Del-credere agency and commission agents in commercial law: rights, duties and risk allocation

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ABSTRACT:

In commercial law, agents are crucial in linking principals with buyers and sellers, facilitating seamless commercial dealings. Commission agents and del-credere agents are frequently utilized in trade and business among these representatives. A commission agent serves as a middleman and receives a commission for facilitating transactions, whereas a del-credere agent takes on extra responsibility by assuring the payment or performance from the third party. This additional guarantee alters the type of risk present in the agency relationship.

This research paper analyzes the legal status of commission agents and del-credere agents, emphasizing their rights, responsibilities, and the distribution of commercial risks. It examines how del-credere commission establishes a unique contractual duty that extends beyond standard agency principles. The study also examines the level of responsibility of a del-credere agent when third parties default and the associated entitlements to indemnity and payment that these agents possess.

This paper emphasizes the distinctions between ordinary commission agency and del-credere agency by examining statutory provisions, judicial rulings, and established principles of agency law. It also examines how risk is transferred from the principal to the agent in del-credere agreements and the legal implications of this risk shift.

The research intends to demonstrate that although del-credere agency offers enhanced commercial protection to principals, it simultaneously places more significant responsibilities on agents. A precise grasp of these legal connections is crucial for efficient risk management in contemporary business dealings.

KEYWORDS: Del-credere agency, Commission agent, Commercial law, Agency law, Risk allocation, Principal–agent liability.

INTRODUCTION:

Within the complex structure of contemporary trade, the "agency" acts as an essential link connecting remote markets with specialized manufacturers.[1] In this context, the commission agent and the del credere agent embody two different approaches to managing risk.[2] Although both intermediaries enable the trading of goods and services for a commission, their legal positions differ significantly when a third-party deal collapses.[3]

A typical commission agent functions as a fiduciary, representing a principal to negotiate and finalize sales.[4] According to established commercial law—like the principles in the Indian Contract Act of 1872 or UK Common Law—the main responsibility of the commission agent is to apply reasonable skill and care.[5] Nonetheless, they are generally protected from the financial consequences if a purchaser fails to pay; the "credit risk" stays solidly with the principal.[6]

In contrast, the del credere agency—originating from the Italian del credere ("of trust" or "of belief")—adds a distinct layer of protection.[7] A del credere agent takes on the role of a guarantor in return for an extra "del credere commission." They offer a personal assurance to the principal that the purchaser will fulfill their contractual commitments.[8] Should the buyer face insolvency or fail to meet obligations, the del credere agent assumes personal responsibility to compensate the principal. This study analyzes the complex legal duties and rights associated with these two positions.[9]

It examines the Right of Lien and the Duty to Account, while particularly focusing on the "Liability Paradox": the reasoning behind an agent's choice to accept the risk of a third party's failure.[10]Through the assessment of modern legal cases and the evolving international trade environment, this research aims to ascertain if the increased expenses of del credere commissions remain warranted in a time characterized by digital credit assessment and strong trade insurance. Using this comparative perspective, we seek to determine whether the higher costs of del credere commissions are still justified in an era of digital credit scoring and robust trade insurance. Through this comparative lens, we aim to clarify the strategic allocation of risk that continues to define commercial agency law today.[11]

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[1] Sir Roy Goode, Commercial Law (5th ed. 2016),
[2] Halsbury's Laws of England, Vol. 1(2), Agency (5th ed. 2017),
[3] Lakshminarayan Ram Gopal & Son Ltd. v. Government of Hyderabad, A.I.R. 1954 S.C. 364,
[4] Irrawaddy Flotilla Co. Ltd. v. Bugwandas, (1891) I.L.R. 18 Cal. 620,
[5] Indian Contract Act, 1872, §§ 182, 211,
[6] Baring v. Corrie, (1818) 2 B. & Ald. 137 (K.B.),
[7] Michael G. Bridge, The Sale of Goods (4th ed. 2019),
[8] Peter Watts & F.M.B. Reynolds, Bowstead & Reynolds on Agency (22d ed. 2021),
[9] Id. (Del Credere Agency discussion),
Indian Contract Act, 1872, §§ 213, 221,
[10] Halsbury's Laws of England, Agency—Del Credere Agents,
[11] Sir Roy Goode, Commercial Law (Credit Risk & Trade Security),

RESEARCH OBJECTIVES:

The following are the research objectives this paper examines:

1) To understand the differences between commission agents and del-credere agents in commercial transactions.[12]
2) To examine how the principal and agent share risk and liability in case a third party breaches the contract.[13]

RESEARCH PROBLEM:

Commission and del-credere agents are significant intermediaries in commercial transactions between principals and third parties.[14] Despite working on a commission basis, the two agents have distinct legal positions, which include different levels of risk and liability in cases of contract breaches by third parties.[15] The differences between the principal and agent regarding credit risk are often not well-defined.[16] Why? While a commission agent is not typically held accountable for third-party default[17], he or she is expected to assume the risk in exchange for monetary compensation from his del-credere agent. The degree of this assumption of responsibility and its legal implications is not always apparent.[18] 'The uncertainty surrounding the determination of liability in breaches arises from this.'[19] The focus of the study is on how commission agents and del-credere agents differ in terms of commercial law, with a particular emphasis upon sharing risk and liability between the principal and the agent.[20]

RESEARCH QUESTIONS AND HYPOTHESIS:

RESEARCH QUESTIONS:

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[12] ibid
Indian Contract Act, 1872, §§ 182, 211 (India),
ibid
[13] Baring v. Corrie, (1818) 106 Eng. Rep. 108 (K.B.); 2 B. & Ald. 137,
Irrawaddy Flotilla Co. v. Bugwandas, (1891) I.L.R. 18 Cal. 620 (India),
HALSBURY'S LAWS OF ENGLAND, vol. 1(2), Agency ¶¶ 701–708 (5th ed. 2017),
[14] Indian Contract Act, 1872, § 182 (India),
[15] ibid
[16] ibid
[17] Irrawaddy Flotilla Co. v. Bugwandas, (1891) I.L.R. 18 Cal. 620 (India),
[18] ibid
[19] Indian Contract Act, 1872, §§ 221–222 (India),
[20] SIR ROY GOODE, COMMERCIAL LAW 553–56 (5th ed. 2016),

1) What distinguishes a commission agent from a del-credere agent in terms of their legal role in commercial transactions?
2) How does the assumption of risk by a del-credere agent affect the distribution of liability between the principal and the agent when a third party breaches the contract?
3) What is the legal extent of a del-credere agent's liability for third-party default under commercial law?
4) Does del-credere agency provide an effective mechanism for managing credit risk in present-day commercial practice?

RESEARCH HYPOTHESIS:

In commercial transactions, a commission agent is not held responsible for third-party default unless there is an express agreement.

The del-credere agency's provision of a contractual guarantee in exchange for delegated commission results in the agent being personally accountable for third-party default.

RESEARCH METHODOLOGY:

The study of the legal principles governing commission agents and del-credere agents in commercial transactions is the focus of this research paper, which follows a doctrinal and analytical approach. The investigation is purely theoretical, as it seeks to scrutinize existing laws and legal interpretations rather than gather empirical data.

Various legal sources, including the Indian Contract Act of 1872, have been utilized to establish and analyze the statutory framework of agency, specifically in relation to agents' rights, duties, and liabilities. Also, Indian courts have analyzed relevant judicial rulings to ascertain the legal role of commission and del-credere agents, particularly in cases related to third party default. Additionally, the use of English case law has been adopted to clarify the principles, as del-credere agency is grounded in common law and necessary for conceptual clarity.

The use of secondary sources, such as standard textbooks, commentaries, and journal articles, has been made possible to provide scholarly interpretation and support doctrinal analysis on commercial and agency law. This has led to a comparative approach emphasising the differences between commission agencies and del-credere agencies, particularly in relation to the sharing of the risk and liability between the principal and agent.

The study is a legal examination of agency relationships in commercial law and requires an analytical approach to be taken. The research has emphasized theoretical and legal analysis, and there have been no fieldwork, surveys, or statistical analyses conducted.

LITERATURE REVIEW

Scholars have consistently emphasized the crucial role of intermediaries in commercial law, emphasizing the importance of interplay between intermediary parties and their ability to manage trade and contractual relationships.[21] The concept of commission agency was regarded as a fundamental aspect of mercantile practice by early legal writers, guided by trust and fiduciary responsibility.[22] Avtar Singh writes, *"A commission agent functions as a sort of extension to the principal [and] must be responsible for reasonable care and skill, but it is not usually his responsibility to take any liability for third-party defaults"*.[23] The risk distribution, as per Singh, is consistent with the customary belief that credit risk remains in the hands of the principal unless explicitly transferred.[24]

For a more detailed doctrinal analysis of agency under the Indian Contract Act, 1872 see *indemnity and lien by Pollock and Mulla*.[25] The explanation is that del-credere agency departs from traditional agency principles, as the agent undertakes an extra contractual responsibility to ensure the buyer's solvency and performance.[26] According to the authors, this arrangement changes only the usual distribution of risk, but they emphasize that the extent of liability assumed by an agent is largely determined by the terms of the parties' agreement.[27]

Del-credere agency has been a topic of study in English legal scholarship. According to Bowstead and Reynolds, the del-credere agent is a hybrid entity that incorporates both agency and guarantee.[28] Those who argue that del-credere commission is justified are those who maintain that the agent assumes the credit risk otherwise bearable on principals. Nonetheless, it is also recognized that the courts have not consistently established the exact limits of liability, leading to interpretative uncertainty. This is particularly noteworthy.[29]

Roy Goode examines del-credere agency in relation to modern commercial law from an economic perspective and suggests that these arrangements were historically created to enhance commercial security and reduce transaction costs.[30] Goode argues that the current availability of credit insurance and advanced risk-assessment mechanisms may challenge the historical rationale for del-credere commissions in trade.[31]

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[21] Roy Goode, Commercial Law 23–27 (5th ed. 2016),
[22] W. Bowstead & F.M.B. Reynolds, Bowstead & Reynolds on Agency ¶ 1-001 (21st ed. 2018),
[23] Avtar Singh, Law of Contract and Specific Relief 472–474 (13th ed. 2022),
[24] Ibid, 475
[25] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 628–631 (15th ed. 2017),
[26] Ibid, 632-633
[27] Ibid,634-635
[28] W. Bowstead & F.M.B. Reynolds, Bowstead & Reynolds on Agency ¶ 7-041 (21st ed. 2018),
[29] ibid
[30] Roy Goode, Principles of Corporate Insolvency Law 41–43 (5th ed. 2018),
[31] ibid

Legal responses, particularly in cases like that of *Irrawaddy Flotilla Co.* between two parties. *Ltd. v. Bugwandas* and *Lakshminarayan Ram Gopal & Son Ltd. v. The Government of Hyderabad* has been questioned by several scholars about the need to differentiate between a fiduciary agency and judicial arrangements, such as del-credere arrangements.[32] However, the literature on these agents is mostly separated and provides only limited comparative analysis that emphasizes the sharing of risks and liabilities.[33]

This review highlights a gap in scholarship regarding the comparative analysis of commission agents and del-credere agents in modern commercial risk management. Additionally, in order to close this gap, the current research seeks to explore how risk and liability are shared between both parties in commercial law while also examining the relevance of del-credere agency in contemporary business.

DISCUSSION AND ANALYSIS

DICUSSION

Generally, the legal differentiation between ordinary agency and guaranteed liability is not discussed in discussions of commissions or del-credere agencies. However, there is a lesser-known aspect: the psychological and strategic shift in commercial behavior that arises when an agent accepts to act as if they are trustworthy.[34] Accepting credit risk doesn't just change the agent's legal responsibilities, it also changes the decision-making process, negotiation methods, and choice of contracting parties.[35]

A commission agent who is not accountable for third-party default prioritizes transaction volume over transaction quality.[36] As the principal's liability in default remains, the agent has little incentive to determine the buyer' creditworthiness.[37] On the other hand, a del-credere agent has monetary control over the third party's solvency. Despite the lack of formal credit assessment mechanisms, this often results in a more cautious selection of buyers and stricter informal due diligence measures. [38]The behavioral differentiation is not frequently discussed in doctrinal legal writing, but it is essential in comprehending the commercial significance of del-credere agency.[39]

Another issue that is not widely recognized is the imbalance of bargaining power in del-credere arrangements. In competitive markets, del-credere clauses are often imposed on agents by principals without clear negotiation. Despite the law's assumption of del-credere liability as a

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[32] ibid
ibid
[33] ibid
[34] ibid
[35] ibid
[36] ibid
[37] Ibid
[38] ibid
[39] ibid

voluntary contractual assumption, it is often the case that agents may assume such risk due to economic pressure rather than informed consent. There is a debate about the validity of the legal assumption of equal bargaining power in relation to commercial realities.

The ambiguity surrounding the connection between del-credere agency and guarantee law is often overlooked.[40] Although courts refer to del-credere agents as guarantors, they don't always adhere to the principles of guarantee law, such as rigorous scrutiny of liability. In cases of fraud or misrepresentation by the principal, uncertainty arises from the hybrid treatment regarding the defences available to del-credere agents. A clear judicial framework does not always lead to predictable litigation outcomes.'[41]

Considering the significance of del-credere agency in the age of internet also requires further investigation. Credit insurance and real-time credit scoring are tools that modern trade has access to, but they are not universally available in all markets.[42] Del-credere agents are still utilized as a practical risk-management mechanism in developing economies and informal trade sectors. It indicates that del-credere agency is not a dead end, but rather an effective means of risk-planning.[43]

The differentiation between commission and del-credere agents is not solely a legal label, but rather demonstrates how commercial law facilitates the private reallocation of risk.[44] Additionally, it allows parties to allocate risk independently. Del-credere agency's ability to survive in the face of changing commercial conditions is aided by the understanding of these unexplored dimensions.[45]

ANALYSIS

The study focuses on the legal differentiation between commission agents and Del-credere agents with specific concerns regarding risk and liability in commercial transactions.[46] This research questions are answered by an analysis of how agency law allocates responsibility for third-party default and whether del-credere arrangements still have a meaningful function in modern commerce."[47]

The initial inquiry in the research pertains to the legal distinctions between commission agents and del-credere agents. A commission agent is essentially a representative of the principal in terms of their duties, which are typically included in fiduciary obligations like loyalty, reasonable care, and accurate accounting.[48] Third-party performance is not typically guaranteed by the commission agent. The principal assumes the risk of not paying or breaching the

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[40] ibid
[41] P.S. Atiyah, An Introduction to the Law of Contract 263–265 (6th ed. 2005),
[42] ibid
[43] ibid
[44] ibid
[45] United Nations Commission on International Trade Law, Legislative Guide on Secured Transactions 15–17 (2010), ibid
[46] ibid
[47] ibid
[48] ibid

contract.'[49] The agency law distinguishes facilitation from financial risk in this allocation, unless there is an express agreement to the contrary.[A][50].

The second research question concerns the sharing of risk and liability in cases where a third party breaches the contract. This number changes in a del-credere agency. Accepting del-credere commission means the agent is liable in case of third-party default, which is contractual.[51] Liability arises from an agreement, not the law, which demonstrates the flexibility of commercial law in redistributing risk.[52] The assumption of risk is not absolute and relies on the contractual terms. Generally, courts have used contractual interpretation rather than fixed legal standards to determine the extent of the agent's responsibility, leading to inconsistency.[53]

In this study, another question is whether del-credere agency remains relevant in modern commercial practice. The availability of credit insurance and banking guarantees in contemporary commerce is not always standardized.[54] Despite the informal and developing nature of many markets, del-credere agents can still offer practical security by leveraging market knowledge and personal networks. Del-credere agency appears to be a viable means of risk-sharing, not an outdated legal concept.[55]

This study highlights structural issues in the realm of bargaining power. Despite treating del-credere liability as a voluntary contract, agents frequently accept such terms under competitive conditions rather than in the midst of actual negotiation. Assuming fair agency bargaining power is not a prerequisite for risk allocation, this raises questions.[56] The judicial system's inability to scrutinize del-credere clauses more closely could result in agents being held accountable for disproportionate liability.[57]

Doctrinal and judicial analyses provide support for the research hypothesis that commission agents do not fall under third-party default liability without express approval.[58] It is also established that del-credere agents accept personal liability in return for higher commission, but the interpretation of these rules and other contractual boundaries must be followed.[59]

The analysis suggests that the differentiation between commission and del-credere agents is indicative of commercial law's flexibility in stratifying risk. The lack of a uniform set of legal principles necessitates the development of more explicit judicial guidance to ensure efficiency and fairness in agency arrangements.[60]

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[49] ibid
[50] ibid
[51] ibid
[52] ibid
[53] ibid
[54] ibid
[55] ibid
[56] ibid
[57] ibid
[58] ibid
[59] ibid
[60] ibid

CONCLUSION

By deviating the formal definitions of commission agents from those of del-credere agents, this research has analyzed how risk and liability are allocated in commercial practice. A commission agent is still a facilitator with fiduciary duties, while the principal bears the financial risk of third-party default. This study highlights the importance of this distinction. This framework sustains the customary division of agency and credit responsibility.

However, del-credere agency is a purposeful transfer of risk through contractual arrangements. The agent's acceptance of an extra commission implies that they are liable in case of third-party default, as commercial law allows parties to reorganize risk as required. However, this flexibility is not free from potential issues. The belief that del-credere liability is always voluntary doesn't align with market realities, where agents may accept such obligations under competitive pressure rather than through actual negotiation. This lack of consistency in judicial standards further increases uncertainty due to the fact that courts frequently resort to "fairness" in liability allocation rather than contractual interpretation.

Del-credere agency remains a significant aspect of modern business, particularly in markets where formal credit mechanisms are scarce, as per the study. Furthermore. It serves as a practical tool of private risk management, not an outdated one.

In general, the differentiation between commission and del-credere agents demonstrates how commercial law is adjusted to economic circumstances. *"Commercial law is most effective when its legal provisions reflect the practical operation of trade",* according to Roy Goode.[61] Providing clear judicial guidance on del-credere liability would enhance commercial certainty while maintaining fair and proportional risk allocation.

[61] ibid