An empirical study of the attributability of the represented person in apparent agency

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Abstract. The system of apparent agency should take into account the interests of the represented person while maintaining the security of the transaction. It is an important criterion for the determination of the appearance of rights, the reliance of the relator and the rationality, which is applied in judicial practice and can be combined with other elements to regulate the determination of the apparent agency. The criterion of attributability of the represented person can be divided into the following: the represented person knows but does not act, negligent management of internal personnel and official seal, failure to properly manage important information, and failure to actively inform the counterparty of important information. China still needs to clearly stipulate the elements of attributability for the represented person, so as to better protect the interests of different subjects under the apparent agency system.

Keywords: Apparent agency; The attributability; Empirical study.

1. Presentation of the problem

The principle of autonomy is one of the basic principles of private law, and each person is only responsible for his or her own actions. In the system of apparent agency, the agent without authority acts in the name of the represented person, and in the case of special justification, the principle of autonomy of intention is broken to a certain extent in order to maintain the interests of reliance and transaction security of the counterparty, and the represented person is liable for the acts of the agent without authority. In order to achieve a balance between the interests of the relator and the interests of the represented person, the establishment of the apparent agency must be subject to strict conditions.

The constitutive elements of apparent agency have been a hot topic of discussion in academic circles, whether the attributability of the represented person should be taken into account is one of the controversial points. Among the affirmative statements, Professor Zhu Hu argues that "in the current legal order, the attributability of the bearer should be considered in the composition of the liability for the appearance of rights by way of reliance protection." Professor Wu Guozhe argues that "there are other stronger reasons to make oneself liable. The attributability of the person himself is the direct and positive reason for his liability." Professor Yin Tian believes that "the legislative intent of the new contract law is not purely to disregard the interests of the person and is not, as the aforementioned 'single element' theory states, to judge whether the third party is negligent (and completely disregard the specific situation in which the person is in the absence of the agency) as the only condition for the establishment of the apparent agency. Professor Wang Hao believes that having reason to believe that the agent has agency means that he or she has made a notice that can sufficiently prove the existence of agency, thus exempting the opposite party from the obligation to investigate and verify whether the agent has agency. Prof. Yang Daixiong defines the attributability of the represented person as "the appearance of agency is caused by factors within the risk of the represented person". Professor Ye Jinqiang believes that the establishment of the attributability element not only lies in the realization of value and logical implementation, but also in its significant methodological significance. In the negative statement, Professor Sun Peng argues that "the element of fault of the represented person should be excluded from the legislative policy." Professor Luo Yao, through comparative law research, believes that the composition of the apparent agency in China's Contract Law draws on the double important elements under the French law model, i.e., the existence of both the appearance of agency and the reliance of a bona fide third party.

The legislative practice has undergone a gradual process for determining the elements of the composition of an apparent represented person. The author composes this in Table 1, Table 2. ([1] requirements for the agency; [2] requirements for the opposite party; [3] appearance of rights; [4] exceptions of apparent agency).

Table 1. Relevant provisions on the constitutive elements of apparent agency

Implementing Time	Regulations Name	Specific Number of Terms	Apparent agency's Constituent elements
1987	General Principles of Civil Law	Article 66	[1] Represented: knowingly but not denying
1988	Regulations of the Supreme People's Court on Several Issues Concerning Suspected Economic Crimes in the Trial of Economic Dispute Cases (2020 Amendment)	Article 5	[1] Represented: there is obvious fault, and the fault between the act and the economic loss of the relator has a causal relationship
1999	Contract Law	Article 49	[2] The relator has reason to believe
2005	Minutes of Discussion of the High People's Court of Jiangsu Province on Several Issues Concerning the Application of the Contract Law of the People's Republic of China (I)	Article 14	[1] Represented: with some fault [2] No fault of the relator in good faith
2009	General Principles of Civil Law (2009 Amendment)	Article 66	[1] Represented: knowingly but not denying
	Notice of the Supreme People's Court Issuing <Guidance on Several Issues Concerning the Trial of Civil and Commercial Contract Dispute Cases under the Current Situation	13, 14	[2] Relator: subjective good faith without fault [3] Objective appearance of agency

From the table, we can see that: firstly, before the implementation of the General Principles of the Civil Code, legislative practice had provided for the attributability of an represented person, but only limited to the represented person's "knowledge but not denial" or limited to specific disputes; secondly, some local legislation had already paid attention to the attributability of the represented person at an early stage; thirdly, the process of formulating the General Principles of the Civil Code and its interpretation shows that China is still cautious about the requirements of apparent agency, and the exceptions of apparent agency were deleted in the finalized Civil Code, and the provisions on the attributability of the represented person were deleted in the finalized Judicial Interpretation of the General Principles of the Civil Code; fourth, the judgment standard of the attributability of the represented person is not uniform in legislative practice.

The research on the issue of the attributability of the represented person of an apparent agency can be summarized as follows: Should the attributability of the represented person of an apparent agency be considered in the composition of an apparent agency? If so, what are the specific criteria for judging the attributability of it? From these two main lines, the author has analyzed and systematically studied 91 cases from the Supreme People's Court, High People's Court, Intermediate People's Court and Basic People's Court, including 25 regions, by reading the literature and relevant legislation.

Table 2. The history of the elements of representation in the General Provisions of the Civil Code and its interpretation

Announcement Time	Documents Name	Specific Terms	Representation Constituent elements
2016/7/15	The General Civil Code (Draft)	Article 152	[2] The relator has reason to believe [4] Exceptions to Representation in Appearances
2016/11/18	General Principles of Civil Law (Second Review Draft)	Article 167	Id.
2016/12/27	General Principles of Civil Law (Third Review Draft)	Article 176	Id.
2017/3/8	General Principles of the Civil Code (Fourth Review Draft)	Article 176	[2] The relator has reason to believe
2017/3/15	General Principles of Civil Law	Article 172	[2] The relator has reason to believe
2021/5/28	Civil Code	Article 172	[2] The relator has reason to believe
--	Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of the General Provisions of the Civil Code of the People's Republic of China (Discussion Draft)	Article 35 (Program I)	[3] Existence of the appearance of entitled agents [2] Good faith and no fault of the relator
		Article 35 (Program II)	[3] Existence of the appearance of entitled representation [1] Nominee: the appearance of having the right to represent is associated with the nominee. [2] Good faith and no fault of the relator
2022/2/24	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	Article 28	[3] Existence of the appearance of agency [2] The relator did not know that the actor acted without agency and was not negligent

2. Judicial status of the element of attributability of the represented person

2.1 Application status

The sample cases in this article are limited to the cases included in the "Peking University Law Treasure". In practice, the courts have not fully applied the element of "attributability". By January 8, 2023, the author retrieved 19,4007 civil cases by searching for the keyword "representation" in the full text. In order to better fit the constitutive elements of representation, I searched for the keyword "reason to believe" and found 95,642 civil cases, and the keyword "attributability" and found only 283 civil cases in this result.

2.2 Sample Case Analysis

2.2.1 Data analysis of the case sample

In order to improve the universality of the research results, for 283 cases from 25 regions, vertically, the author selected cases from the Supreme People's Court, High People's Court, Intermediate People's Court, and Basic People's Court, respectively, and horizontally, the author selected 1-5 cases for each region according to the number of decisions in different regions, and finally determined 91 cases as samples. Among the sample cases, 6 cases were heard by the Supreme People's Court, 27

cases were heard by the High People's Court, 48 cases were heard by the Intermediate People's Court, and 10 cases were heard by the Basic People's Court. Excluding the 6 cases from the Supreme People's Court in the case sample, the remaining 85 cases were from Beijing, Shanghai, Chongqing, Tianjin, Inner Mongolia Autonomous Region, Guangxi Zhuang Autonomous Region, Xinjiang Uygur Autonomous Region, Jilin Province, Shanxi Province, Fujian Province, Jiangxi Province, Hunan Province, Yunnan Province, Shaanxi Province, Qinghai Province, Jiangsu Province, Zhejiang Province, Anhui Province, Shandong Province, Henan Province, Hubei Province Guangdong Province, Sichuan Province, Guizhou Province, Hebei Province.

2.2.2 Analysis of the results of the case sample.

I divided the 91 cases into four categories: (1) the court finally found that they constituted apparent agency, and the attributability of the represented person was stated in the determination of apparent agency; (2) the court finally found that they constituted apparent agency, but the attributability of the represented person was not stated in the decision rules; (3) the court ultimately found that the agency did not constitute an agency in person and stated that the represented person was not imputable; (4) the court ultimately found that the agency did not constitute an agency in person, but did not state in the rules that the represented person was not imputable. For details, see Table 3 (" √ " means the result or condition is established, "×" means the result or condition is not established, "-" means the condition does not exist, i.e., the judge does not mention the "element of attributability of the represented person" in the rules of decision).

Table 3. Analysis of results for the case sample

Category	Representation is established	Nominee Attributable	Cases Quantity	of the total sample Proportion
(1)	√	√	42	46.15%
(2)	√	-	14	15.38%
(3)	×	×	13	14.29%
(4)	×	-	22	24.18%

As can be seen from the above table, category (1) has the largest number of cases, accounting for 46.15%, while category (3) has a relatively small number of cases, accounting for less than one-fifth of the total sample. For categories (2) and (4), the attributability element only appears in the reasoning of the parties, and the judges did not use it to determine whether the representation was established or not.

3. The need for the attributability of the Represented

3.1 The views of Chinese and foreign scholars

Under China's civil law system: from the perspective of distinguishing between powerless agency and apparent agency, some scholars conclude in the article "Attributability of the Represented person in Apparent Agency" that "even if the counterparty in a powerless agency is bona fide, it may not necessarily constitute an apparent agency". In this article, the reason for the conclusion that "the attributability of the represented person should be taken into account in the composition of the apparent agency ". Later, the scholar argued that "the good faith of the opposite party in the powerless agency and the apparent agency should adopt the same standard of determination", in conjunction with his article "The Attributability of the Represented person in the Apparent Agency", put aside the fact that "even if the opposite party in the powerless agency is in good faith, it does not necessarily constitute the apparent agency. "In addition to the reason for the relator to believe, the attributability of the represented person is also required. The existence of the attributability of the represented person makes the boundary between the powerless agency and the apparent agency clearer, and the apparent agency does not enjoy the right of retrospective recognition compared with the powerless agency. From a methodological point of view, some scholars believe that "there is a

degree of reasonableness of reliance, and the degree is very suitable for comparison with the degree of one's own attributability. The establishment of the element of attributability makes it possible to establish a framework of comparative weighing". The balance between personal attributability and the reasonableness of reliance gives a certain amount of room for discretion to better integrate the determination of apparent agency with the facts of the case. In the perspective of the relationship between the appearance of rights and the attributability of the represented person, some scholars believe that the represented person's attributability can be one of the evaluation factors for the appearance of rights. Some scholars argue that if the appearance of rights cannot be attributed to the person, then the relative's 'reliance' is also completely outside the scope of 'reasonableness' and does not constitute 'justified belief'. While maintaining legal security, the balance between the represented person's duty to prevent and the relator's duty to examine is sought.

Under the German civil law system, in the study of the issue of apparent agency, some scholars analyzed the necessity of the attributability of the represented person in apparent agency from the perspective of weighing the interests of the third party and the represented person. "If the represented person creates the illusion that the agent has agency on his part to the third person despite the fact that the represented person has not authorized the agent, the third person is more deserving of protection than him". The fiction that the represented person created the illusion that the agent had agency to the third party can be understood as the attributability of the represented person. Some scholars analyzed the issue from the perspective of analogous application, and believe that tolerated agency and apparent agency can be applied by analogy to the relevant provisions of Article 171(1) and Article 172(1) of the German Civil Code. The right to tolerate agency means that "the represented person is aware of the presence of another person for his benefit and acts as his agent, and the represented person is at liberty to do so". (P732) Apparent agency means that "the represented person does not know that another person has appeared for his benefit, but could have known and prevented this fact if the he had exercised sufficient care". (P732) These two situations can be regarded as the specific embodiment of the represented person's attributability, and I understand that the represented person knew of the agency's conduct but did not prevent it, and the represented person should have known of the agency's conduct but did not exercise due care.

Under the Japanese civil law system, some scholars have shown in their analysis of the purpose of the apparent agency system that one of the constituent elements of the apparent agency system is the attributability of the appearance of making, according to the persuasive jurisprudence of appearance, and that "the attributability of the person is required for the appearance of making, which is premised on the viewpoint of protecting the true right holder (the person) and the importance of The position of attributable principle that 'liability is limited to cases where there is a compelling reason'". Some scholars, in their analysis of the basis for liability for appearance, it is stated that "liability for appearance occurs on the premise that the 'reliance of the other party' on 'appearance' and the 'attributability of the person'" and "active participation in the making of appearance is required as an element of imputation. From the point of view of Japanese civil law scholars, the constituent elements of apparent agency can be framed as a pivotal point of appearance, looking at the issue from the point of view of the opposite party, and looking at the issue from the point of view of the represented party. And thinking from the perspective of the represented person is to consider the attributability of the represented person.

In summary, the views of both Chinese and foreign scholars reflect to a certain extent the necessity of the existence of the attributability of the represented person.

3.2 Argument of the court

According to the sample of cases, the proportion of cases in category (1) and category (3) in which the attributability was applied to the determination of apparent agency or not exceeded 3/5 of the total sample. Although this is related to the author's search method, it also proves to a certain extent the reasonableness of the existence of the attributability element of the represented person.

In category (2) cases, there are cases in which the judge did not directly state the "attributability of the represented person" in the rules of decision, but made substantive arguments on the elements of the represented person's attributability. For example, in the case of Zhou Zhiming and Lin Wenguo's Housing Lease Dispute, the agent Zhou Bojiang and the represented person Zhou Zhiming were father and son, and it was because the represented person did not keep the copy of the house ownership certificate properly that the represented person's father had the appearance of agency. The rule in this case did not actually state the attributability of the represented person but had the same effect as the rule in "Jia Jing and Xiao Deqiang, etc." which stated and argued the attributability of the represented person.

In the appeal case of Jia Jing and Xiao Deqiang, the attributability of the represented person played an important role in the determination of the apparent agency. In the balance of represented person's interests and the interests of the opposite party, the represented person give cause or not is an important weight, if I do have attributability for the formation of the appearance of agency, then when the interests of the two parties are in conflict, the balance will be tipped to the opposite party to maintain the safety of the transaction. In this case, the defendant Xiao Yufen informed her son Xiao Deqiang of the important information of the stock account, fund account and trading password, which is the direct reason for the formation of Xiao Deqiang's appearance of agency, so it satisfies the element of attributability of the represented person.

3.3 The relationship between the attributability of the represented person and the appearance of rights, the relator did not know that the actor acted without agency and without negligence

The relator did not know that the actor did not have the right to act and was not negligent is from the perspective of the relator to determine whether the apparent agency is established, while the cause of the appearance of rights has a certain relationship with the represented person, these two elements are from the perspective of the represented person to determine whether the apparent agency is established. Does the appearance of rights in the representation include attributability? Does having the appearance of rights mean that the represented person has attributability? Professor Wu Guozhe believes that the determination of the cut-off point between the appearance of agency and the attributability of the represented person is a flexible factor, "which can be moved back and forth consciously according to the actual situation and the reasonableness of the third party's reliance". The author agrees with this. In the cut-off point between the appearance of rights and the attributability of the represented person, but also with the reliance of the reasonableness of the relator, need to weigh each other to determine whether it constitutes an apparent agency. For example, in the appeal case of "Heilongjiang Dagujin Coal Co., Ltd. and Xing'an Thermal Power Co. However, Liu Haibin has been delivering goods and providing invoices for price settlement on behalf of Dagujin Company, and the reliance of the opposite party has a high reasonableness.

The existence of the attributability of the represented person in the apparent agency is necessary for the synthesis of the first three points. In the theoretical world, the attributability of the represented person in the apparent agency is an important point of difference between the powerless agency and the apparent agency, regardless of whether it exists as an independent element, it is an important criterion for the determination of the appearance of rights and the reasonableness of the reliance of the opposite party. In judicial practice, judges directly use the attributability of the represented person to determine the good effect of the apparent agency, although there are relatively few such cases, but in other parts of judicial practice, judges also implicitly express the judgment of the attributability of the represented person in the comprehensive determination of the apparent agency. The attributability of the represented person can be combined with other constituent elements can jointly regulate the determination of the apparent agency.

4. Analysis of the criteria for judging the attributability of the represented person

By sorting out the cases of category (1) and category (3) in the case sample, the author summarized the following four criteria for judging the attributability of the represented person in the representation, and indicated the specific cases in the quotation. Under the circumstances that the types of disputes and the rules of adjudication are basically the same, the author enumerates the rules of adjudication according to different types of disputes.

4.1 The represented person for the agency act knowingly but does not act

The represented person for the agency act knowingly but not act is divided into positive inaction and negative inaction. Positive inaction is mainly manifested as follows: 1 represented person knows the agent's behavior but provides facilities for the agent's behavior, such as in the construction contract, taking the initiative for the agent to issue the construction statement and note. 2 represented person knows the agent's behavior and has acknowledged the effect of similar agent's behavior, for example, the company has acknowledged the effect of the official seal used in the agent's behavior can't arbitrarily deny its effect in another transaction. Negative inaction is mainly manifested as follows: 1 the represented person knows the agency act but has not raised any objection, 2 the represented person knows the agency act but does not take active measures when it can take precautionary measures. 3 in the case of non-discretionary agency, no restrictions are made on the agency authority. Agency authority is within the scope of the represented person's control, and is one of the criteria for the relator to examine whether the agent has the authority to act in a particular matter. In the case that the agent is not authorized to handle all the affairs, the represented person uses general language in the power of attorney and does not limit the authority of the represented person is imputable.

4.2 Negligent management of internal personnel and official seal

For the determination of the attributability of insider negligence, the represented person cannot deny that the agent's actions are related to the actions of the person in charge of the position, continuous agency and the actions of the person with whom the counterparty is dealing etc. This is because "these objective circumstances can be exempted from the duty of verification of the bona fide third party, whose reliance is reasonable, and can be established as an apparent agency". The author believes that the reason for such a judgment is that the represented person appointed a certain actor as an agent or a person in charge on his own initiative, and should bear the corresponding risk and responsibility for this. It should be noted that, in the case where the represented person has done its duty of management, he does not have the attributability for the acts made after the actor has carved the official seal and forged the power of attorney. "Although the unit has the authority to manage the unit's employees, but the authority is a certain scope and limits, for employees in the work duties, work time, workplace outside the behavior, if all require the unit to take responsibility, will undoubtedly require the unit to fully control the private life of employees, which is obviously neither legal nor practical." The question that arises here is whether the agent or the person in charge of the private engraving of the official seal by the represented person has attributability? The author believes that the ultimate purpose of identifying the represented person's attributability is to determine whether the actor constitutes an apparent agency. Private engraving of the seal itself is the actor wants to do beyond the authority of the represented person, which requires the represented person to the agent, the person in charge of the scope of authority to make restrictions, time limits, so that the relative does not know whether the actor acted without agency and no negligence, the final determination of whether the agent constitutes an apparent agency.

Negligent management of the official seal is mainly manifested in the following three situations: First, the number of official seals recognized as valid is uncertain, the state of confusion in the management and use of the official seal makes the opposite party unable to judge whether it is the true intention of the represented person, and the reliance of the opposite party has a high degree of

reasonableness, constituting an apparent agency. Secondly, the official seal is placed in the custody of a person who has the risk of abuse. This requires that the represented person should authorize a sufficiently trusted agent, and the relevant agency authority should be clearly limited or publicized. Third, after the loss of the official seal, the cancellation procedure is not carried out, and the use of the official seal may be allowed to cause adverse consequences to itself.

4.3 Failure to properly manage important information

Failure to properly manage important information is mainly manifested in the following three cases: first, failure to properly store important documents, such as ID cards, real estate certificates, account books, original land use right certificates, vehicle license, motor vehicle registration certificates and other important documents. Of course, the subject who is responsible for the failure to take proper custody should be limited to the person with full civil capacity. For documents that are closely related to personal interests, they should be kept within the scope of their control to avoid the occurrence of incidents that damage personal interests. Second, actively informing others of private information, such as stock accounts, capital accounts, trading passwords, etc. Third, not properly managing other important information. For example, managing stamped consulting contracts and receipts for payments, etc.

4.4 Did not take the initiative to inform the relative important information

Failure to take the initiative to inform important information is mainly manifested in the following cases: 1 For the relative, the represented person is not timely informed of the information that the relative does not know and should not know but affects the composition of the apparent agency. For example, in the case that the agent has changed, the represented person does not inform the relative in time that the agent no longer has the right to act. Failure to promptly inform the counterparty of internal company information that affects the composition of the apparent agency. 2 For the represented person itself, he does not promptly publicize the relevant information. Commonly, the company did not change the registration in time after the change of directors. After the change of legal representative, the information of the legal representative was not disclosed to the society through newspapers or other forms in time.

5. Conclusion

Although the existing laws and judicial interpretations do not explicitly provide for the attributability of the represented person, the existence of the attributability of the represented person has a certain necessity, and this view has been recognized by most scholars in the theoretical field and applied by some judicial decisions, so when applying Article 28 of the Judicial Interpretation of the General Provisions of the Civil Code to the determination of the apparent agency, the article should be interpreted expansively. For the determination of the attributability of the represented person, judicial practice does not have a clear basis for the determination, and there is a risk of confusion. "The more detailed the division, the more reliable the appropriateness of the application of norms, and the legal judgment is more in line with the nature of things", the law still needs to specify the attributability of the represented person. "in order to achieve a balance between 'static security' and 'dynamic security' by taking into account the interests of the person under the premise of protecting the security of the transaction."

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