either to rely on the hidden contract and sue the principal or, on the other hand, sue the agent on the basis of the "simulated" contract. The third party may not act against both the agent and the principal. By contrast, the principal may not proceed directly against the third party on the basis of the dissimulated act.

3. Undisclosed principal

Under the undisclosed principal doctrine of the COMMON LAW, the third party may sue the principal without any preconditions (see Note 3 to Article 3:301 above). Therefore the third party has the choice either of proceeding against the principal or against the agent.

4. Third party may never proceed against principal

In DENMARK and SWEDEN, in general the third party may not proceed against the principal.

Article 3:304: Requirement of Notice

The rights under Articles 3:302 and 3:303 may be exercised only if notice of intention to exercise them is given to the intermediary and to the third party or principal, respectively. Upon receipt of the notice, the third party or the principal is no longer entitled to render performance to the intermediary.

COMMENT**A. Procedural Details**

Article 3:304 lays down the procedure for transferring, or delegating the exercise of, the rights which had accrued to the intermediary, and the point in time when the transfer or delegation becomes effective.

B. Insolvency Proceedings not Prejudiced

The provisions of Articles 3:302 to 3:304 do not prejudice the position of principal and/or third party in the intermediary's insolvency, especially the fate of assets furnished to the intermediary. This is to be decided by national law, either by the general rules on insolvency or under specific rules, for example on e.g. commission agents.

NOTE

Since only the Geneva Convention on Agency and the DUTCH BW provide for rules comparable to Articles 3:302 and 3:303, only these instruments contain rules on previous notification. Geneva Convention art. 13(3) corresponds almost literally to Articles 3:304. Also under Dutch law the principal may not proceed against the third party without having notified the latter and as well the intermediary of this intention (BW art. 7:420(1)). Also in the reverse case of the third party's action against the principal, written notification to the intermediary and to the principal is necessary (BW art. 7:421 (1)).

