

Agency Agreements In American Law;Comparison With Turkish Civil Law

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ABSTRACT:

Agency is a relationship between two persons whereby one of them (the agent) is authorized to act for and on behalf of the other (the principal). Within the scope of authority the principal grants the agent. Agency relationship is one of the most common legal relationships. By virtue of agency device, one person can make contracts at numerous places with many different parties at the same time. Thus disputes based upon contract law and tort law may arise out of transactions or work done by others. In the article agency in American Law is given much more detailed because of the differences from the Turkish Law.

Giriş

Law consist of enforceable rules governing relationships among individuals and between individuals and their society. The primary function of law is to simultaneously maintain stability and permit change. Law does this by providing for dispute resolution, the prezervation of political, economic, and social institutions, and the protection of property (Miller, R./ Jentz, G. "Fundamentals of Business Law" USA 1996westpublisher p.2).

To maintain peace and stability with legal rules can be effective when a person may be liable for something he or she did. In agency we have to go one step further to ask when and under what circumstances a person may make another person liable for what he did.

Agency is one of the most common and important relationship between two parties. It is hard to imagine a business world without agents. Picture Mustafa Koç from Koç Holding trying to sell all of the cars that Tofaş Company manufactured. Obviously, other people must be appointed to fill in - act as agents - for the owner of a large company (the principal).

Agency relationships permeate every aspect of modern economic life. By using agent a principal can conduct multiple business operators simultaneously in various locations (Miller/Jentz, 632).

In the article; outline about the formaiton of agency relationship, the scope of an agent's authority and how an act without the authority can bind principal. Principal's and agent's duties to liabilities, distinction between employees and independent contractors, and indicate when they are agents. Realtions with third parties and last termination of an agency in American Law comparison with Turkish Private Law (Civil Law and Commercial Law) are given.

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In the USA agency is primarily goverred by State Common Law. An orderly presentation of this law is found in the Restatement of the Law of Agency . Regarded as a valuable authoritative reference work. The restatement is extensively cited and quoted in judicial opinions

I- Main Definitions, Nature of Agency, Scope of Agency Purpose In American Law

A) Definitions

Agency is a relationship authorising one party (agent) to act for and behalf of other party (principal).

Principal is a person who authorises another to act on her/his behalf. Agent agrees to act or represent for another party. The principal has the right to control on agents conduct in matters entrusted to the agent.

B) Nature of Agency

Agency relationship is a consensual relationship. It must be based on an affirmative indication that the agent agrees to act for the principle and the principal agrees to have the agent to act (Miller/Jentz "Instructors Manual to accompany Fundamentals of Business Law" 1995 West Publishing Company p.350).

C) Scope of Agency Purpose

As a general rule, a person may do through an agent whatever business activity, he may accomplish personally. Conversely what ever he can not legally do himself, he can not authorise another to do for him. In addition, a person may not appoint an agent to perform acts that are so personal, that performance may not be delegated to another, as in the case of a contract for personal services (Mann/Roberts "Essentials of Business Law and Legal Environment"1995 p.540).

II- Agency Formation (Creation of Agency)

A) Formalities

a) Capacity of Pricipal

As a general rule, one who has contractual capacity himself may be a principal and enter into a contract through an agent. The capacity to be a principal and thus to act through an agent depends on the capacity of principle to do the act herself (Mann/Roberts p.542). Eg: Contracts entered into by minor or incompetent not under guardianship are void.

¹ Restatement (second) of Agency, Section 1. The restatement is an authoritative summary of the law of agency and is often referred to by jurists in decisions and opinions (Miller/Jentz p.634).

Consequently, the appointment of an agent by a minor or an incompetent not under a guardianship and any resulting contracts are void, regardless of agent's contractual capacity.

Minor: As a general rule can not bind himself absolutely in contract appointment of an agent is void too.

Incompetents: An incompetent's appointment of an agent as well as agent's actions may be disaffirmed by the incompetent, his committee or personal representative.

Unincorporated Association: Non-profit organisations (churches, clubs) can not be principals. However members may be held jointly liable as principals if they have authorised or assented to the act (New York Bar Review 1996 p.16).

b) Capacity of Agent

Any person may be an agent, even though he has no contractual capacity himself.

- Minor: May validly be appointed
- Incompetents: Individuals incompetent to enter into valid contract on their own behalf may still act, another's agent.
- Disqualification: A person may be disqualified from being an agent for following situations;

- 1) Representing both parties,
- 2) Self dealing ;The agent may not secretly act for her own account,
- 3) Not licensed; If the law requires to have a license eg: Brokers, Insurance Agents.

B) Creating the Agency

As it is mentioned above agency relation is consensual not necessarily contractual. Nonetheless agency by contract, the most usual method of creating the relationship, an agency may arise by agreement (appointment), ratification, conduct (estoppel) or operation law.

a) Agency by Agreement

The usual method of creating agency by agreement is authorisation. Authorisation may be expressed or implied after that a person on the behalf of another. An agency can be in a written form or oral. An agency agreement can also be implied by conduct for

example a hotel expressly allows only 'A' to park the cars, as a parking valet.

b) Agency by Ratification

When a principal affirms a contract made by a person who is not an agent, or who is an agent acting outside the scope of his or her own authority. Ratification as a matter of intent, can be expressed by words or conduct.

c) Agency by Estoppel (Authorisation by Conduct)

When a principal causes a third person to believe that another is the principal's agents, that gives a person reason to believe that the principal consents to that person's acting as agent is sufficient to create an agency.

d) Agency by Operation of Law

In certain instances the courts, have found it desirable to create agency relationship. This action is influenced by necessity or social desirability, for example in family relationships. In emergency situations also agency by operation of law may also occur. For example when the agent is unable to contact the principal, the courts will often grant this emergency power.

III -Rights and Duties Between Principal and Agent

A) Duties of Principal to Agent

a) Contractual Duties

1) Compensation: The principal must compensate the agent as specified in the contract for the reasonable value of services provided, if no amount is specified. A principle has a duty to compensate the agent unless the agent has to serve gratuitously. An agent loses her right of compensation by; -Breach of duty of obedience -Breaching the duty of loyalty or,-Wilfully and deliberately breaching the agency contract

2) Reimbursement: The principal must pay back to the agent authorised payments the agent has made on principal's behalf. A principal under the duty of reimbursement his agent for authorised payments the agent makes on the principal's behalf and for authorised expenses the agent incurs. Eg: An agent who reasonably and properly pays life insurance premium for the protection of principal's property is entitled to reimbursement for the payment.

3) Indemnifications: The principle must pay the agent for losses the agent incurred while acting as directed by principal. The principal is under the duty of indemnifications for the losses the agent incurred or suffered while acting as directed by the principal in a transaction that is not illegal or not known by agent to be wrongful. To indemnify is to make good or pay of loss.

b) Tort Duties Tort duties includes the duty to provide on employee with reasonable safety conditions of employment and warn the employee of any unreasonable risk involved in the employment.

B) Rights of Agents

a) Breach of Contract

An agent has the usual remedies for breach of contract. The most important thing is that agent has a duty to mitigate damages.

b) Agent's Lien

An agent has a possessory lien (i.e a claim against the principal's property held by the agent) for any money due to the agent, unless the contract provides otherwise. An attorney has a lien on her client's money, documents, securities, and papers. An accountant, however, is deemed to own all work papers, so she does not need a lien (New York Bar review p.17)

c) Duties of Agent to Principal

When the principle-agent relationship created by a contract, the duties of the agent to the principal are primarily by the provisions of the contract. In addition to these contractual duties, agent is a subject of other various duties imposed by law, unless the parties agree otherwise. Normally a principal bases the selection of an agent on agent's ability, skill, and integrity. Moreover the principal not only authorises and empowers the agent to bind him on contracts with third persons, but often places an agent in possession of money and other property. As a result agent is in the possession to insure the principal either through negligence and dishonesty.

Accordingly an agent as a fiduciary person (a person in a position of trust and confidence), owes her principal the duties of obedience, diligence and royalty, duty to inform, duty to provide accounting.

A gratuitous agent also has the same liabilities. A gratuitous agent is subject to the same loyalty that is imposed upon a paid agent and equally liable to the principle for the harm he causes for careless performance.

a) Duty of Obedience

Duty of obedience requires the agent to act in the principal's affairs only as authorised by principal and to obey all reasonable instructions and directions of principal.

To act with principal's reasonable instructions; The agent may be the subject to liability for breach of duty of obedience.

1) If she entered to an unauthorised contract for which principal is liable.

2) She has improperly delegated her authority.

3) If she committed a tort for which the principle is liable

Moreover the agent who breaches her duty of obedience loses her right to compensation.

b) Duty of Diligence (Duty of Reasonable Care)

A paid agent must set with reasonable care and skill in performing the work for which he is employed. He must also exercise any special he may have.

The agent who does not exercise the required care and skill is liable to his principal for any resulting loss.

Eg: A appointed B to sell goods for the highest price he can obtain. B sells goods in glutted market and obtain low price. B is liable for breach of the duty of diligence.

c) Duty of Inform

Give the information that is relevant to the affairs on trusted to her and give all the information which principal wants to know.

d) Duty of Account

The agent is under the duty to maintain and provide to the principal a true and complete account of money and other property that the agent has received or expended on the principal's behalf. The agent must also keep the property separate from his own.

e) Fiduciary Duty

Fiduciary duty is arising out of the relationship trust and confidence is one of utmost loyalty and good fate.

f) Loyalty and Good Faith An agent owes the duty of loyalty and good faith to principal. An agent who violates his fiduciary duty is liable to his principal for breach of contract.

In for loses caused and in restitution for profits he made or property he received in breach of fiduciary duty. Moreover he loses the right of compensation.

g) Breach of Fiduciary Duty- Conflicts of interests

- Duty not to complete
- Confidential information
- Duty to account for financial benefits

D) Rights of Principal

a) Action for Damages

1) Breach of Contract

A compensated agent may be held liable for damages suffered by principal related with breach of contract.

2) Tort

All agents (compensated or gratuitous) may be held liable for damages of the principal's property. Damages may be intentional or negligent misperformance, or failure. For the negligent misrepresentation an agent may held personally liable.

b) Action for Secret profits

If an agent breaches her fiduciary duty and secretly profits, the principal may recover the actual profits or property by the agent.

c) Accounting

The principal may bring an action in equity in complicated situations to have the court determine the exact amount of principal's funds that the agent has that must be return to the principal.

d) Withholding of Compensation

If the agent committed an intentional tort or intentionally breached his fiduciary duty the principle may refuse to pay any compensation to the agent with other remedies (Anderson/Fox/Twomey "Business Law" USA 1992 p.753 Mann/Roberts "Contemporary Business Law" p.753, New York Bar Review).

IV-Differentiate from Other Relationship

Two other relationship overlap with agency, these are employment relationship and independent contractor.

A) Employer - Employee

The employer has right to control the physical conduct of employee. In employer-employee relationship employer controls the performance of tasks involved in employment. Employee do not have independent business discretion, eg: Full-time driver.

B) Principal - Independent Contract

A person who engages an independent contractor has no right to control the physical conduct. Independent contractors have discretion power about business. Although all employees are agents, all agents are not employees. Agents who are not employees are independent contractors. Eg: An attorney retained to handle a particular transaction

would be an independent contractor. The distinction between employee and independent contractor has a number of important legal consequences. Eg: principal is liable for the torts an employee commits within the scope of employment but ordinarily is not liable for the torts committed by independent contractor. In addition under numerous federal and state statutes, the obligation of principal apply only to agents who are employees. Eg: Social Security act the national labour relations act, workers compensation act (Anderson/Twombey/Fox p.1057-1174).

V- Termination of Agency

In most cases, either party of an agency relationship has power to terminate the relationship at any time. Any agency may be terminated by the act of or both parties to agency agreement or by operation of law (Clarkson/Miller/Jentz/Cross "West's Business Law " 1995 p.690). Because agency is based on the consent of the principal, the agency is terminated when such consent is withdrawn or otherwise ceases to exist. On termination of agency the agent's actual authority ends and she is not entitled to compensation for services subsequently rendered, although her fiduciary duties may continue (Mann/Roberts p.150).

A) Termination by Agreement

- 1) Acts of Parties Lapse of time fulfilment of the purpose, mutual agreement of both parties, revocation of authority, renunciation by the agent. These are acts of parties which used for the termination of agency relationship.
- 2) Lapse of Time Authority conferred upon an agent for a specified time terminates when that period expires. If no time is specified authority terminates at the end of reasonable period. This reasonable period must be suitable for the action of agency relationship.
- 3) Fulfilment of Purpose The agent authorised to perform a specific act after fulfilment of the purpose agency is terminated. Eg: Sale of home or to accomplish the particular result may terminate the agency relationship any time.
- 4) Mutual Agreement Both parties may terminate the relationship at any time with their mutual agreement.
- 5) Revocation of Agency Principal may revoke the agent's authority at any time, but if such revocation constitutes a breach of contract by the principal, the principal recover the damages of agent. Nonetheless where the agent has seriously breached the agency contract, has wilfully disobeyed or violated his fiduciary duty, the principle is not liable for revoking the contract. If the agent is gratuitous the principal ordinarily may revoke it without the liability of agent.

6) Renunciation by The Agent The agent has the power to end the agency by notifying the principal that she renounces the authority which the principal has given her.

B) Termination by The Operation of Law

The operation of law, the occurrence of certain events will automatically terminate the agency relationship. These events either makes impossible for the agent to perform or unlikely that principle would want the agent to act.

1) Bankruptcy

The filling of the petition in bankruptcy which initiates bankruptcy proceedings in federal courts, usually terminates all the debtor's existing agency relationship.

2) Death

Death of a principal or agent naturally terminates the agency relationship.

3) Incapacity

Incapacity of principal or the agent which occurs after the formation of agency terminates the authority. But almost all the states have statues providing for "durable power of attorney" (one remains effective despite subsequent incapacity of agent). Durable power of attorney is extremely useful in families, allowing adult children to become agents of their elderly or ill parents. If parents become incapacitated their children are legally empowered to act for them according to the statue power of attorney act.

4) Change in Circumstances

The authority of agent is terminated by a notice for knowledge of a change in subject matter or change in business conditions from which the agent should reasonably refer that principal would not wish to exercise the authority given to him.

5) Loss or Destruction of Subject Matter

Where a specific subject matter to which agency authority based on lost or destroyed, such authority thereby terminated.

6) Disloyalty of The Agent

If the agent without principal's knowledge acquires interests adverse to those of the principal or otherwise breaches her duty of loyalty her authority to act on principal's behalf is terminated.

7) Change of Law

If the related law changes and restricts the performance about the subject matter or the subject matter itself, than the authority of the agent ends automatically due to change of law. Change in law makes the performance of the authorised act illegal or criminal, than the law terminates the agent's authority.

VI- Agency In Turkish Civil and Commercial Law

A) In General

In Turkish Private law agency relationship is regulated mainly by the Code of Obligations and Commercial Code. Our Code of Obligations is inspired from Swiss Code of Obligations and Commercial Code from German Law. Turkish Code of Obligations contains provisions about agency in Art.32-40 Art. 386-399 and also Art. 449-456 are about commercial representative. The general part of Code of Obligations regulates the power of attorney, the special part contains provisions about the power to act on behalf of another person, and attorney acting without authority and ordinary mandate. (Pestalozzi Gmuer&Heiz ;Business Law Guide to Switzerland, Germany 1992 p.69) The specific provisions on commercial agency agreements, different types of commercial agency are regulated in Commercial Code.

B) Definitions

In Turkish Private Law, one can find similar definitions to American Law of Agency. According to our Law : Agency is a relationship between two persons whereby one of them (the agent) is authorized to act for and behalf of the other (the principal) within the scope of authority her principal grants her. The agent may negotiate the terms of contracts with others and binds the principal to such contracts. The agent may be the employee of the principal but this is not necessary. The power of attorney (procuration) is the unilateral authorization by principal to an agent to perform legal acts on his or her behalf (C O. Art. 32). The legal basis for a power of attorney may be contractual or statutory.

C) Formation of Agency

Formation of agency in Turkish Civil Law can be in two different ways. First one is regulated with in the CO. Art.32-40; requires no particular formality for agency relationship, it can be oral or created by the conduct of the principal. Second one is a contract between principal and the agent which creates ordinary mandate and regulated in CO. Art. 386-399

a) Capacity

Agency relationship depends on mutual consent and capacity is important in Turkish Law. Principal must be full capacity person . Those who reached majority , as age completion of 18 years ,able to make fair judgements , are full

capable of entering in to transactions are defined full capacity person. For the Agent we only need ability to make fair judgements according to CO. Art.32. According to CO. Art.388 agency relationship can be created by agreement. In this case both parties must be full capacity persons and capable of entering transactions. About Capacity there is a difference between American and Turkish Law of Agency. In American Law Minor may validly be appointed as an agent. Incompetent individuals who can enter in to valid contract on their own behalf may still act another's agent. In Turkish law a Minor can only be appointed as an agent if she has ability to make fair judgements.

b) Authorization

Agency is a relationship between two persons, by agreement or otherwise, where one (agent) may act on behalf of the other (principal) and bind the principal by words and actions. Relation in which a person acts for a represents another by latter's authority. (Black's Law Dictionary 6th.ed. USA 1990)

Agent must act explicitly or implicitly in the other party's name for her conduct. Agent needs authorization. The usual method in both (Turkish and American) law system is, express authorization that a person; that is a person is appointed to act on behalf of another. Authorization can be made orally. In some special cases we need written authorization. Just the same in Turkish and American Law the legal basis of authorization may be contractual or statutory.

D) Classification Of Agency According To Code Of Obligations

In Turkish Code of Obligations creation or classification of agency depends on the modification of the consent. Agency relationship is a consensual relationship like in American Law of Agency the most usual method creating the relationship is appointment by agreement. In American Law agency may arise by agreement, ratification, by estoppel or operation of law. In Turkish law agents way of acting with the authorization and relations with the third parties is important. If the agent whose authorized according CO. Art.32 does not disclose the agency relationship when entering the contract

With the third party. Principal receives directly rights and obligations. In ordinary mandate which is regulated CO. art 386-399 the parties are free to arrange their contractual relationship individually. The ordinary mandate (vekalet ilişkisi) is a contract according to which the agent agrees to carry out the business or service entrusted. The mandate implies authority for all legal acts necessary to carry out the function involved.

An agent entrusted with an ordinary mandate is responsible to the principal for the proper performance.

Acting without authority in agency and ordinary mandate is regulated in Code of Obligations. If the business has been conducted without authorization is subsequently

ratified by the principal, CO. art 32-40 or 386-399 will applied. If it is not ratified then the liability of agent who acts without authority will change.

E) Classification According to Commercial Code (Types of agents in commercial affairs)

Agency is based on the consent of the parties and for the reason is called consensual-relationship. If consideration is present the relationship is also contractual. The law sometimes imposes on agency relationship. According to the extent of power of representation there are various types of agents

1) Commercial Representative

A commercial representative is an agent who is expressly or impliedly authorized by the owner of the commercial enterprise to conduct the business and to sign per procuracion, e.g. "In the name of".

A commercial agent is a general agent an alter ego of the principal. He has the power, so far as bonafide third parties are concerned, to enter into all kinds of transactions with in the purpose of enterprise including signing negotiable instruments and representing the principal in the court.

If there is any registration the "purpose of enterprise" shall be determined in accordance with in the purpose stated in commercial register, otherwise according to the reasonable limit of the purpose of particular enterprise. (Ansay T; The Commercial Laws of Turkey, published as a part of "The Digest of Commercial Laws of the World", Ocean Publications New York) This statutory extend of powers can't be limited. All limitations are in effective to bona fide third persons. There are however several exceptions to this rule.

- a) A commercial representative may not sell or change real property iff he has not been expressly authorized in that behalf (CO. art 450)
- b) The authority may be limited to the affairs of a branch office (CO.art451)
- c) If the authority is given to several persons jointly to the effect that the signature of the single person alone doesn't bind the principal without the signature of others.

2) Commercial Agents (Diğer Ticari Vekiller)

The person who may not be classified as a commercial representative can be classified according to the extend of their authority:

- a) Commercial agents may be appointed to carry on the whole business of commercial enterprise without the power of procuracion. Such agent is not entitled to sign negotiable instruments, contracts, loans or carry on law suits; if he is not

expressly authorized in that behalf .

b) Salesmen and Other Personnel All employees in a store are deemed authorized to enter in to regular sale transactions and do related transactions in that particular store, unless the contrary is stated is stated.(CO.art 453/3)

c) Travelling salesmen who are doing business for a particular firm outside the business center are presumed as authorized to collect the purchase price resulting from the sale effected by them in the name of the firm and give receipts therefore and grant receipts for payment. A limitation of this authority is not effective to bona fide third parties.(CO.art 454) (Cenani,R; The Turkish Commercial Code İstanbul 1957)

3) Acenta

Agents acting as intermediaries in commercial business independently; persons authorized permanently to make transactions in their name but on behalf of local or foreign enterprises are called acenta and subject of special provisions at Commercial Code (art.116-134) Acenta is not different from broker, has limited power of representation. They can accept all kinds of declarations such as notices and protests about contracts .(CC.art.119) An acenta receives the payments for the goods they deliverd, may reduce price or postpone payments, can make bargains. If acenta has a special written approval from the principal they will sign contracts. But the authorization must be registered and publicized. If acenta acts unauthorized or exceeds the limits of authorization, the principal must refuse the contract otherwise principal is liable. In case of disapproval acenta will be liable.

F) Termination of Agency in Code of Obligations and Commercial Code

There is one important although somewhat controversial mandatory provision. According to art.404 CO, a mandate may be terminated at any time by revocation or notice by any party. If a mandate is terminated at an unreasonable time, the terminating party is required to indemnify the other party for the resulting damage. Recent case law shows a tendency to limit the application of this provision.(Pestalozzi Gmuher & Heiz, Business Law Guide) An agency contract can be terminated with the general legal procedure. The agency relation is terminated by the act of principal discharging the agent at any time. However if it is terminated at an unreasonable time principal must pay for the damages. The agency contract may also be terminated with the abandonment by the agent at any time. If the time is inconvenient agent will indemnify the other party for the damage. Unless the contrary is provided the relation expires by death, insanity, or bankruptcy of principal or agent. Effects of Termination is also important specially for the third parties. The principal must make an announcement about the termination for the third parties; otherwise principal is responsible.

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