Medieval and Post-Medieval Roman Law

In the Roman system of common law (*ius commune*) of the Middle Ages and the later periods, the legal idea of agency is roughly equivalent to the concept of *mandatum* (mandate). Its most important legal foundations are contained in Justinian's *Institutes* (I.3.26), *Digests* (D.17.1), and *Codex* (C.4.35). The mandate is an agreement in which the agent (*mandatarius*) promises the principal (*mandator*) to perform a service without remuneration. As an *officium gratuitum exhibendum* (freely performed service), such an agreement must be sharply distinguished from paid contractual activity (*locatio conductio*, service for hire; Franciscus Accursius, gloss "mandatum" to I.3.27[26].pr., p. 475). In their mixtures of *ius commune* and local or regional elements, local and regional legal systems of the Middle Ages and early modernity did not always maintain a sharp distinction between paid and unpaid contractual activity; thus, for instance, a contract for services, according to the Prussian Civil Code of 1794 (ALR), could either feature or not feature compensation (1.13.74 et seq. ALR). Such indistinctness was furthered by the existence of a right, acknowledged already during Roman antiquity, to perform unpaid contracts for services in return for an honorarium (*salarium*). In fact, the agent could even sue for an honorarium promised in advance, so long as the preexisting agreement could be demonstrated with sufficient certainty (C.4.35.17).

Only a few of the nineteenth century's codifications pushed the contract back toward the provision of unpaid services (§ 1295 Bürgerliches Gesetzbuch für das Königreich Sachsen [Civil Code for the Kingdom of Saxony], 1863; § 662 Bürgerliches Gesetzbuch Deutschland [German Civil Code, BGB], 1896). In such readings, mandates were to be distinguished from contractual services provided against payment, as occurring under contracts for work and labor or contracts for services, both of these two paid contracts combined in the *locatio conductio operis vel operarum* in Roman common law. Other law books, however, tended to integrate paid and unpaid contractual services (*mandat* in art. 1986 Code Civil des Français, 1804; *mandato* in art. 1739 Codice Civile del Regno d'Italia, 1865, and art. 1709 Codice Civile Italiano, 1942; *mandato* in art. 1711 Spanish Código Civil, 1889). In this manner, mandates and paid contractual activities emerged together as subsets of a unified concept of agency contract law (§§ 1002, 1004 Allgemeines Bürgerliches Gesetzbuch Österreich [Austrian Civil Code, ABGB], 1811).

The *mandatum* is a consensual transaction. It is thus like purchase (*emptio venditio*) or paid contractual activity (*locatio conductio*), an agreement that may be concluded informally (I.3.22; Samuel Stryk, to I.3.27[26].pr., p. 465, with reference to D.17.1.18). However, the general rule that no party may dissolve an agreement once concluded, without instituting a further agreement (*pacta sunt servanda* or *pacta custodiantur* (agreements must be kept); see D.2.14.1.pr.; 1.35.1 *Liber Extra* [Book Outside], 1234) applies only under limited circumstances. As long as the agent has not yet carried out the contracted activites, either party may dissolve the agreement (I.3.26.9). An explanation for this ran as follows: By way of exception (*speciale est in mandato*), conclusion of an agreement does not automatically constitute a mutually binding commitment (*non statim hinc inde nascitur obligatio*), since the transaction does not automatically constitute an interest in its execution (Franciscus Accursius, gloss "evanescit" to I.3.27[26].9, p. 479). This explanation goes further than the Roman position (D.17.1.8.6), which states that a complaint may not be grounded in the agreement, until an interest in its execution emerges. This postponement is consistent with the fact that Roman law invariably describes transactions of title as suits. Hence it is no great step to trace the nonactionable back to the nonbinding. Transactions involving paid contractual activity, in contrast, are immediately binding; the interrelationship between contractual activity and remuneration clearly already constitutes, in and of itself, sufficient interest in completion of the agreement. The principal, however, is always protected against damages stemming from the agent's withdrawal. Only the principal may freely revoke; the agent is liable for damages, should she or he revoke or terminate the agreement without reason and at an infelicitous time (§ 1021 ABGB; § 671 BGB). This is part and parcel of the logic of commitment by the emergence of an

interest. As soon as an interest arises, a loss and thus a tort also becomes possible.

Although the agent receives no remuneration, the *mandator* can sue him or her for implementation (as long as the agreement is not dissolved from one or the other side). The agent is also liable for damages, should she or he wilfully *(dolo)* or negligently *(culpa)* fail to carry out the affair as promised (Johannes Voet, 17.1.9, p. 325; art. 1992 Code Civil; 1.13.54 et seq. ALR). A person who only shares advice, however—that is, someone who advises some action in another's interest and not in his or her own or that of some third party—is not bound by mandate (I.3.26.6). If the advice-giver advises falsely out of malice (*dolus*), however, then because of this malice she or he must make recompense for any damages suffered (Franciscus Accursius, gloss "ex consilio" to I.3.27[26].6, p. 477). One who is not freely handling some affair but has rather contracted his or her services for payment is no less bound to his or her word than an agent and is liable for any breach of duty.

The agent accounts for and transfers to the principal that which has been accomplished or obtained for the latter (1.13.61 et seq. ALR; art. 1993 et seq. Code Civil). The person who handles an affair in exchange for payment is likewise so obliged. The principal reimburses the agent for such costs as have arisen in the course of carrying out the former's business (D.17.1.12.7–9; Johannes Voet, 17.1.10 et seq., pp. 327–330; art. 1999 et seq. Code Civil; 1.13.65 et seq. ALR). This balancing of accounts or reimbursal is also necessary in the case of paid contractual activity. There, however, reimbursal is not always clearly separable from payment for services.

In commercial intercourse, in particular, there arose ancillary to *mandatum* and *locatio conductio* legal statuses that included, besides elements of agency, variously weighted elements of credit (*mutuum* and *faenus*) or association (*societas*). An example of this would be an agreement between two traders, whereby one made capital available and the other used it to make a long-distance trade journey. Trading companies sprang forth from precisely such arrangements (2.8.614 et seq. ALR; art. 18 et seq French Code de Commerce 1807). Consignment, too, developed out of agency contract law (art. 91 et seq. French Code de Commerce; §§ 360 et seq. Allgemeines Deutsches Handelsgesetzbuch [General German Code of Commerce, ADHGB], 1861), particularly out of *mandatum* and its accompanying idea of the honorarium, therefore art. 92 of the French Code de Commerce refers to art. 1984–2010 of the Code Civil [*mandat*]).

The intertwined roots of agency and the trading company may still be seen today in the limited partnership (*société en commandite* in art. 23 et seq. French Code de Commerce; *vennootschap en commandite* in art. 14, 19 et seq. Dutch Wetboek van Koophandel [WvK], 1838; *Kommanditgesellschaft* in §§ 161 et seq. Handelsgesetzbuch [German Code of Commerce, HGB], 1897). Here, we have a group of managing partners and a group of limited partners, who are excluded from management. The latter are solely responsible for injecting capital and are similar to the principal under agency contract law insofar as they consign their affairs to the general partners. The silent partnership, too, functions in a similar fashion (*sociedade tacita* in art. 565 et seq. Portuguese Código Commercial, 1833; *handelingen voor gemeene rekening* in art. 57 et seq. WvK; *stille Gesellschaft* in §§ 335 et seq. HGB 1897 [§§ 230ff. HGB 1985]). There, the investor remains still further in the background, as it is not the partnership that conducts affairs—that is, uses the capital—and appears in public but solely the receiver of the capital; therein lies the affinity to credit as well.

Often, in order to handle affairs for the principal, the agent must undertake contracts or other legal transactions. To begin with, Roman common law recognized no absolute liability on the part of the principal for the conduct of the agent. Rather, the counterparty could regard only the agent as a contractual partner. Entitlements, too, were gained by the agent fundamentally for him- or herself. Only in exceptional cases did Roman law recognize an obligation or a direct acquisition of rights on the part of the principal (and this, indeed, already in antiquity). Barring such exceptional cases, the counterparty had only the hope that the principal would recognize and fulfill the terms of the transaction and that the agent would actually transfer the received goods or services to the principal. The better the agent could legitimize him- or herself, the greater would be the counterparty's trust in a successful execution of the business at hand. Notary practice in the Middle Ages and early modernity developed reliable warrants of attorney, through which the principal promised to acknowledge the agent's transactions. In this practice, the principal could formulate his or her covenant as narrowly or broadly as desired; she or he could limit it to a single, special transaction or to a category of transactions or else could extend it to all his or her affairs; she or he could set boundaries with respect to time or place or to the person of the counterparty.

A particularly large number of such documents have been maintained in Augsburg, where the notary Johann Spreng (1524–1601) was the agent for the great trader families of Augsburg (the Fuggers, Welsers, and others), themselves active around the world. Such engagements to recognize the affairs of one's agent as one's own led to development of the concept, in early modernity, that those transactions completed by an agent acting as proxy for a principal were legally without mediation—both for and against the principal (1.13.85 ALR; § 164, 167 BGB). The agent, then, was no longer personally bound to the counterparty, nor could she or he acquire rights respecting the counterparty. Proxy's ancestry in the agency relationship

continues, indeed, to make itself felt, as numerous law codes deal with proxy and agreement together (*Vollmacht-sauftrag* in 1.13.5 et seq. ALR; *mandat* or *procuration* in art. 1984 et seq. Code Civil; *mandato* in art. 1709 et seq. Código Civil; *Bevollmächtigungsvertrag* in §§ 1002 et seq. ABGB). It is only slowly that a distinct treatment of proxy is beginning to develop (§ 788 Civil Code for the Kingdom of Saxony, §§ 164 et seq. BGB; art. 211 et seq. Greek Civil Code, 1940; art. 1387 et seq., 1704 Italian Codice Civile, 1942).

[*See also* Accursius, Franciscus; Breach of Contract, *subentry on* Medieval and Post-Medieval Roman Law; Justinian; Notary; *and* Tort, *subentry on* Tort, Negligence, and Delict.]

BIBLIOGRAPHY

PRIMARY WORKS

Accursius, Franciscus. *Domini Iustiniani imperatoris institutionum libri IIII. Francisci Accursii glossis illustrati*. Lyon, France: Bartholomaeus Vincentius, 1577.

Stryk, Samuel. *Domini Iustiniani sacratissimi principis institutionum libri quatuor . . . notis maxime necessariis explanati*. Halle, Germany: Johannes Fridericus Zeitler, 1726.

Voet, Johannes. *Commentarius ad pandectas: Tomus tertius, ejusdem commentarii continens supplementum*. Halle, Germany: Johannes Jacobus Curtius, 1778.

SECONDARY WORKS

Müller, Ulrich. *Die Entwicklung der direkten Stellvertretung und des Vertrages zugunsten Dritter: Ein dogmengeschichtlicher Beitrag zur Lehre von der unmittelbaren Drittberechtigung und Drittverpflichtung*. Stuttgart, Germany: W. Kohlhammer, 1969.

Nörr, Dieter, and Shigeo Nishimura, eds. *Mandatum und Verwandtes: Beiträge zum Römischen und Modernen Recht*. Berlin: Springer-Verlag, 1993.

Zimmermann, Reinhard. *The Law of Obligations: Roman Foundations of the Civilian Tradition*. Cape Town, South Africa: Juta, 1990.

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