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Law of Agency: Agents and Authorisation

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In today's fast-moving world, the creation of an agency and the role of agents have taken a prime and pivotal role in most commercial transactions, in order to get business deals made. This chapter will discuss each element involved in the making of an effective agency relationship, which will in turn be utilised for the benefit of the principal in an attempt to facilitate his day-to-day business transactions. In essence, the main parties we will be referring to throughout this chapter will be the principal, the agent and the third party, and how they are interlinked for the purpose of a commercial transaction.

The agency creation

■ What is an agency?

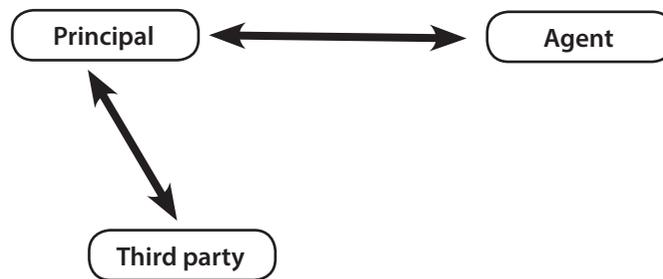
"An agency is a bilateral, onerous, consensual contract whereby one party, the principal, authorizes another, the agent, to execute business on his behalf."

The agent acts on behalf of the principal and can alter the principal's legal position by binding him to a contract with the third party. In so doing, the principal may incur legal obligations to the third party through the agent, provided that the latter has acted within the scope of authority that has been conferred on him.

The three parties to an agency are therefore:

- 1 **The principal** – contractually bound to the third party for the purpose of the commercial transaction and contractually bound to the agent for the purpose of the agency agreement.
- 2 **The agent** – contractually bound to the principal and acts on behalf of the principal for the purpose of the commercial transaction.
- 3 **The third party** – contractually bound to the principal for the purpose of the commercial transaction.

The agency relationship looks like this: two contracts and three parties



Note: Mandate is similar though not identical to agency, the main difference being that mandate is gratuitous, whereas an agent is normally paid.

Agency is widely used in business and examples include auction houses, stockbrokers, ship's captains, directors and employees of companies, solicitors, estate agents, and football and theatrical agents. Agents are much used in international business: a company in one country will often use an agent based in another to seek business for it in that country.

■ The agent

"...he who acts through another, acts himself..." in Latin, *qui facit per alium, facit per se*

This maxim implies that when an agent transacts on behalf of a principal, it is as if the principal is acting himself.

An agent shall be deemed as acting on behalf of a principal when the agent's actions bind the principal to the third party. However, an agency relationship does not arise when the agent is negotiating on his own behalf and in that event he would be eventually contractually bound to deliver to the third party in his own capacity. In that case there is no tripartite relationship.

For example, in *Spearmint Rhino Ventures (UK) Ltd v Commissioners for H.M Revenue and Customs* [2007] E.W.H.C. 613 (Ch) the defendants, Spearmint Rhino, contested a tribunal decision for the claimant (HM Revenue and Customs (HMRC)) that they had directly supplied the services of lap dancers as agents. According to HMRC, the defendants exercised control over the service fees that the dancers received from customers for dances and 'sit downs' and should therefore be liable for Value Added Tax (VAT). Mr Justice Mann held that although the dancers were paid a commission by the defendants, they were acting as 'principals' in their own right due to the fact that they separately negotiated whatever fee their services per client might render. He further declared that the dancers were not engaged as agents for the defendants since they entertained customers on their own behalf and were themselves liable to account for VAT for the services rendered.

Types of agents

There are various types of agency relationships but they are mainly categorised into general agents and special agents.

General agents:

These agents act for many functions on behalf of the principal, and have general authority to carry out all business for the principal, or all business of a particular type. They therefore have implied authority to contract on behalf of their principal, without needing express instructions, as will be discussed later in this chapter. Masters (captains) of ships are a good example: in the days before modern communications, ships often encountered problems far from their home ports, and captains had to make rapid decisions about the sale of perishable cargoes, or about getting repairs done to the ship, without being able to get express instructions from the principal. Other examples of general agents include solicitors and mercantile agents.

Special agents

These agents act on behalf of the principal for a specific function.

Mercantile agents

They operate in trade on behalf of the principal and are remunerated on the basis of a share of the profits (commission) on the sale or purchase of goods. They are divided into **factors** and **brokers**. A factor would have a