

The Positioning of the Imputability of the Principal in Apparent Agency

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Abstract: Whether the apparent agency should consider the imputability of the principal has always been a vague area in the field of agency. Due to the unclear constitutive elements, the phenomenon of different judgments in the same case has occurred, affecting judicial authority. From the perspective of comparative law research, extraterritorial law gradually recognizes this factor ; from the perspective of positive law, the three situations of apparent agency stipulated in the Civil Code need to consider this factor ; from the perspective of value orientation, apparent agency should take into account the interests of the principal and the counterpart. Therefore, the imputability of the principal should be considered in the apparent agency. In the absence of a provision in the law for the time being, it is expedient to find space for interpretation from the current provisions for imputability. It is of great applicability to interpret the imputability of the agent as the constituent element of the constitutive requirement that the relative person has reason to believe that the actor has the right of agency.

Keywords: Apparent Agency; the Imputability of the Agent; Explanatory Theory

1. Controversy over the Imputability of the Principal

Since the establishment of the apparent agency system by legislation, this legal system for the purpose of promoting transactions has been widely used in social life, injecting new vitality into the development of the market economy. However, the apparent agency system has always been controversial in the constituent elements, especially in whether the imputability of the agent should be considered. This has also led to frequent occurrences of different judgments in judicial practice. The " Civil Code " does not make clear provisions on the issue of

constituent elements, " Interpretation of the Supreme People s Court on Several Issues Concerning the Application of the General Provisions of the Civil Code of the People s Republic of China " (hereinafter referred to as the " Judicial Interpretation of the General Provisions of the Civil Code ") Article 28 holds that the apparent agency should include the appearance of the agency right and the goodwill of the counterpart without fault, and does not respond to the imputability of the principal. How to locate the accountability of the principal has become an unavoidable topic.

For this problem, there are two views in the academic circles : single element theory and double important element theory . The single element theory holds that as long as the counterpart is in good faith and has no fault, and there is enough appearance to make him believe that the unauthorized agent has the right of agency, then the apparent agency behavior can be established. This view is consistent with the " Judicial Interpretation of the General Provisions of the Civil Code, " and is more inclined to protect the interests of the counterpart. The double important piece theory holds that the formation of apparent agency should also meet the condition that the principal has imputability, otherwise it is extremely unfair to the principal. This view emphasizes the balance of interests between the two parties. At present, the academic community has not reached a consensus on this issue, but even scholars who support the " single element theory " have gradually recognized that the imputability of the principal should be considered when applying apparent agency, but they do not agree with it as a constituent element of apparent agency..

Due to the controversy about the imputability of the principal in theory, there are also differences in the application of the apparent agency system in judicial practice. In the court opinion part of Peking University s magic weapon, 162 cases were obtained after advanced retrieval of principal and imputability . That is to say, in

these cases, the court believes that when judging whether it constitutes apparent agency, it is necessary to pay attention to whether the principal has imputability. Compared with the large number of apparent agency disputes in practice, the cases considering the imputability of the principal are obviously only a small part. As for whether the imputability of the principal should be used as a constituent element of apparent agency, in the court reasoning part of the above case, it is mainly divided into the following two situations :

First, the default in the identification of apparent agency should be considered when the principal is attributable, as to why and whether it can be used as a constituent element, not a positive response. For example, in a second instance judgment of the Supreme People's Court, the Supreme People's Court only stated : In judging whether Fangda Special Steel Company has reason to believe that Ma Ajun has agency rights, it should be... Shandong Baohua Company, as the principal, comprehensively considers whether the existence of the appearance of the right is attributable to the three aspects of accountability and its degree. As for whether the imputability here belongs to the constituent elements of apparent agency and why this condition needs to be considered, the Supreme Court did not state. This approach has also been recognized by some local courts and followed in practice.

Secondly, it is clear that the imputability of the principal is the constituent element of the apparent agency, and the reason is generally believed . This approach is mainly based on the fact that the law does not stipulate the imputability factor, and the factor needs to be considered when it is determined to constitute apparent agency, so the theoretical point of view is cited. For example, in a second instance judgment of the Intermediate People's Court of Yichang City, Hubei Province, the court held that : the constitutive elements of apparent agency are : 1.unauthorized agents do not obtain the authorization of the principal ; 2.The unauthorized agent must make the counterpart believe that he has the right of agency in the appearance of the right ; 3.The counterpart is subjectively bona fide and without fault ; the occurrence of unauthorized agency behavior is related to the agent. In the following, it is mentioned : In the theory of civil law, it is generally believed that the establishment of

apparent agency requires the agent to be accountable .

From the perspective of judicial practice, some courts have recognized the important role of the accountability of the principal in the apparent agency, but it is still controversial whether it can be used as a constituent element.

2. The Justification of the Imputability of the Agent

Since the current law does not clearly stipulate the relevant content of the agent's imputability, it is first necessary to explore the existence value of the agent's imputability. This paper intends to analyze and demonstrate from three aspects : the comparative law research of the agent's imputability, the basis of the positive law and the value orientation of the apparent agency system.

2.1 A Comparative Study on the Imputability of the Principal

The original provisions of French law on agency by estoppel were relatively simple. In the absence of agency and beyond agency, judges usually cite the provisions of fault liability, believing that only if the agent has fault, the agency by estoppel is considered to be established, which actually takes into account the issue of the imputability of the agent. With the increasing emphasis on the protection of the interests of the other party, the mainstream French doctrine gradually believes that the formation of apparent agency only requires the appearance of agency power and the reasonable trust of the third party, and no longer restricts the apparent agency behavior through fault liability. French law has undergone a similar transformation from the " double important element theory " to the " single element theory " on this issue. Of course, unlike the " single element theory, " the imputability of the principal here is not not not considered, but as a measure of whether there is a reasonable trust of the third party.

The fifth section of the " German Civil Code " stipulates the right of agency. Among them, Article 170 generally stipulates that the validity period of the right of agency shall end when the third party knows that the right of agency is extinguished. Articles 171 and 172 respectively stipulate the validity period of the apparent agency granted in the form of notice and in the form of authorization, and the principle of its adherence is the same as that of Article 170.

Therefore, German law makes it clear that if the agent is to be eliminated, the agent must clearly inform the third party. Once the agent fails to timely feedback the notice or authorization of the elimination of the agent to the third party, the third party can claim the establishment of the agent. German law holds that it is necessary to consider whether the principal has imputability in the apparent agency, which is also a typical representative of the " double important theory. " Of course, there are different views on how to determine the imputability of the agent, including the principle of fault imputation, incentive imputation, risk imputation and so on. The fault imputation refers to the fact that the agent is responsible for the fault of the agent, that is, the agent is responsible for the fault of the formation of the appearance of the apparent agency right; incentive imputation refers to the imputation principle that the principal bears the responsibility because of the connection between the appearance of rights and the principal; risk imputation refers to whether the risk of the appearance of rights is caused by the agent or can be controlled by the agent. None of these three imputation principles has become a common theory in the academic circles. The ambiguity of the imputation principle has also become the main basis for critics to criticize the " double important parts theory. "

Articles 109 to 112 of the Japanese Civil Code stipulate the agency by estoppel. Article 109 stipulates that the premise of the agency by estoppel is the authorization of the principal, while article 110 stipulates the agency by estoppel in the case of exceeding the power of agency, and article 112 stipulates the agency by estoppel in the case of termination of the power of agency. Both of them need to meet the conditions of good faith and no fault of the third party. Although both cases of apparent agency do not stipulate the imputability of the principal, the premise of the establishment of apparent agency is that the principal has been authorized, so the element of the principal cannot be ignored. In addition, Article 111 stipulates the reasons for the elimination of the right of agency, in which the right of agency is eliminated in the case of the death of the principal. At this time, even if the third party is in good faith and without fault, the apparent agency behavior is still invalid. The reason is that the conditions for the imputability of the principal must not be met in this case. Therefore, it can be seen that the Japanese Civil

Code has implied the requirement of the liability of the principal.

In short, the factor of considering the imputability of the principal in apparent agency has been recognized by some extraterritorial laws..

2.2 The Legal Basis of the Imputability of the Principal s Liability

From the provisions of the " Civil Code, " the situation of apparent agency includes three situations : the actor has no agency right, exceeds the agency right and terminates the agency right. For beyond the agency , the reason is that the agent does not inform the relative person of the clear scope of authorization, resulting in his belief in the existence of the agency, and the agent is obviously liable. For the termination of agency right , the principal does not recover the authorization in time, which makes the counterpart mistakenly believe that the agency right still exists, and the principal is also liable. How to explain the " no agency right " here will affect the positioning of the imputability of the agent, and the answer cannot be obtained literally, which needs to be analyzed and demonstrated. First of all, the no agency here obviously cannot cover all the situations where the agency does not exist, otherwise beyond the agency and termination of agency can also be included in the scope of no agency .It is meaningless to distinguish the three situations, so it is necessary to make a restrictive interpretation of no agency . Secondly, for the specific scope of no agency here, some scholars believe that it should be identified as authorized apparent agency . The so-called " authorized apparent agency " refers to the fact that the actor has no agency, but because of the explicit or implicit behavior of the agent, the relative person believes that the actor has agency. According to this kind of interpretation, it is obvious that the apparent agency should have the condition that the agent can be blamed, because the premise of the apparent agency is that the agent has carried out the express or implied act. Therefore, in the case of no agency , the principal needs to have imputability. To sum up, whether there is no agency right, beyond the agency right or the termination of the agency right, it is necessary to meet the condition that the principal has the imputability, that is, the imputability of the principal is of great value in determining whether it constitutes apparent

agency.

2.3 The Value Orientation of Apparent Agency System

The apparent agency system has always been considered to be more inclined to protect the interests of the counterpart. Some people believe that in order to promote transactions and promote greater social interests, higher review requirements should not be put forward for the counterpart. If the provisions constitute apparent agency, it is necessary to examine the imputation of the principal, then the counterpart needs to bear the burden of proof, which means that it will not only prove the appearance of rights and its own goodwill, but also prove that the principal has imputation, which will increase its burden and deviate from the value orientation of the apparent agency system. Therefore, there is no need to examine whether the principal has imputability in apparent agency.

It should be noted that the value orientation of the apparent agency system is not clearly stipulated in Chinese and foreign laws. The above view is prevalent because the agency system itself is to promote the transaction. As a kind of agency system, the apparent agency system should naturally apply this value. It is understandable that the value orientation of the apparent agency system is biased towards the protection of the third party. The legal system should also serve the economic and social development in practice, but this bias cannot be unlimited. If all the behaviors and results of the agent are pushed to the principal, it not only violates the principle of private law autonomy, but also seriously infringes on the legitimate interests of the principal. Once the principal cannot recover from the agent, the principal will be in a very passive situation, and the rights and interests of the principal cannot be guaranteed. The agent may often drill the system's air, which is contrary to the original intention of protecting transactions and promoting economic and social development. At the same time, the legal system can also fully consider the difficulty of the relative person's proof when designing the legal system. Whether the principal has the imputability of the principal is the most clear to the principal himself. Therefore, it is entirely possible to require the principal to bear the burden of proof that he does not have the imputability, which can not only reduce the difficulty of the relative person's proof, but also

be more apparent. The authenticity of the agent. In fact, as far as proof is concerned, the second paragraph of Article 28 of the Judicial Interpretation of the General Principles of the Civil Code has fully considered the reality and reduced the difficulty of proof for the counterpart, because the agent needs to bear the burden of proof for the counterpart's failure to meet the bona fide conditions.

Therefore, considering the imputability of the principal when applying the apparent agency system is not only a trade-off and protection of the rights and interests of both parties, but also a respect for market behavior. From the perspective of value orientation, when judging whether it constitutes apparent agency, it should be judged whether the principal has imputability.

3. The Interpretation Path of the Agent's Imputability Positioning

As the name implies, the imputability of the agent must be generated by the agent and is closely related to the agent. By analyzing the connotation of apparent agency in the Civil Code, the element that can cover the imputability of the agent should be "the counterpart has reason to believe that the actor has the agency right." According to the provisions of Article 28 of the Judicial Interpretation of the General Provisions of the Civil Code, it is necessary to consider the condition of "the appearance of the existence of the right of agency" when determining that the relative person has reason to believe that the actor has the right of agency, and the appearance of the right of agency is also closely related to the agent. Therefore, it is possible to explore whether the imputability of the principal can be integrated into the judgment of the relative person has reason to believe that the actor has the right of agency. The logic here is to determine whether the relative person has reason to believe that the main consideration is whether the agent behavior has the appearance of the agency right, and the imputability of the agent is an important manifestation of the appearance of the agency right. In this case, the imputability of the principal is not an independent constituent element, but a constituent element in the constituent element of the other party has reason. Whether this conclusion is justified or not needs to be comprehensively demonstrated by combining various means of interpretation.

3.1 Literal Interpretation

From the perspective of literal interpretation, it is necessary to judge whether the imputability of the principal can be used as a factor to measure the counterpart has reason to believe that the actor has agency. In other words, the relative person will not consider the agent when determining whether the actor is really his agent. The answer is obviously yes: when the actor claims to be an agent, the counterpart will inevitably judge the authenticity of the agent's identity through a variety of methods, because the counterpart is in a civil legal act with the principal rather than the actor. For example, the agent has publicized his agent's situation on the website, or the agent has issued a proxy letter and allowed the actor to represent himself in civil activities. The relative person can judge that the actor has the right of agency by understanding this information. If the agent simply forgets to revoke the expired agent publicized on the website, or has issued a letter of agency contrary to its true meaning without careful review, resulting in the relative person believing that the actor has the right of agency, it should constitute apparent agency. One of the key roles is a series of acts of the principal, resulting in the appearance of rights and making the principal accountable. Here, we do not discuss whether these acts are a fault or an incentive or a risk, but from the perspective of the relative person, it is determined that these acts give the relative person a reason to believe that the right of agency exists, that is, it belongs to the relative person has reason to believe that the actor has the right of agency stipulated in the law. From this point of view, it is consistent with the value orientation of protecting the counterpart to look at the accountability of the principal from the perspective of the counterpart, and to avoid falling into the discussion of the three imputation methods of fault imputation, inducement imputation and risk imputation. Therefore, from the perspective of literal interpretation, it can be seen that taking the imputability of the principal as a constituent element in the constitutive requirement of "the counterpart has reason" can not only save the principal from falling into the innocent situation of being responsible for all acts, but also do not violate the value orientation of the apparent agency system that focuses on protecting the counterpart.

3.2 Historical Interpretation

From the perspective of historical interpretation, the "Contract Law" in 1999, the "General Principles of Civil Law" in 2017, and the "Civil Code" in 2021 did not make provisions on the imputability of the principal, but there were relevant provisions in some other documents or proposals. First of all, the Supreme People's Court adopted in 1987, "on the trial of economic contract disputes in the specific application of a number of questions to answer" Article II, according to the user's use of the letter, the chapter is borrowed or stolen to make a different arrangement, in which the lender shall bear joint and several liability, the stolen person does not bear any responsibility. This judicial interpretation reflects the value of the agent's imputability, that is, because the stolen letters and chapters are not controlled by the agent, they should not bear any responsibility; the borrowed letters, chapters and the agent are still related, so they need to bear joint and several liability. This clause does not clarify the relationship between the apparent agency and the imputability of the principal, but it highlights the value orientation of considering the imputability of the principal in the apparent agency. Secondly, Article 14 of the Guiding Opinions of the Supreme People's Court on Several Issues Concerning the Trial of Civil and Commercial Contract Disputes under the Current Situation puts forward that many factors should be considered when judging whether the counterpart of the contract is subjectively in good faith and without fault. One of them is Whether the construction unit knows the behavior of the project manager, that is, when identifying the apparent agency, it is necessary to examine whether the construction unit, the agent, knows the behavior of the project manager. Obviously, this article takes into account the imputability of the agent, and clearly regards it as a factor in identifying the apparent agency rather than as a constituent element of the apparent agency. Consistent with the view of this article. Finally, in the third review draft of the general principles of civil law, there are also descriptions of the imputability of the principal: the actor forges another person's official seal, contract or power of attorney, etc., and implements civil legal acts in the name of others and the principal's official seal, contract or power of attorney, etc., is lost, stolen, or the specific position relationship with the actor has been terminated, and has been announced or notified in a reasonable manner. In the case of

the other party should know , it does not constitute apparent agency. The reason why these situations do not constitute is precisely because these situations of forgery, counterfeiting, loss, and theft cannot be attributed to the agent, which is consistent with the first situation. It is important to note that the content of this review draft is not ultimately written into the General Principles of Civil Law , so we can only say that legislators have indeed considered the need to consider the imputability of the principal when determining the apparent agency.

4. Conclusion

Taking the imputability of the principal as the constituent element of the judgment of " the counterpart has reason, " in fact, can only be used as an expedient to solve the problem at present. The reason why the law has not responded to the problem is that the theoretical research is not in-depth at present, and the opinions of all parties are quite different, so it is difficult for the law to make a unified arrangement. The blank of the Civil Code on this issue means that these disputes will still exist for a period of time in the future. Therefore, in order to ensure the unity of the legal order, it should be the optimal solution to find the destination for the problem of imputability from the current law, so that the referee has the law to follow in the trial of the case, so as to prevent the phenomenon of different judgments in the same case from affecting the authority of the law. At present, the debate on this issue in China's academic circles mainly focuses on whether the imputability of the principal should be regarded as an independent constituent element. Assuming that the final conclusion is reached and the answer is yes, the law amender should modify the concept of apparent agency in the law and increase the content of the imputability of the principal. If the answer is no, the problem we need to face is how to locate the imputability of the principal without taking it as a constituent element. At this time, the above scheme can be used as a solution to the problem.

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