

German Article: The Law Applicable to Voluntary Agency in a Comparative Perspective

Simon Schwarz (Hamburg) has published a comprehensive article on “**The Law Applicable to Voluntary Agency in a Comparative Perspective**” (“*Das Internationale Stellvertretungsrecht im Spiegel nationaler und supranationaler Kodifikationen*”) in the latest issue of the “*Rabels Zeitschrift für ausländisches und internationales Privatrecht*” (RabelsZ 71 (2007) pp. 729-801).

Here is the English summary:

Questions relating to an agent’s authority represent a basic problem of contract law and are of considerable practical importance in international market transactions. The article analyses which law should govern the powers of an agent to bind his principal vis-à-vis a third party. To this end, the article examines, systemises, and evaluates the pertinent solutions adopted in more than twenty jurisdictions as well as in the European Commission’s Proposal for a Rome I-Regulation of December 2005. The findings may be summarised as follows:

1. Due to the characteristic triangular relationship of the agency situation there is a clear need for a separate conflicts rule dealing with the agent’s authority.

*2. The agent’s place of business and the place where the agent acted represent the most commonly accepted and best founded connecting factors in this respect while the place of the habitual residence of the agent should not be taken into account. As to the question which law should prevail if the agent actually does not act in the country of his business establishment, the solutions differ considerably among the various legal systems. Basically, applying the law of the place of business of a professional agent constitutes a sound and sensible solution which particularly meets the needs of international trade. Therefore, this connecting factor should generally take precedence over the *lex loci actus* provided that the agent’s place of business was actually foreseeable to the third party.*

3. Most of the legal systems recognise party autonomy with regard to the law governing the agent's authority, which appears to be a particularly reasonable concept. As to its implementation, however, there are some variations in detail. Both as a matter of principle and of business practice the most appropriate approach seems to be to allow the principal to designate the law applicable to the agent's powers unilaterally, i.e., without the consent of the agent or the third party, provided that this designation is in writing and is foreseeable to the third party. Since the ambit of the law chosen by the principal also extends the possible liability of the agent as *falsus procurator* the choice must be foreseeable to the agent as well.

4. The scope of the conflict rule on agency should be designed comprehensively rather than restrictively in order to avoid difficult problems of characterisation. Hence, the rule should not merely adjudicate the existence and the extend of the agent's actual or apparent authority but should encompass the legal consequences of the exercise of the agent's powers with regard the principal/third party relation as well as the agent/third party relation, including the liability of the *falsus procurator* and the effects of an undisclosed agency.