THE RATIONALISATION OF THIRD PARTY RIGHTS UNDER THE LAW OF UNDISCLOSED AGENCY

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ABSTRACT

Undisclosed agency relationships refer to situations in which the agent deals with third parties without professing the existence of his principal. The common law has vested third parties with the right to hold such an undisclosed principal liable under the contracts made by his agent. However, simultaneously, courts have also created 'exceptions' which have limited this right. The aim of this paper is to analyse four of these limitations on the rights of the third parties – the doctrine of election, discharge of the principal by settlement with the agent, limits on authority and ratification. The paper advocates that the balance between the rights of the third parties and that of the undisclosed principal needs to be corrected, keeping in mind that concealment and secrecy that the law of undisclosed agency endorses works primarily to the advantage of the principal and his agent, and not the third party. It undertakes a comparative analysis of the position of the law in the English common law and the United States to recommend the legislative changes that need to be introduced in the Indian law.

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TABLE OF CONTENTS

I. INTRODUCTION

Undisclosed agents may be employed in commercial relations out of a sense of 'necessity' when the principal believes that contracting in their own name would be disadvantageous to their interest. For instance, the principal may choose to remain undisclosed when they are aware that the revelation of their identify would lead the third party to negotiate less favourable terms, such as money-consideration.[1] Or, the undisclosed principal may decide to contract through an agent if they believes that the third party may not be interested in entering into a contract with them.[2] While initial commentators perceived it as a dubious method of contracting without any social utility; today, commentators recognise the business efficiency

[1] Martin Schiff, *The Problem of the Undisclosed Principal and How It Affects Agent and Third Party*, 1984 DET. C. L. REV. 47, 48 (1984). *But see* Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 211 N. Y. 68 (1914).
[2] *Ibid.*

arguments in favour of the use of undisclosed agents.[3] This is reflected in the fact that undisclosed agents are commonly employed in business transactions.[4]

Despite this, the use of undisclosed agents is discouraged for various reasons. One, the emergence of the undisclosed principal can not only jeopardise the economic advantage that the third party may have bargained for (in terms of the standing of the agent), it also compels the third party to deal with a new party.[5] Two, the use of undisclosed principals can injure the interests of efficiency and fairness in ordinary commercial dealings, particularly where policy is in favour of disclosure of material information.[6]

Recognising this, most common law countries[7] allow the undisclosed principal to be sued directly by the third party, in addition to holding the agent personally liable under the contract to the third party.[8] However, in order to maintain reciprocity and mutuality of obligations, the common law also allows the undisclosed principal to sue the third party directly, without relying on his agent.[9] Even when the common law recognises the right of the undisclosed principal to sue the third party, it has held that the third party cannot be made worse-off due to the appearance of the undisclosed principal. For this reason, the third party is entitled to enjoy the same rights and defences against the undisclosed principal as they would have enjoyed if they were sued by the agent.[10] Thus, the third party cannot be bound by obligations greater than that they undertook while contracting with the agent.[11]

In addition, with a view to saving the third party from suffering prejudice due to the emergence of the undisclosed principal, courts have recognised various exceptions to the

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[3] Arnold Rochvarg, *Ratification and Undisclosed Principals,* 34 MCGILL L. J. 286, 327-28 (1989).
[4] *Ibid.*
[5] Randy E. Barnet, *Squaring Undisclosed Agency Law with Contract Theory*, 75 CAL. L. REV. 1969, 1987 (1987).
[6] Mark A. Sargent & Arnold Rochvarg, *A Re-examination of the Agency Doctrine of Election*, 36 U. MIAMI L. REV. 411, 431 (1982).
[7] *See* Wolfram Muller-Freienfel, *Comparative Aspects of Undisclosed Agency*, 18 MOD. L. REV. 33 (1955). The position is in stark contrast with that in civil law countries where an agent acting in his own name acquires rights and becomes bound to the third party only personally; whereas, the rights and obligations of the undisclosed principal operate only *vis-à-vis* the agent. Despite such a construction, even civil law countries have created limited exceptions which allow the undisclosed principal and the third party to proceed directly against each other.
[8] *See* The Indian Contract Act, 1872, §§232, 233.
[9] The Indian Contract Act, 1872, §231.
[10] *See* The Indian Contract Act, 1872, §231; Miller v. Lea, 5 Md. 396 (1872) as cited in Ferson, *infra* note 12, 159.
[11] Ferson, *infra* note 12, 150.

liability of the third party to the undisclosed principal.[12] For instance, courts have upheld the right of a third party to rescind the contract if the identity of the other party was material to it or when the third party could show that they would not have entered into the contract if they were aware of the existence of the undisclosed principal.[13] Similarly, the third party is allowed to escape liability to the undisclosed principal if the contract specifically excluded the existence of an undisclosed principal.[14] In addition, the undisclosed principal is not allowed to acquire rights under the contract when its terms contemplated provision of services of a personal nature.[15]

Despite these protections, in many common law countries, courts have placed limitations on the rights of the third parties dealing with undisclosed principals. *First*, despite recognising the rights of the third party to sue both the agent and their undisclosed principal, courts require the third party to make an election between the two. *Second*, courts have held that the right of the third party to proceed against the undisclosed principal comes to an end if the undisclosed principal settles the accounts with his agent. *Third*, courts have refused to hold that the undisclosed principal can be held liable to the third party for the acts of their agent outside the scope of their actual authority. *Fourth*, courts have refused to hold the undisclosed principal liable for the unauthorised acts of their agent under the doctrine of ratification. In this manner, courts have curtailed the reliefs available to third parties to a large extent.

Such a stance of the common law is, however, problematic. The secrecy that the law of undisclosed agency allows works primarily in the interest of the undisclosed principal and their agent. For this reason, the tenor of the law should be to protect the rights of the third party from being prejudiced or curtailed in favour of that of the undisclosed principal or their agent. The underlying rationale is that any risk arising from the use of undisclosed agents should fall on the principal who is best placed to manage and minimise the risk, as opposed to imposing the same on the third party who is neither aware of the existence of agency nor has the means to manage the risk. Unless the risk is correctly allocated and the inequities inherent in the

[12] However, the law, in its present form, also imposes certain duties on the third party. If the circumstances at the time of the conclusion of the contract are such that they would create an apprehension in the mind of a reasonable person that the character of the other party is equivocal, the third party is bound to inquire to determine whether he is acting on behalf of a principal. *See* Miller v. Lea, 5 Md. 396 (1872) as cited in Merton L. Ferson, *Undisclosed Principals*, 22 U. CIN. L. REV. 131, 159 (1953). *See also* The Indian Contract Act, 1872, §§231, 232.
[13] The Indian Contract Act, 1872, §231; Sargent & Rochvarg, *supra* note 6, 412.
[14] Sargent & Rochvarg, *supra* note 6, 412.
[15] Schiff, *supra* note 1, 73.

misallocation of the risk undone, the principals would prefer to remain undisclosed in order to shield themselves from the liabilities which are otherwise borne by disclosed principals. Further, the third parties may be denied their rights and lose valid claims.

This paper aims to analyse whether the law of undisclosed agency protects the rights of the third parties vis-à-vis the undisclosed principal in light of its limitations. Part II provides a brief overview of theories behind the rationalisation of the law of undisclosed agency, demonstrating how its rules are inconsistent with traditional theories of contract law. Parts III, IV, V and VI each deal with one of the four limitations discussed above, i.e. the doctrine of election, the rule of discharge by settlement, limits on authority, and ratification. Each section compares and contrasts the position of the Indian law with two legal traditions: the English law – because the Indian Contract Act, 1872 ('Contract Act') is based on it – and the American law – because it has sometimes been considered more proactive in incorporating changes into the law of contract via the Restatements, which seek to inform judges about the evolving principles of common law.[16] Each section considers arguments for and against the existing position of the law and then advocates for changes in the Indian position. The underlying rationale for the changes discussed in this section is that the current law of undisclosed agency must be tailored in order to better reposition the notions of equity and to safeguard the rights of the third parties engaged in such relationships. Part VII concludes that, while the current state of the law relating to the rule of election, discharge by settlement of accounts, and limitations on scope of authority must be amended to prevent undisclosed principles from escaping liability vis-à-vis third parties, the rule of ratification, being a technical and not a purposive device, would not be able to capture this goal.

II. THEORETICAL INDETERMINACY IN THE LAW OF UNDISCLOSED AGENCY

The law of undisclosed agency, which allows the undisclosed principal to sue and be sued on contracts made between the agent (on their own behalf) and the third party, is an anomaly. This is because the common law has solemnly affirmed the principle of privity of contract, thereby preventing the enforcement of contracts by persons not parties to the

[16] *See generally* Julian Hermida, *Convergence of Civil Law and Common Law Contracts in the Space Field*, 34(2) H.K.L.J. 339 (2004).

contract.[17] Thus, Barnet concludes that none of the five traditional theories of contract – the will, reliance, efficiency, substantive fairness, and bargain theories – adequately explain the basis of the law of undisclosed agency.[18]

To address this, other scholars looked for justification for undisclosed agency law in alternative theories. Lewis argues that the true basis for the liability of undisclosed principals lies in the fact that they are the ones who *cause* the contract to be concluded and, in effect, induce the third party to enter into the contract.[19] Rochvarg relies on the benefit-burden theory to argue that the undisclosed principal should be held liable for the burden of the contract as he is the one who receives the *benefit* therefrom.[20] Misller-Freienfel explains the benefit-burden theory as the consideration theory of undisclosed agency – he argues that, despite contrary manifestations, since it is the principal who bears the detriment for moving the *consideration* to the third party, they should have the rights and the liabilities under the contract.[21] Moving beyond the confines of traditional contract law principles of consideration and detriment, Ames explains the relationship between the agent and the undisclosed principal as that of a trustee and a *cestui que* trust, i.e. the beneficiary of a trust. On this basis, he argues that the right of an undisclosed principal to sue the third party on the contract is anomalous.[22] He also argues that the right of the third party to sue the undisclosed principal is essentially an equitable enforcement of the agent's right to exoneration against his principal by the third party.[23] Despite the intuitive force of these theories, each suffers from limitations; on account of this, there is no single theory which enjoys overwhelming support in academic literature or case law, or which has been able to explain all the rules governing undisclosed agency relationships.[24] However, even without any convincing theoretical justification, the application of the rules of undisclosed agency remains unchallenged. This may be due to the principle of fairness that the rules relating to undisclosed agency seem to capture.[25] Given the tension

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[17] *See generally* Jesse W. Lilienthal, *Privity of Contract*, 1 HARV. L. REV. 226 (1887-88). Despite the principle of privity being affirmed by common law, it was subsequently diluted in English law by the Contract (Rights of Third Parties) Act, 1999.
[18] Barnet, *supra* note 5, 1974.
[19] William Draper Lewis, *The Liability of the Undisclosed Principal in Contract*, 9(2) COL. L. REV. 116, 133 (1909).
[20] *See* Rochvarg, *supra* note 3, 298-99.
[21] Wolfram Muller-Freienfel, *The Undisclosed Principal*, 16 MOD. L. REV. 299 (1953).
[22] James B. Ames, *Undisclosed Principal-His Rights and Liabilities*, 18 YALE L.J. 443 (1909).
[23] *Ibid.*
[24] Grover R. Heyler, *Undisclosed Principal's Rights and Liabilities: A Test of Election of Remedies*, 39 CAL. L. REV. 409, 412 (1951).
[25] Michael L. Richmond, *Scraping Some Moss from the Old Oaken Doctrine: Election between Undisclosed Principals and Agents and Discovery of Their Net Worth*, 66 MARQ. L. REV. 745, 750 (1983).

behind the basis of undisclosed agency in contract law, some scholars have conceded that the law of undisclosed agency is essentially an outcome of equity, aided by the fiction of identity of the principal and the agent, and the doctrine of mutuality of contractual obligations.[26]

III. DOCTRINE OF ELECTION

The doctrine of election states that when two or more inconsistent remedies exist and a party pursues one of these remedies, they are precluded from pursuing any other.[27] In the context of undisclosed agencies, the doctrine requires the third party to proceed either against the principal or the agent. While the rule of election is considered to be a procedural issue, it is inextricably linked to the substantive conceptualisation of the relationship among the three parties involved in undisclosed agency relationships. Part III.A presents the position of the English, United States ('US') and Indian laws on this issue, and Part III.B analyses arguments for and against the doctrine to recommend the position the Indian law should take.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

The English law places a strict burden on the third party under the doctrine of election - the third party only has a single claim under the contract and thus, the liability of the agent and the undisclosed principal is alternative.[28] According to the single claim approach, as soon as a judgment is procured by the third party against the agent, their claim against the principal merges with the judgment procured against the agent.[29] For this reason, the third party is barred from proceeding against the undisclosed principal even when they were not aware of the principal's existence at the time of obtaining the judgment against the agent.[30]

Thus, under the English law, *first*, the bar on the right of the third party against the undisclosed principal operates even when they were not aware of the existence of the

[26] Ferson, *supra* note 12, 133.
[27] Maurice H. Merrill, *Election between Agent and Undisclosed Principal: Shall We Follow the Restatement*, 12 NEB. L. BULL. 100, 119 (1933); Chicago Tit. & Tr. Co. v. De Lasaux, 168 N. E. 640, 642 (1929).
[28] SIR FREDRICK POLLOCK & SIR DINSHAW FARDUNJI MULLA, POLLOCK & MULLA: THE INDIAN CONTRACT AND SPECIFIC RELIEFS ACT, VOL. II 1808 (Nilima Bhadbhade ed., 14th ed., 2012).
[29] Ferson, *supra* note 12, 145; Merrill, *supra* note 27, 118.
[30] Ferson, *supra* note 12, 146. *See* Kendall v. Hamilton, 4 App. Cas. 504 (1879).

undisclosed principal, and *second*, the bar starts only once the judgment has been procured and not merely from the commencement of proceedings against one of the parties. For these two reasons, this rule is seen as an offshoot of the doctrine of merger as opposed to the doctrine of election – this is because the doctrine of election presupposes that the party making the election should have knowledge of the alternate claims, and, further, can label any conduct and not merely procurement of judgment as amounting to election.[31]

2. Position of Law in the United States

The American position acknowledges that the third party enjoys two different claims against the principal and the agent, but holds that these claims are enforceable in the alternate as they arise from a single contract.[32] Thus, the American position says that a third party who pursues an agent is not precluded from holding a principal who has remained undisclosed up to that time.[33] However, once the agency is disclosed and knowledge of the existence of the principal is received by the third person, they are obligated to choose either of the parties.

In this regard, the American courts have taken different stances on when a third party shall make an election between the agent and the principal. Some courts have placed a very onerous burden on the third party to make an election at the earliest possible opportunity – thereby exacerbating the inequities of the doctrine.[34] Other courts, however, have taken a fairer approach by holding that while the third party would be allowed to sue both, they would be required to make the election sometime prior to the pronouncement of the judgment.[35] Another set of courts have further diluted the rigours of the doctrine by adopting a flexible interpretation, construing most forms of conduct of third parties as not amounting to election.[36] Some courts have held that election cannot be imputed on the third party unless the same is demanded by the defendant agent and principal, thereby allowing the right to election to be waived on account of the failure of the agent and the principal to specifically demand the same.[37] This is unlike the English position where obtaining a judgment against either of the

[31] Karl Stecher, *The Doctrine of Election as Applied to Undisclosed Principal and Agent*, 7 MISS. L. J. 466, 471 (1935).
[32] Merrill, *supra* note 27, 118.
[33] *Ibid*, 107.
[34] Richmond, *supra* note 26, 765.
[35] *Ibid*, 766.
[36] Stecher, *supra* note 31, 472.
[37] Klinger v. Modesto Fruit Co., 107 Cal. App. 97 (1930) as cited in Sargent & Rochvarg, *supra* note 6, 428. *See also* Fleming v. Dolfin, 4 Pac. (2d) 776 (1931); Craig v. Buckley, 21 Pac. (2d) 430 (1933) as cited in Merrill, *supra* note 27, 107.

parties is said to constitute a definite election.[38] Still others, while acknowledging that the second claim raised by the third party would have been barred by the doctrine of election, have nonetheless permitted the same on equitable grounds.[39] Despite this trend demonstrating that most courts are not convinced of the fundamental soundness of the doctrine in the context of undisclosed agency, the rule of election of remedies continues to be a tool in the hands of the undisclosed principal and their agent to invalidate claims raised by the third party.[40]

3. Position of Law in India

The position of Indian law with respect to election is laid down in §233 read with §230 of the Contract Act. §233 provides that, in cases in which the agent is personally liable, as in the case of undisclosed agency,[41] "a person dealing with him may hold either him or his principal, or both of them liable".[42] The language of the section initially created confusion as to whether it aimed at effecting a departure from the English position – wherein the liability of the principal and the agent is alternative – to favour joint liability. Despite the language of the section seemingly suggesting otherwise, the drafting history of the provision shows that the drafters had only intended to reproduce the English law.[43]

Despite the intention of the drafters, the section was interpreted differently by different High Courts. The Madras and the Calcutta High Courts opined that the provision allowed the third party to sue either the principal or the agent, or sue both of them alternatively, but did not allow them to be sued together as jointly liable for the amount in question.[44] The Courts reached this conclusion on the ground that the liabilities of the agent and the undisclosed principal are not joint, but mutually exclusive.[45]

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[38] Curtis v. Williamson, L.R. 10 Q.B.D. 57.
[39] Evans, Coleman & Evans Ltd. v. Pistorino, 245 Mass. 94, 139 N.E. 848 (1923) as cited in Heyler, *supra* note 24, 413.
[40] In other to further remedy the inequities of the doctrine of election, various states in the US have brought in legislative amendments providing that procuring of a judgment against either the agent or the undisclosed principal shall not be deemed to be an election of remedies until the same remains unsatisfied. *See* Heyler, *supra* note 24, 420.
[41] *See,* The Indian Contract Act, 1872, §230.
[42] The right of the third party under §233 is subject to §234 which formulates a rule of estoppel preventing the third party from suing the principal when he induces him to believe that only the agent would be held liable, and vice-versa.
[43] POLLOCK & MULLA, *supra* note 28, 1808.
[44] Pootheri Illath Kuttikrishnan Nair v. Kallil Appa Nair, A.I.R. 1926 Mad. 1213; Nicholas Schinas v. Nemazie, A.I.R. 1952 Cal. 859 as cited in POLLOCK & MULLA, *supra* note 28, 1808. *See also* Kutti Krishna Nair v. Appa Nair, 49 Mad. 900 as cited in LAW COMMISSION OF INDIA, THIRTEENTH REPORT ON CONTRACT ACT, 1872, ¶176 (September 26, 1958).
[45] *Ibid.*

However, the Bombay High Court held that a third party can either sue one of the two, or sue them jointly – however, if the third party chooses to obtain a judgment against either the principal or the agent, they cannot subsequently file another suit against the other.[46] The Court reasoned that the right of the third party to sue is based in 'one cause of action' and that it was in the interest of public policy that litigation with respect to the 'same cause of action' must come to an end. Despite making this observation, the Court held that obtaining a judgment against the agent would not bar a subsequent suit against the principal in cases when the judgement against the agent was obtained before the disclosure of the agency. This conclusion, however, is at odds with the Court's earlier observation that a bar on the subsequent suit is imposed on account of it emanating from the 'same cause of action.' Despite te internal inconsistency in the decision of the Bombay High Court, its position was later endorsed by both the Madras[47] and the Calcutta High Courts,[48] as well as by the Law Commission of India in its 1958 Report on the Indian Contract Act.[49] In my opinion, the judgment of the Bombay High Court is sound as it is in line with the plain reading of the language of the provision.

B. Analysing the Rule of Election in Undisclosed Agency

1. Justifications for the Rule of Election

There are three major justifications for the application of the rule of election in cases of undisclosed agency.

First, the doctrine of election brings the law of undisclosed agency in consonance with the theory of the identity of the principal and the agent, according to which only one obligation is created when the agent makes a contract with the third party.[50] Even though the law of undisclosed agency allows the third party the choice to sue the principal or the agent, there is still only one contract and hence, the liabilities are alternative. Without the doctrine of election, allowing the third party to sue the agent and the principal subsequently would be tantamount

[46] Raja Bahadur Shivlal Motilal v. Birdichand Jivraj, (1917) 40 Ind. Cas. 194.
[47] Shamsddin v. Shaw Wallace & Co., A.I.R. 1939 Mad. 520.
[48] Pasupati Gorai v. Brindaban Khan, (1951) I.L.R. 1 Cal. 82.
[49] LAW COMMISSION OF INDIA, *supra* note 44, ¶176.
[50] Ferson, *supra* note 12, 143.

to allowing them to assert that there were two contracts – one with the agent and the other with the principal.[51]

Second, the rule of election prevents the third party from enjoying an "undeserved windfall" on account of the emergence of the undisclosed principal.[52] This is because the third party may contract with the agent relying on his standing, but is nonetheless given the option to choose between the two – this right, however, should not be extended to create a situation in which the third party can pursue any party on a whim.

Third, the doctrine of election may be justified due to expediency. Without the requirement of an early election, there may be uncertainty regarding whether the third part would choose the agent or the principal in their claim. This could lead to business inconvenience.[53]

2. Criticisms of the Rule of Election

The criticisms of the rule of election relate to four main arguments.

First, in an undisclosed agency relationship, there are two separate obligations: *one*, of the agent, emanating from the law on the basis of the binding nature of the contract they have entered into; and *two*, of the undisclosed principal, emanating not from any contract per se, but from the principles of the law of agency which are grounded in equity.[54] In other words, while the agent's liabilities are based in their status as a party to the contract, the undisclosed principal's liabilities are based in their jural status under agency law.[55] The doctrine of election, as understood in the common law, is inapplicable in such a scenario as there are two separate, non-contradictory obligations, emanating from the peculiar circumstances of undisclosed agency relationships.

Second, the emergence of the principal and the consequent liability imposed on them by law is not a windfall for the third party. The third party contracts with the agent relying on their standing, but is inevitably prejudiced due to the emergence of the principal, as it may

[51] Merrill, *supra* note 27, 120.
[52] Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 126.
[53] *Election of Remedies by Party Dealing with Agent of Undisclosed Principal*, 39(2) YALE L. J. 265 (1929).
[54] Warren A. Seavey, *The Rationale of Agency*, 29(8) YALE L. J. 859 (1920); Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 122; *Election between Undisclosed Principal and Agent*, 24(3) INDIANA L. J. 446 (1949).
[55] Sargent & Rochvarg, *supra* note 6, 419.

imply that the agent is not as credible as they claimed.[56] Thus, the application of the rule of election defeats the fundamental objective of the law of undisclosed agency – which is to provide the third party with the economic advantage they bargained for.[57] This is so because the rules of election allow the third party to choose to litigate the matter against the agent on whose credit he relied in the first place, as opposed to compelling him to litigate against the undisclosed principal against his choice.

Third, the business expediency argument in favour of election is unacceptable as the undisclosed principal and their agent themselves decide to enter into contracts by maintaining secrecy. Any burden of inconvenience flowing from secrecy should thus be borne by the principal and their agent, as opposed to the third party.

Fourth, the rule of election on the ground places an additional burden on the third party to determine who of the two is more solvent and more likely to remain solvent until the judgment is satisfied.[58] However, the third party may not have the information necessary to make this determination. This is because, in most jurisdictions, rules of procedure do not allow discovery of the net worth of the defendant before the pronouncement of the judgment in most cases.[59] This may result in an erroneous selection by the third party and a total loss of a valid claim.[60] For instance, the third party may choose to sue the principal, on the presumption that they have better financial standing, and lose out due to an inability to prove the agency relationship.[61]

C. Recommended Position

To address the concerns affecting the application of election, some argue that the doctrine of election should not be applied. Instead, they advocate for a shift from the rule of discharge by election to a rule of discharge by satisfaction. According to this rule, *first*, the third party should be permitted to join both the principal and the agent as defendants, with the judgment standing against both until it is satisfied by either of the parties.[62] *Second*, the third

[56] Heyler, *supra* note 24, 412.
[57] Merrill, *supra* note 27, 126.
[58] Heyler, *supra* note 24, 415.
[59] Richmond, *supra* note 26, 74.
[60] Ferson, *supra* note 12, 142; Merrill, *supra* note 27, 124.
[61] Heyler, *supra* note 24, 415.
[62] Stecher, *supra* note 31, 475; Ferson, *supra* note 12, 147; Richmond, *supra* note 26, 783.

party should also be allowed to sue the other party subsequently if the agent or the principal against whom the judgment was first obtained is unable to satisfy the same.[63] This position seeks to minimize the inequities arising from the application of the rule of election and safeguard the rights of the third party.

While the first prong of the rule of satisfaction has already been incorporated under §233 of the Contract Act, legislative amendment or creative judicial interpretation is needed to read in the second right under §233. Here, it is important to note that the language of §233, which reads that the third party may hold "both of them liable," does not prevent the third party from filing a subsequent suit when the first one has remained unsatisfied.[64] In light of the arguments presented against the rule of election, it is submitted that the Indian law should correct its position on the issue to allow subsequent suits against the undisclosed principal or their agent, as the case may be, if the original judgment remains unsatisfied.

IV. SETTLEMENT OF ACCOUNTS

The second rule under which courts have limited the rights of third parties vis-à-vis undisclosed principals is the rule of discharge by settlement of accounts. This rule prevents the third party from proceeding against the principal if the principal has settled their accounts with the agent before the disclosure of agency.[65] Part IV.A provides an overview of the position of the law with respect to this rule in different jurisdictions, whereas Part IV.B analyses arguments for and against the same.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

[63] This rule of satisfaction has been incorporated under Article 13, Paragraph 2 of the 1983 Convention on Agency in the International Sale of Goods,[63] which provides that the third party may exercise his rights against the principal in a situation when the agent fails to fulfil his obligations under the contract. Given the broad manner in which Paragraph 2 is worded, arguably, failure by an agent to satisfy a judgment obtained against him would not deprive a third party to proceed against the principal. *See generally* J. S. McLennan, *Undisclosed Principals - The Troubles Continue: An International Solution*, 10 S. AFR. MERCANTILE L. J. 239, 243 (1998).

[64] However, the right of the third party to sue the undisclosed principal subsequently can be barred in those cases when the principal has paid the agent in reliance of the conduct of the third party, such that it would be inequitable to hold him liable again. This consequence flows directly from the language of §234 of the Contract Act and is further discussed in Part IV.

[65] Floyd R. Mechem, *The Liability of an Undisclosed Principal*, 23 HAR. L. REV. 513, 520 (1910).

The rule relating to settlement of accounts originated from a dictum of Lord Tenterden in the case of *Thompson* v. *Davenport* (*'Thompson'*), in which he laid down that the right of the third party to recover from the undisclosed principal is subject to the qualification that "*the state of the account between the principal and the agent [should] not [have been] altered to the prejudice of the principal*".[66] This observation indicates that the principal shall be discharged if they pay the agent, in good faith, having reason to believe that the third party would settle the accounts with the agent. However, the judicial position in England on this issue was not settled for a long time, with different courts taking varying stances.

In *Heald* v. *Kenworthy* (*'Heald'*),[67] the rule of discharge by settlement of *Thompson* was rejected. Lord Parke observed that an undisclosed principal would not be discharged from thir obligation to pay the third party by merely making the payment to their agent, regardless of whether the third party is aware of their existence. This is because, despite making the payment to their agent, the undisclosed principal is under an obligation to ensure that the agent makes the payment to the third party. However, the case created scope for barring the rights of third parties. It laid down that the rights of the third party to claim from the principal would be barred in situations when, by their conduct, the third party leads the principal to believe that the agent and the third party have come to a settlement and, thus, induces the principal to make the payment to his agent.

However, the position of law changed once again in *Armstrong* v. *Stokes* ('*Armstrong'*).[68] Reviving the *Thompson* rule, the court in *Armstrong* held that payment by the principal to the agent, made *before* the disclosure of the agency, is sufficient to discharge the principal. Due to these conflicting judgments, the issue was once again raised in *Irvine & Co*. v. *Watson & Sons* ('Irvine'),[69] which held that the rule laid down in *Heald* reflected the correct position of the law. Thus, in its present form, the English law places a bar on the right of the third party to sue the principal based on this rule only in cases where "it was reasonable [for the principal] to infer [from the conduct of the third party] that the agent has already settled with such third party, or that the latter looks exclusively to the agent for payment".[70]

[66] Thompson v. Davenport, 9 B. & C. 78 (Exch. 1829).
[67] Heald v. Kenworthy, (1855) 10 Exch. 739.
[68] Armstrong v. Stokes, (1872) L.R. 7 Q.B.D. 598.
[69] Irvine & Co. v Watson & Sons, (1880) 5 Q. B. D. 414.
[70] Stecher, *supra* note 31, 466-67.

2. Position of Law in the United States

In the US, *Fradley* v. *Hyland* ('Fradley'), was the first case to consider the rule of discharge by settlement.[71] Adopting the rule laid down in *Armstrong* over that laid down in *Heald*, the court in *Fradley* held that the principal would be exonerated from their liability if they make the payment to the agent *prior* to the disclosure of agency, even when they have not been misled in any manner by the third party. The Second Restatement of the Law of Agency sought to correct the position. The Restatement stated that good-faith payment by an undisclosed principal to their agent will not absolve the undisclosed principal from their liability to the third party, unless the third party has indicated by their conduct that the agent has settled the account,[72] thereby bringing the law in conformity with the English position .[73]

3. Position of Law in India

The provisions of the Contract Act are silent on whether any settlement between the undisclosed principal and their agent can exonerate the principal from liability towards the third party, and the issue has not been litigated in the undisclosed agency context.[74] However, given that the Contract Act does not codify the entire law of agency[75] and since Indian contract law draws heavily from English law,[76] it is safe to conclude that if such an issue is raised before an Indian court, it may follow the position taken in *Irvine*. This conclusion is bolstered by the fact that §234 of the Contract Act says that if a third party contracting with the agent induces the principal to act on the belief that only the agent would be held liable or vice-versa, he cannot later hold the principal or the agent, respectively, liable.

B. Analysing the Rule of Discharge by Settlement

[71] Fradley v. Hyland, 37 F. 49 (1888).
[72] Restatement (Second) of the Law of Agency, §208, reads:
"*An undisclosed principal is not discharged from liability to the other party to a transaction conducted by an agent by payment to, or settlement of accounts with, the agent, unless he does so in reasonable reliance upon conduct of the other party which is not induced by the agent's misrepresentations and which indicates that the agent has settled the account.*"
[73] *See e.g.* A. Gay Jenson Farms Co. v. Cargill Incorporated, 309 N.W. 2d 285 (1981).
[74] The effect of payment by a disclosed principal to his agent vis-à-vis the third party has, however, been discussed in many cases. *See generally* Kamal Singh Dugar v. Corporated Engineeers, A.I.R. 1963 Cal. 464 (the case held that payment by a disclosed principal to his agent would not relieve him of liability under the contract, unless the third party has authorised the agent to receive payment on his behalf or, by conduct, induced the principal to believe that the payment to the agent would exonerate him).
[75] The Indian Contract Act, 1872, Preamble.
[76] NILIMA BHADBHADE, CONTRACT LAW IN INDIA 27 (2010).

The courts which have endorsed the rule of discharge by settlement have done so in the interest of equity, reasoning that it would be inequitable to require an undisclosed principal, who already paid their agent, to once again make the payment to the third party. However, there are several flaws in this line of reasoning.

First, the application of the rule, as laid down in *Thompson* and subsequently narrowed down in *Armstrong*, suggests that the third party does not have a right of their own against the undisclosed principal.[77] If the third party had an independent right of recourse against the principal, such a right cannot be taken away by a transaction between the principal and the agent inter-se.[78] This would be tantamount to saying that the law of undisclosed agency is simply an 'assignment' of the agent's rights against the principal in favour of the third party at the time of disclosure.[79] However, this is not the case given that the rules of equity recognise the independent right of the third party to proceed against the undisclosed principal. Since an undisclosed principal is aware of these equitable rights of the third party – flowing from the presumption of knowledge of the law – they cannot defeat the same by simply making the payment to their agent.[80]

Second, *Irvine* curtailed the scope of the rule to limit its application to only those cases in which the principal is induced to make the payment to their agent on account of the conduct of the third party. This approach is justified from one perspective – the right of the third party to sue the undisclosed principal is grounded in equity and, hence, the third party cannot claim such a right when their own conduct has been inequitable.[81] However, the court in *Irvine* ultimately held that the narrow version of the rule would apply, irrespective of the knowledge of the third party regarding the existence of the principal. The rule, thus, assumes that the third party may induce the principal, probably through his conduct, into believing that they were exclusively looking at the agent for payment, even before the third party is made aware of the existence of the principal.[82] This is naturally problematic – while a third party dealing with a partially disclosed principal may be said to have acted in a manner so as to create reliance in the mind of the principal, even without being aware of their exact identity;[83] a third party

[77] Muller-Freienfel, *supra* note 21, 313-14 (1953).
[78] *Ibid.*
[79] *Ibid.*
[80] P. F. P. Higgins, *The Equity of the Undisclosed Principal*, 28 MOD. L. REV. 167, 177 (1965).
[81] *Ibid*, 177.
[82] *See* Mechem, *supra* note 65, 513.
[83] *Ibid*, 530.

dealing with an agent professing to act as the principal themselves cannot be said to have misled the actual undisclosed principal, of whose existence he was completely unaware. In other words, the ratio in *Irvine* goes against the very concept of inducement, where knowledge is presumed, and hence is fundamentally inconsistent.

Third, even when the application of the rule is limited to inducement by the third party *after* they become aware of the existence of the undisclosed principal, the question of what amounts to 'misleading conduct' to justify the application of this rule remains. The threshold of misleading conduct is lower than that of election, as long as the principal can show that they have changed their position in reasonable reliance of the conduct of the third party.[84] However, this may lead to unforeseen consequences. For instance, there may be a situation where the third party commences a suit against the agent (as principal) and later becomes aware of the existence of the undisclosed principal, and yet fails to withdraw the suit to sue the principal. Such a failure on part of the third party to withdraw the suit may lead the principal to believe that he intends only to sue the agent, on account of which the principal may proceed to make the payment to the agent to settle the accounts. However, the third party may subsequently choose to litigate against the principal, even after he has made the payment to the agent. Since the issue has not been litigated much,[85] the question of whether this would amount to misleading conduct is unclear. Nonetheless, from the few cases decided on the issue, it may be inferred that courts tend to apply the rule strictly to prevent the principal from having to make the payment again. For instance, courts have held that both the failure of the third party to insist on payment (from the principal) within the time period stipulated under the contract[86] and a mistaken issue of receipt of payment by the third party to the agent[87] to be conduct sufficient to discharge the principal if they proceed to make the payment to the agent in reliance thereon.

Fourth, any rule requiring the principal to pay the third party, even when they have settled the accounts with the agent, would not necessarily result in inequitable consequences.[88] This is because the principal can recover the loss from their agent by bringing an action for breach of fiduciary duties.[89] In any case, even when the sum paid is not recoverable from the

[84] Mechem, *supra* note 65, 528.
[85] *Ibid*, 529.
[86] Kymer v. Suwercropp, 1 Camp. 110.
[87] Wyatt v. Marquess of Hertford, 3 East 147.
[88] Warren A. Seavey, *Undisclosed Principal; Unsettled Problems*, 1 HOWARD L.J. 79, 84 (1955).
[89] Richmond, *supra* note 26, 747; *see* The Indian Contract Act, 1872, §211.

agent, the risk of the ultimate loss should fall on the principal who employed the undisclosed agent as opposed to on the third party.[90] Such an allocation of risk is justified since the principal chose to deal in a secretive fashion and is in a position to ensure that payment is made to the third party. Thus, if the principal pays their agent while failing to ascertain whether their agent made the payment to third party, they should be held liable for the same.

C. Recommended Position

If a case involving settlement of accounts comes before an Indian court, instead of following the common law interpretation, it is submitted that §234 of the Contract Act should operate, as it is the sole section in the Act which purports to apply to such a situation. Given the objections to the rule of discharge by settlement, the application of the rule in the Indian context, as provided under §234 of the Contract Act, should be limited to only those cases where the third party has, by their conduct, induced or misled the undisclosed principal to make the payment to the agent *after* the disclosure of the agency relationship. This is because it is only when the third party is aware of the existence of the undisclosed principal that they may create an inducement or reliance in the mind of the undisclosed principal. Before the disclosure of agency, any act of the third party suggesting that they exclusively look at the agent (professing to be the principal) or rely solely on their standing for payment cannot create a reliance in the mind of the actual principal.

V. SCOPE OF AUTHORITY

The general rule that an agent can render their principal liable for acts done in contravention of their instructions but within the scope of their apparent authority[91] does not apply in the case of undisclosed principals. Intuitively, such a position of the law has a logical appeal – a third party who deals with an agent in the capacity of a principal (and is unaware of the existence of the principal) cannot later argue that the principal must be held liable because there was an appearance of authority in their agent.[92] However, this rule may unjustifiably limit the rights of the third parties dealing with undisclosed principals. V.A discusses the position of

[90] Richmond, *supra* note 26, 747.
[91] *See,* The Indian Contract Act, 1872, §237.
[92] Martin Schiff, *The Undisclosed Principal: An Anomaly in the Laws of Agency and Contract*, 88 COM. L.J. 229, 232 (1983).

the law on this issue in different jurisdictions, and V.B analyses the rule to suggest the position Indian courts ought to adopt.

A. Position of Law in Different Jurisdictions

1. Position of Law in England

The English position is that the doctrine of apparent authority cannot be applied to hold the undisclosed principal liable. Thus, the undisclosed principal cannot be made liable to the third party for those acts of their agent which were outside the scope of their actual authority.[93]

Despite this general rule, in certain cases, courts have taken a different approach and imposed liability on the undisclosed principal. In *Watteau* v. *Fenwick* ('*Watteau*'),[94] the principal, Fenwick, appointed an agent, Humble, to manage his beer business. Humble's name was painted on the door and the license of the business was also taken out in his name, but he did not have any "authority to buy any goods for the business except bottled ales and mineral waters." Nonetheless, Humble bought Bovril and cigars from *Watteau*, who after discovering the existence of the undisclosed principal, proceeded to sue him to recover the price of the goods. Given that the court could not directly infer apparent authority in this matter, it held that:

> "*Once it has been established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies – that the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and the agent, put upon that authority.*"

Thus, the case laid down that, in the case of an undisclosed principal, the agent would be deemed to have the usual authority given to an agent of that character, thereby fastening liability to the principal for the consequent acts. The court held that the application of such a rule was justified, even when there could not be any 'holding-out' of authority in undisclosed

[93] *See e.g.* Miles v McIlwraith, (1883) 8 App. Cas. 120.
[94] Watteau v. Fenwick, 1 Q.B.D. 346; *see also* Edmunds v. Bushell 4 Jones, (1865) L.R. 1 Q.B.D. 97.

agency scenarios, as otherwise secret limitations placed on the authority of undisclosed agents would be invoked to defeat the claims of the third parties against the principals.

This case, however, has not received much acceptance in subsequent judicial decisions, though it has never been explicitly overruled.[95] It has also been criticised in academic literature[96] – scholars reason that despite referring to the concept of 'usual authority', the case in fact held the principal liable because he 'held-out' to the world that his agent had the authority of the owner of the business.[97] Other scholars, instead of rejecting the decision altogether, seek to limit its applicability to cases in which an undisclosed principal creates an 'apparent ownership' of the business in the agent, as opposed to all cases of 'apparent authority' – since in the cases dealing with the former, the third party can be said to have given the credit not only to the agent (as principal) but to the firm he apparently owns (which, in fact, belonged to the principal).[98]

However, some scholars justify the decision in *Watteau*, arguing that the case does not necessarily hinge on apparent authority by emphasising the fact that usual authority is analytically separate from ostensible authority.[99] Some others still support the decision on considerations of equity and fairness. They argue that the rule in *Watteau* ensures that unscrupulous principals are not able to escape their liabilities by hiring insolvent, undisclosed agents to contract for them and assert secret limitations on their authority; thereby bringing parity between the liabilities of the disclosed and undisclosed principals.[100]

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[95] *See e.g.* Jerome v. Bentley, (1952) 2 All E.R. 114; Rhodian River Shipping Co. SA v. Halla, (1984) 1 Lloyd's Rep. 373.

[96] Erich C. Stern, *A Problem in the Law of Agency*, 4 MARQ. L. REV. 6 (1919); J. L. Montrose, *Liability of Principal for Acts Exceeding Actual and Apparent Authority*, 17 CANADIAN B. REV. 693, 695 (1939); J. A. Hornby, *The Usual Authority of an Agent*, 1961 CAMB. L.J. 239, 246 (1961); Michael Conant, *Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 678 (1968).

[97] J. G. Collier, *Authority of an Agent – Watteau v. Fenwick Revisited*, 44(3) CAMB. L. J. (1985); Goodhart & Hamson, *Undisclosed Principals in Contract*, 4 CAMB. L. J. 310 (1932).

[98] POLLOCK & MULLA, *supra* note 28, 1639; Stern, *supra* note 96, 11.

[99] Richard T. H. Stone, *Usual and Ostensible Authority - One Concept or Two?*, J.B.L. 325 (1993) (The author argues that usual authority depends upon the nature of a particular job, whereas apparent authority depends upon some holding-out or representation of the agent's authority. In one way, all cases of usual authority can be said to be cases of apparent authority wherein the principal can be said to have made a representation to the world by hiring an agent of a given character for an act – but such an approach would place unnecessary strain on the concept of representation and thus it is better if such cases are analysed from the perspective of what the job and the act entailed.).

[100] Higgins, *supra* note 80, 167; Kevin M. Rogers, *A Case Harshly Treated? Watteau v. Fenwick Re-Evaluated*, 2(2) HERTFORDSHIRE L. J. 26, 29 (2004).

2. Position of Law in the United States

While the rule laid down in *Watteau* has been criticised in England, it has been adopted by the Second Restatement of the Law of Agency in the US. The Restatement states that a general agent for an undisclosed principal would render the principal liable for all the acts done on their account, if they are "*usual or necessary in such transactions, although forbidden by the principal […].*"[101] The Restatement specifically adopts the rule laid down in *Watteau*, stating that an "undisclosed principal who entrusts an agent with the management of thier business is subject to liability to third persons with whom the agent enters into transactions usual in such businesses and on the principal's account, although contrary to the directions of the principal."[102] The Restatement, however, states that the inherent powers rule cannot be applied in cases when an undisclosed principal hires a special, rather than a general agent.[103]

By virtue of these sections, an undisclosed principal may be liable due to the inherent powers of a general agent, even when the agent breaches their authority, as long as the agent's acts were usual or necessary.[104] However, in order to address the objections to the rule, the Restatement clarifies that the "*inherent agency power is derived […] solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent*."[105] Thus, the concept of inherent agency is used in cases where the third party has reasonably relied on the agent's authority, even when there are no manifestations or representations made by the principal, as in the case of apparent agency.

3. Position of Law in India

Under the Contract Act, a disclosed principal is bound not only by those acts of the agent which are within the scope of their actual and apparent authority,[106] but also by those acts of the agent which are necessary to do the authorised acts or which are usually done in the course of dealing in the business to which the acts relate.[107] The rationale for reading in usual

[101] Restatement (Second) of the Law of Agency, §194. *See also* Butler v. Mapes, 76 U.S. (P Wall.) 766 (1970).
[102] Restatement (Second) of the Law of Agency, §195.
[103] Schiffl, *supra* note 92, 233 (1983). Restatement (Second) of the Law of Agency, §161, defines a general agent as one who is appointed "to conduct a series of transactions over a period of time" and who could be properly regarded as "part of the principal's organization in much the same way as a servant is normally part of the master's business enterprise".
[104] Schiffl, *supra* note 92, 232 (1983).
[105] Restatement (Second) of the Law of Agency, §8A.
[106] The Indian Contract Act, 1872, §237.
[107] The Indian Contract Act, 1872, §188.

authority is that, partly, it is presumed to be intended by the principal and partly, it is presumed that the third party may attribute such authority to the agent with whom he deals – it is thus not based on any sort of representation by the principal.[108] However, the Indian cases have not delved into whether the usual authority doctrine would also cover cases of undisclosed agency relationships. However, some argue that the decision in *Watteau* may not be followed in the Indian context – both due to the criticism it has received in English law and because of its incorrect reasoning.[109]

B. Analysing Inherent Powers Rule & Recommended Position

The rule limiting the liability of an undisclosed principal to only authorised acts has been criticised on the ground that such a rule implies that an undisclosed principal would receive more favourable treatment than that accorded to those principals who choose to deal with third parties without any concealment.[110] For this reason, it is submitted that the result reached by the application of the inherent powers doctrine under American law is just. If a principal chooses to remain concealed while conferring wide-ranging powers on their general agent, the principal should be made liable for the acts of the agent which are usually done for effecting such transactions.[111]

However, some scholars object to such a broad conception of the scope of an agent's authority in the case of undisclosed agency. They assert that unlike disclosed principals, the undisclosed principal is not in a position to acquaint third parties with the limitations placed on the agent's authority. This is because it would inevitably require the principal to disclose their status to the third party and they would cease to enjoy the benefit of undisclosed agency.[112] While undisclosed principals may not be able to inform the third party of the limits placed on the agent's authority to save themselves from such liability; if a risk arises from the failure to make the third party aware of the limits on their authority, the same should be borne by the principal as opposed to the third party. In this manner, the rule would correct the balance of rights between the undisclosed principals and the third parties. It would ensure that undisclosed principals are not able to defeat the claims of the third parties by placing secret limitations on

[108] POLLOCK & MULLA, *supra* note 28, 1639.
[109] POLLOCK & MULLA, *supra* note 28, 1639.
[110] Stecher, *supra* note 31, 469.
[111] Seavey, *supra* note 88, 88 (1955).
[112] Stern, *supra* note 96, 9.

the authority of their agents.[113] Thus, amendments on the lines of the American law should also be brought into the Contract Act.

VI. RATIFICATION

Inter-alia, ratification can be done when a contract was entered into and executed on behalf of the person who wishes to ratify.[114] Based on this, following the English case of *Keighley Maxsted & Co.* v. *Durant* (*'Keighley'*)[115], the courts have held that ratification cannot be allowed in cases when an agent merely intends to bind the principal, but does nothing to profess or represent that intention, which is clearly the case in an undisclosed agency.[116] This not only prevents an undisclosed principal from authorising an unauthorised act of their agent, but also prevents the third party from holding the undisclosed principal liable under such a contract.

A. Position of Law in Different Jurisdictions

There is no divergence in the position of the English, the American and the Indian law on the issue of ratification the undisclosed principals. The law laid down in *Keighley* is followed in all three jurisdictions.[117]

Despite this, some courts in the US have held an undisclosed principal may ratify in cases where the agent 'intended' to act as an agent, even when he did not 'profess' that intention, as whenever an agent so intended, they can be said to be acting on behalf of their principal.[118] However, this line of reasoning has been rejected by the English court in *Keighley*. It has also not received much acceptance before the US courts – one reason being the evidentiary uncertainty associated with ascertaining the intentions of the agent which are not

[113] Higgins, *supra* note 80, 177-178.
[114] *See* The Indian Contract Act, 1872, §196.
[115] Keighley Maxsted & Co. v. Durant, (1900) Q. B.D. 630.
[116] Keighley Maxsted & Co. v. Durant, (1900) Q. B.D. 630; Morgan v. Georgia Paving & Construction Co., 40 Ga. App. 335, 149 S. E. 426 (1929).
[117] Edwin C. Goddard, *Ratification by an Undisclosed Principal*, 2 MICH. L. REV. 25, 39 (1903).
[118] *Ibid*, 39.

professed.[119] Hence, ratification is not available to the third party to hold the undisclosed principal liable for the unauthorised acts of the agent.[120]

However, the Second Restatement of the Law of Agency, concerned about the inequitable results such a bar on ratification may cause in cases where the principal accepts benefits under an unauthorised contract, incorporates a provision to offer some relief to a third party. The Restatement states that, "[…] although there is no ratification, a person on whose account another acts or purports to act […] may become subject to liability for the value of the benefits received as a result of the original transaction."[121] Such a relief, grounded in unjust enrichment, is also available under English and Indian law.

B. Analysing the Rule of Ratification & Recommended Position

The doctrine of ratification has not been able to accommodate undisclosed agency relationships, as the courts have always resorted to a rigid and strict application of the rules under this doctrine.[122]

However, Goddard, who favours ratification by the undisclosed principal, argues that there is a need to reconsider the position on ratification by keeping in mind commercial convenience and reason. He reasons that, ratification should be allowed to preserve business relations between parties as much as possible.[123] Goddard also states that by allowing ratification by the undisclosed principal in cases when the agent 'intended' to act for the principal, the courts would uphold the real intention of the agent as it existed at the time of the contract formation. He believes that mere evidentiary uncertainty is not enough to deny substantive rights to parties.[124] Goddard further asserts that if the law, in its current form, allows the undisclosed principal to be sued by the third party and further holds the principal liable beyond the scope of the actual authority given by him to his agent, it is only 'fair' to also allow him to ratify such contracts to 'correct' the balance of rights.[125] On the other hand, Rochvarg

[119] *Ibid.*
[120] *See generally* Timothy J. Sullivan, *The Concept of Benefit in the Law of Quasi-Contract*, 64(1) GEORGETOWN L. J. 1 (1975).
[121] Restatement (Second) of the Law of Agency, §104.
[122] Goddard, *supra* note 117, 40. *See* Bolton Partners v. Lambert, (1889) 41 Ch. D. 295; Brook v. Hook, L. R. 6 Ex. 89, 31 Am.
[123] Goddard, *supra* note 117, 40-44.
[124] *Ibid*, 44.
[125] *Ibid*, 33.

favours ratification with a view to protect the rights of the third party. He asserts that courts need to appreciate that the denial of ratification often prejudices the rights of the third party by negating the liability of the undisclosed principal.[126]

Despite the arguments presented by these scholars, and despite the appeal of the argument that allowing ratification may protect third party rights, it is submitted that it is not necessary to change the position of India law as it exists currently. This is primarily due to the technicalities underlining the doctrine of ratification; particularly, the requirement that the act must be done 'on behalf of another.' Further, ratification has never been understood in a 'purposive' fashion. The doctrine of ratification emphasises on professing one's intention to act on behalf of another to prevent strangers from becoming parties to the contract. Additionally, ascertaining what the agent actually intended is a complex question. Nonetheless, statutory amendments may be incorporated to allow the undisclosed principal to adopt the contract with a retroactive effect, as long as the third party re-affirms the same after the disclosure of the agency – but such a right cannot be squared away with the doctrine of ratification as it is understood in the common law.

VII. CONCLUSION

The status-quo allows undisclosed principals to escape liability based on rules of election, discharge by settlement of accounts, limitations on scope of authority and ratification. This is unfair and inequitable, as it places the risk of undisclosed dealings onto third parties as opposed to the principals and agents who choose to engage in such dealings. The policy suggestions put forth in this article are not intended to squash undisclosed agency agreements altogether. They aim to vest third parties with rights which reflect the true cost of contracting without disclosure with the principal and their agent.[127] This correction in the rights of the parties would ensure that the risk of dealing with incomplete information is borne by the principal and agent who have chosen to take the risk. Unless the issues discussed in this article are addressed, the device of undisclosed agency may be employed by principals with the objective of shielding themselves from liability otherwise borne by disclosed principals, thereby injuring the rights of the third parties in the process.

[126] Rochvarg, *supra* note 3, 292.
[127] Sargent & Rochvarg, *supra* note 6, 432.