UNDISCLOSED AGENCY: AN ANALYSIS

Karthik Varma O.P. Jindal Global University

ABSTRACT

The Doctrine of Undisclosed Agency, though perceived as an anomaly by English jurists, holds significant value for French lawyers as a tool to grasp the complexities of the agency problem, while German legal experts view it as a catalyst for legal progress.[1] Despite its centuries-old prevalence, controversies persist around this concept, including debates over the rights of third parties, the obligations and entitlements of undisclosed principals, and the roles of agents. Early cases like Scrimshire v. Alderton[2] and Smith & Snipes Hall Farm Ltd. V. River Douglas Catchment Board[3] have delved into the rights of undisclosed principals.

In Indian law, echoes of undisclosed agency resonate in sections 230 and 231 of the Contract Act.[4] This article aims to dissect the rights and remedies available to third parties in pursuing undisclosed principals or agents, and vice versa. It will explore the stance on this matter in American law and Indian law, examining interpretations of various sections of the Indian Contract Act relating to undisclosed agency, and pondering the question of whether it should be permitted at all.

[1] W. Muller-Freienfels, "*The Undisclosed Principal*", The Modern Law Review, Jul., 1953, Vol. 16, No. (July., 1953), pp.299-317

[2] ibid

[3] ibid

[4] The Indian Contract Act 1872

Introduction:

An agent is a person who is conferred with certain rights to do an act in lieu of another or represent another person in transactions with a third party. Agency is very commonly observed in our day to day lives and the person for whom the agent is acting or representing is said to be "principal."[5]

Usually in most situations the existence of principal is disclosed to the third party. However, in certain situations the agent does not disclose the existence of the principal. These contracts are known as contracts of undisclosed agency and the principal is referred to as an undisclosed principal. Different jurisdictions around the world have opined different views on the concept of undisclosed agency. This concept was observed largely in England and the US and prominent jurists like Sir Fredrick Pollock, Lord Lindley, Oliver Lindley Holmes, and others expressed that this concept should be considered an anomaly or an inconsistency in the contract law.[6]

The English law pertaining to undisclosed agency has been under constant criticism. Few critiqued the anomaly using privity of contract, a doctrine that is being strictly followed by the English courts since its inception wherein, a person who is not a part of a contract, does not have any right to sue the parties of that contract. In contracts involving undisclosed agency, the absence of explicit mention of the principal raises concerns regarding the applicability of the privity of contract doctrine. Critics argue that this arrangement contradicts the principle, as a party not formally part of the contract lacks the legal standing to sue the contracting parties. In response, English courts have contended that the agent should be treated as an apparent agent, thus designating the principal as the true contracting party. Nevertheless, further criticisms have been levied, drawing upon the will theory. This perspective posits that the undisclosed principal's anonymity precludes a genuine meeting of minds or mutual understanding between the principal and the third party. As a result, doubts persist regarding the legitimacy of contracts formed under undisclosed agency.[7]

[5] The Indian Contact Law 1872, s 182

[6] W. Muller-Freienfels, "*The Undisclosed Principal*", The Modern Law Review, Jul., 1953, Vol. 16, No. (July., 1953), pp.299-31

[7] ibid

Rights and liabilities in contracts involving undisclosed agency:

In common law countries, the legal principle allows the third party to sue the undisclosed principal, and vice versa. However, there are limitations in most jurisdictions on the rights available to both parties in an undisclosed agency contract.

Principle of election with respect to undisclosed agency is one such doctrine where the third party must elect or choose either the principal or the agent in order to pursue a claim. Under the law in UK, once the third-party elects to procced against one of either the principal or the agent, then a subsequent claim against the other will not sustain. Insofar as the American law is concerned, the third party can hold the agent and the principal liable until the principal is undisclosed. As soon as the principal is disclosed the third-party must choose between the principal and the agent. Courts across the US have different interpretations of this doctrine especially on when the election is to be made. Few courts have expressed that the election between the parties must be made as early as possible. This notion however, places the third party under immense pressure. Several other courts have followed that, the election must be made before the judgement is rendered by the court. Few other have observed the doctrine to be applicable only when the agent and the principal demands for the same.[8] A minority of courts used to follow the Pennsylvania rule which allows the third party to pursue both the undisclosed principal and the agent until and unless he reaches one remedy. This rule could be justified with two main points, one it does not place the third-party under extra burden and also does not allow the agent to discharge liability until any one satisfaction is reached.[9]

In India, the Indian Contract Act governs undisclosed agency through Sections 230 and 233. Section 233 empowers the third party to hold either the agent, the principal, or even both liable, depending on the agent's personal liability. However, Section 230 adds another layer. It presumes that, in the absence of disclosed principal information, the agent has the authority to enter contracts on the principal's behalf, while also holding the agent personally bound by them. Hence, the sections 230 and 233 are to be read together to understand the principle of election

[8] Paridhi Poddar, "*The Rationalisation of Third Party Rights Under The Law of Undisclosed Agency*", (2019) 13.1 NSLR 74

[9] Alan C Boyd, "*Election to Sue Undisclosed Principal or Agent",* The Michigan Law Review, Vol. 49, No.3(Jan., 1951), pp.438-439

in cases involving undisclosed agency. These sections when read together provides the third party to hold the principal or the agent liable and both under different claims.

Another general rule limits the remedies of the third party to sue the principal if, an undisclosed principal pays the agent a goodwill amount or an amount to settle with the agent before the principal is disclosed. This way the principal is discharged of his liabilities.[10] In the US, the courts have taken a stance similar to the English courts, wherein the principal is discharged of his liabilities only if he can infer form the conduct the third party, that it (the third party), believes the agent is settling on behalf of the principal.[11] In India, courts haven't encountered such cases yet, but if they do arise, it is likely that Indian courts will adopt the stance taken by that of English courts. Section 234 of the Indian Contract Act further supports the probability of Indian courts aligning with the approach of the English courts.[12]

History of Undisclosed Agency:

Let us try to understand the history and how the concept of undisclosed agency evolved from doctrine of foreign principal. Undisclosed agency, with its historical roots embedded in mercantile law, particularly in Europe, finds its earliest origins intertwined with the doctrine of the undisclosed principal. Hugh J. Fegan posits that the emergence of undisclosed agency can be traced back to the concept of foreign principal. During this period, foreign merchants encountered various obstacles when attempting to trade directly within England. Native merchants viewed them as unwelcome competitors, often due to perceived advantages such as tax evasion. In response to these challenges, foreign merchants opted to operate through intermediaries, employing agents who were native to England to conduct trade on their behalf. In most cases these foreign principals chose not to disclose their identities, this might have been one of the foundation stones of undisclosed agency. By employing native agents to represent their interests without revealing their true identities, foreign principals could circumvent the barriers posed by local opposition and regulatory constraints. Consequently, the doctrine of

[10] Paridhi Poddar, "*The Rationalisation of Third Party Rights Under The Law of Undisclosed Agency"*, (2019) 13.1 NSLR 74

[11] Randy E. Barnett, "*Squaring Undisclosed Agency Law with Contract Theory*", California Law Review, Dec., 1987, Vol.75, No.6 (Dec.,1987), pp.1969-2003

[12] Paridhi Poddar, "*The Rationalisation of Third Party Rights Under The Law of Undisclosed Agency"*, (2019) 13.1 NSLR 74

the foreign principal began to take shape as a legal doctrine aimed at addressing the suits and cases arising from such arrangements.[13]

In the case of Scrimshire v. Alderton[14], an early instance of undisclosed agency, a farmer engaged an agent to sell his oats on a del credere commission basis. When the agent went bankrupt, the farmer revealed himself to the buyer and requested payment directly. However, the buyer still paid the agent. Despite the farmer's lawsuit, the jury ruled in favour of the buyer. Gonzalez v. Sladen, and Gurratt v. Cullum are similar cases where the rule of the foreign principal was invoked, albeit without explicit reference to the doctrine of the undisclosed principal.[15] These cases primarily focused on the relationship and liabilities among the agent and the third party involved.

Much later, in the case of Smith & Snipes Hall Farm Ltd v. River Douglas Catchment Board[16], Lord Justice Denning articulated the principle that individuals can be held liable in a contract even if they are not explicitly named, as long as they derive benefit or have an interest in the contract. Additionally, he affirmed that an undisclosed principal has the right to sue on a contract entered by an agent acting on his behalf.[17]

Theories and Criticisms:

The undisclosed principal doctrine has faced criticism as an anomaly in contract law. Despite this, various attempts have been made to integrate it into contract law through different theories such as the trust theory, assignment theory, consideration theory, intervention theory, and the theory of implied contract. These theories seek to provide justifications for bringing undisclosed principals within the scope of contract law. The question of whether a contract exists amongst the agent and the third party or among the undisclosed principal and the agent in an undisclosed agency situation has been a subject of debate. jurists have also sought to decipher these questions. However, none of these theories seem to give us a strong justification.

Three particularly intriguing theories are the consideration theory and the intervening theory

---

[13] Hugh J. Fegan, "*Foreign Principals", 1932*

[14] (1743) 2 Str 1182

[15] Hugh J. Fegan, "*Foreign Principals", 1932*

[16] (1949) 2 K.B. 500, pp. 514-515

[17] W. Muller-Freienfels, "*The Undisclosed Principal*", The Modern Law Review, Jul., 1953, Vol. 16, No. (July., 1953), pp.299-317

and the implied contract theory.

In the theory of intervention, the undisclosed principal is said to intervene amongst the agent and a third party, even though there is no direct contractual relationship between the principal and the third party. This intervention is based on the fiduciary relationship among the principal and the agent, where the principal holds a superior position.[18] However, this explanation does not fully address how the principal can sue or be sued by the third party when the principal is not directly involved in the contract. This raises questions because it seems to contradict the concept of privity of contract, which is fundamental in contract law. Privity of contract typically dictates that only parties directly involved in a contract can be held liable or enforce its terms. The challenge lies in reconciling the principle of intervention with the concept of privity of contract, as they appear to be at odds with each other within the framework of contract law.

The consideration theory in contract law offers both compelling justifications and notable criticisms, particularly in English law where the doctrine of privity of consideration holds significant importance. This doctrine asserts that a party who is not privy to the consideration exchanged in a contract cannot enforce the contract.

Muller-Freienfels presents an intriguing justification for the doctrine of undisclosed principal, drawing upon the concept of consideration. He explores whether there is any detriment to the principal, assessing whether the concealed principal provides consideration to the third party. According to his analysis, consideration flows from the principal to the third party, suggesting that the agent is a "stranger" to the contract. Muller-Freienfels argues that the agent is authorized by the undisclosed principal to enter into the contract, and the payments or goods are provided by the principal to the agent for the purpose of contracting with the third party.

However, this perspective has faced criticism. Some argue that consideration must be provided at the time of contract creation, yet in contracts of undisclosed agency, the contract is amongst the agent and the third party, with the principal making "payments" only after the contract has been formed. Additionally, critics contend that in contracts of undisclosed agency, consideration arises from the assumption of contractual obligations among the agent and the

[18] Ania Lang, "*Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine*

third party, which are legally binding.[19]

Professor Tan Cheng Han presents an intriguing theory as well, he suggests that the third party's intent to contract should be implied, regardless of whether the principal is disclosed or undisclosed. According to his argument, if the third party is willing to enter into a contract with the agent, it shouldn't matter whether the principal's identity is revealed. Professor Tan contends that by contracting with the agent, the third party implicitly agrees to contract with the principal.[20]

However, this theory encounters difficulties when applied in practice. Particularly, when the third party has never met or been made aware of the principal's existence, it becomes challenging to accept that there is an implied intention on the part of the third party to contract with a concealed principal. This raises questions about the practicality and fairness of implying such intent in cases where the third-party lacks knowledge or awareness of the undisclosed principal's involvement.

It could be posited that in case of undisclosed agency, a tripartite contract exists among the undisclosed principal, agent, and third party, alongside a fiduciary relationship between the agent and the undisclosed principal. This fiduciary relationship plays a pivotal role in elucidating the meeting of minds or mutual assent amid the concealed principal and the third party.

Drawing from agency law principles, it is evident that when the agent contracts with a third party, it has a similar legal effect as if the principal had contracted directly. The principal's liability is contingent upon the agent acting within the scope of the principal's instructions, whether apparent or actual authority. Consequently, the mutual assent between the principal and the third party can be argued to be conveyed by the agent, acting as a delegate of the undisclosed principal.

Moreover, the concept of detriment incurred in the contract is ultimately borne by the undisclosed principal. Instead of positing an implied intention on the part of the third party to contract with the principal as proposed by Professor Tan Cheng Han, a more apt theory could

[19] Finlay T T Dempster, "*The Undisclosed Principal Doctrine: Rationalisations, Justifications and Origins*", Faculty of Law Victoria University of Wellington, 2021

[20] Ania Lang, "*Unexpected Contracts versus Unexpected Remedies: The Conceptual Basis of the Undisclosed Principal Doctrine*

revolve around the notion of implied consideration flowing from the principal. This consideration arises from the inherent relationship and agency between the principal and the agent, reinforcing the contractual obligations undertaken by the principal through the actions of the agent.

Undisclosed Agency and its Validity in the Indian Context:

In the context of India, sections 10, 185, and 230 of the Indian Contract Act hold significance in understanding undisclosed agency contracts and determining the validity of contracts between third parties and undisclosed principals. Section 230 of the Indian Contract Act sheds light on undisclosed agency and the presumption of a contract that empowers the agent to act on behalf of the principal, binding the agent personally to contracts entered into with third parties, in cases where the agent does not disclose the identity of the principal or when the agent engages in contracts for sale and purchase on behalf of a foreign merchant.[21] Section 185 of the Indian Contract Act emphasizes that consideration is not necessary to establish an agency relationship.[22]

Applying these sections and the principles of agency law, we can infer that an agent works as a representative of the principal and conducts business or acts within the ambit of the principal's instructions and also the agent indirectly carries the intention or willingness to contract between the principal and the third party. Furthermore, under section 10 of the Indian Contract Act, the agreement made by the agent in the name of the principal, as outlined in section 230, is deemed to be with the free consent of the third party. Additionally, consideration flowing from the undisclosed principal through the agent is considered valid.

Should undisclosed agency be allowed?

Undisclosed agency, while advantageous to the principal, often puts the third party at a significant disadvantage. Consider a scenario where an undisclosed principal wishes to purchase land but fears that disclosing their identity may lead to inflated prices. By employing an agent to negotiate the purchase without revealing their identity, the principal secures a favourable deal. From the perspective of the principal, they benefit from acquiring the land at a lower price. However, the landowner, unaware of the principal's identity, loses bargaining

[21] The Indian Contract Act 1872, s 230
[22] The Indian Contract Act 1872, s 185

power and may settle for a lower price. Moreover, it's worth noting that while the landowner may miss out on the potential for higher profits they could have negotiated, in many instances, they still agree to the terms offered by the agent and ultimately sell the land for a price that satisfies them.

The third party, in an undisclosed agency faces several disadvantages. Their bargaining power is diminished, and they are unable to negotiate terms that they might have otherwise included if they knew the principal's identity. Additionally, when seeking remedies, the third party must choose between pursuing the principal or the agent, a challenging decision as they must assess who can fulfil contractual obligations or pay damages. Furthermore, the surprise revelation of the principal's identity during legal proceedings can disrupt the third party's expectations and strategy.

From a perspective of equity, fairness, and natural justice, undisclosed agency appears to favour the principal at the expense of the third party's interests.

We have observed above the history and evolution of the undisclosed agency, where the foreign merchants hired agents without out disclosing themselves to enter into native markets in England one of the major reasons to hire an agent also includes the complexities to enforce a foreign judgement and to seek remedies in case either party failed to perform their contractual obligations. However, the modern globalisation, the developments in cross-border contracts and dispute resolution mechanisms offer alternatives. International organizations like UNIDROIT and conventions like the New York Convention provide avenues for parties to seek remedies and enforce contracts globally, mitigating some of the challenges associated with undisclosed agency. Thus, the concept of undisclosed agency sees no prominent significance in the present scenario. Moreover, it complicates the process of justice and gives rise to a number of controversies although there are settled laws.

An alternative to undisclosed agency is partially disclosed agency, where the agent reveals the presence of a principal but not their identity. This approach allows the third party to assess the risk and decide whether to proceed with the contract without knowing the principal's identity. Partially disclosed agency offers a fairer option compared to undisclosed agency, as it provides transparency while still protecting the principal's anonymity.

Conclusion:

In conclusion, the concept of undisclosed agency, while historically rooted and once serving practical purposes, now faces significant scrutiny and criticism in modern legal frameworks. While advantageous to principals seeking anonymity, it often disadvantages third parties, impacting fairness and equity in contractual dealings. With advancements in globalization, cross-border contracts, and dispute resolution mechanisms, the relevance of undisclosed agency diminishes. Moving forward, a shift towards transparency, as seen in partially disclosed agency, offers a fairer approach while balancing the interests of all parties involved.