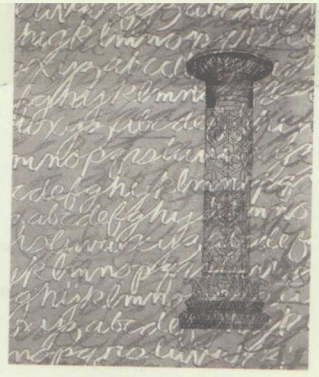
国际法双语教学试用教材

# International Business Law

## Agency and Product Liability

# 国际商法

## （代理法与产品责任法篇）



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# 编者说明

国际法双语教学教材《国际商法》包括三本，即国际商法“合同销售篇”、“公司与票据法篇”及“代理法与产品责任法篇”。国际商法是法学院国际经济法和民商法专业学生和商学院学生必须要学的一门法律专业课，而外语又是系统学习理解国际商法的必要工具，基于这样的目的，我们编著这套教科书，作为双语教学的试用教材，供法学院和商学院大学英语四级以上的学生以及法律工作者学习理解国际商法和法律英语使用。

本书《国际商法》（代理法与产品责任法篇）以介绍英美代理法与产品责任法为主，全篇包括两部分共八章。第一部分“代理法”包括：代理法概述、本人和代理人的义务、与第三方有关的合同责任和与第三方有关的侵权责任四章；第二部分“产品责任法”包括：产品责任概述、担保责任、疏忽责任与严格责任制、赔偿与辩护四章。

全书编写结构依法律要点布局，参照英美法学院和商学院同类教科书，内容力求概而全，保持原著的风貌。每章后有模拟案例问题，供学生课堂讨论，旨在使其加深对有关法律要点的理解和训练英语口头表达能力；每章后的案例直接引自英美法院判例，供学生课后阅读，在课堂上择疑分析，以提高学生综合理解和分析能力。全书以英文编著，不附任何中文解释，旨在使学生摆脱对母语的依赖，同时也避免母语解释外国法律的局限所造成的误导，这也应该是法学院双语法律教学应当达到的目的之一。书后附部分涉及代理法与产品责任法常用及疑难法律术语，以及相关法律原文，便于学生和使用者查阅。

使用本教材，强调法律和语言的双重培养，因此教师具有法律和外语双重专业基础，将有利于完成双语教学的要求。我们希望，通过一个学期的教学，学生能对英美代理法与产品责任法有一个比较全面的理解，并在实践中，明显提高其英语的口头表达和阅读分析能力。

本教材在编写过程中得到了本校研究生院、教务处领导的大力支持，以及同行的积极帮助，在此一并感谢。此外，由于编者水平有限，书中错误、不当或遗漏之处在所难免，敬请同行和读者批评指正。

编者

2008 年 12 月

华政园

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# PART ONE Agency Law

## I. AGENCY IN GENERAL

Agency is a two-party relationship in which one party (the agent) is authorized to act on behalf of, and under the control of, the other party (the principal). Simple examples of the agency relation include hiring a salesperson to sell goods, retaining an attorney, and engaging a real estate broker to sell a house. Agency law's most important social function is to stimulate business and commercial activity. It does so by allowing people and businesses to increase the transactions that they can complete within a given time. Without agency, business and commercial life would proceed at a very slow pace. A sole proprietor's ability to engage in trade, for instance, would be limited by the need to make each contract for purchase or sale in person. As artificial persons, moreover, corporations can act only through their agents.

Agency law can be divided into two rough categories. The first involves the legal rules controlling relations between the principal and the agent. These include the rules governing formation of the agency relation, the duties the principal and the agent owe each other, and the ways that an agency can be terminated. Such topics are the main concern of this chapter. The second involves the legal rules controlling the principal's and the agent's relations with the third parties. In this chapter, our main concerns are the principal's and the agent's liability on contracts made by the agent and on torts committed by the agent.

**1. Formation and capacity**. An agency is created by the manifested agreement of two persons that one person (the agent) shall act for the benefit of the other (the principal) under the principal's direction. As the term *manifested* suggests, the test for the existence of an agency is *objective*. If the parties' behavior and the surrounding facts and circumstances indicate an agreement that one person is to act for the benefit and under the control of another, courts hold that the relationship exists. If the facts

establish an agency, it is immaterial whether either party is aware of the agency's existence or subjectively desires that it exist. In fact, an agency may be present even where the parties have expressly stated that they do not intend to create it, or intend to create some other legal relationship instead.

Often, the parties create an agency by a written contract (sometimes called a *power of attorney*). But an agency contract may be oral unless state law provides otherwise. Some states, for example, require written evidence of contracts to pay an agent a commission for the sale of real estate. More importantly, the agency relation doesn't need to be contractual at all. Thus, consideration is not necessary to form an agency. As the following Warren case illustrates, courts sometimes imply the existence of an agency from the parties' behavior and the surrounding circumstances without discussing the need for a contract or consideration.

A principal or an agent who lacks the necessary mental capacity at the time the agency is formed can ordinarily release himself from the agency at his option. Common examples include those who are minors or who are insane in the period of the agency's formation. However, the English Law of agency does not require the full capacity of an agent since the agent does not contract on his own behalf. Of course, incapacity may occur or exist at other times as we might see under various circumstances.

As you have seen, business organizations such as corporations can and must appoint agents. In a partnership, each partner generally acts as the agent of the partnership in transacting partnership business; partnerships can appoint nonpartner agents as well. In addition, corporations, partnerships, and other business organizations can act as agents.

Certain duties or acts cannot be delegated by a principal to an agent. This means that the principal must perform such duties or acts personally. For example, making statements under oath, voting in public elections, and the signing of a will cannot be delegated to an agent. The same is true for service contracts in which the principal's personal performance is crucial. Examples include certain contracts by lawyers, doctors, artists, and entertainers.

**2. Authority**. As you have seen, agency law allows principals to multiply their dealings by employing agents to represent them. Presumably, however, a principal should not be liable for *any* deal that his agent concludes. Thus, agency law generally allows the agent to bind the principal only when the agent has authority to do so.

*The Restatement (Second) of Agency* defines authority as the agent's ability to affect the principal's legal relations with third parties. Authority comes in two general forms: actual authority and apparent authority. Both are based on the principal's manifested consent that the agent may act for and bind the principal. For actual authority, this consent is communicated to the *agent*, while for apparent authority it is communicated to the *third party*.

The two kinds of actual authority are express authority and implied authority. Express authority is created by the principal's actual *words*, whether written or oral. Thus, an agent has express authority to bind the principal only when the principal has made a fairly precise statement to that effect. Often, however, it is impractical or impossible for the principal to specify the agent's authority fully and exactly. To avoid unnecessary restrictions on the agent's ability to represent the principal, therefore, agency law also gives agents *implied authority* to bind the principal. In general, an agent has implied authority to do whatever it is reasonable to assume that the principal wanted him to do, given the principal's express statements and the surrounding circumstances. Courts seeking to determine an agent's implied authority typically examine matters such as the principal's express statements, the nature of the agency, the acts reasonably necessary to carry on the agency business, and the acts customarily done when conducting that business.

Sometimes, an agent who lacks express or implied authority may still *appear* to have such authority, and third parties may reasonably rely on this appearance of authority. To protect the third party in such situations, agency law allows agents to bind the principal on the basis of their *apparent authority*. Apparent authority arises when the principal's behavior causes a third party to form a reasonable belief that the agent is authorized to act for the principal. Note that apparent authority is based on the *principal's* behavior. For example, a principal might clothe an agent with apparent authority by direct statements to the third party, telling the agent to do so, or allowing the agent to behave in a way that creates an appearance of authority. But agents cannot give themselves apparent authority, and apparent authority does not exist where the agent creates an appearance of authority without the principal's consent. Note also that in apparent authority cases, our main concern is what the principal communicates to the *third party*. Communications to the *agent are* generally irrelevant unless they become known to the third party or affect the agent's behavior. Finally, note that the third party must *reasonably* believe that the agent has authority. Normally, trade customs and business practices can help courts determine whether or

not there is reason to believe that the agent has authority.

Authority is important in a number of legal contexts, and we discuss its specific applications in those contexts. As the next chapter shows, the principal's liability on contracts made by the agent depends on the agent's authority to make the contract in question. The next chapter also discusses the role authority playing in determining whether the principal is bound by facts about which the agent receives notification or has knowledge, and in determining the principal's liability for the agent's misrepresentations. Moreover, a proper grant of authority is needed to create the relation *of subagency* described below. Finally, the concept of authority is also assumed to important in a wide range of miscellaneous situations. The following *Walker Bank* case is an example.

**3. Types of agents**. The blurred distinction between a general agent and a special agent can be important in determining the scope of an agent's implied and apparent authority. A general agent is one continuously employed to conduct a series of transactions, while a special agent is one employed to conduct a single transaction or a small, simple group of transactions. Thus, a continuously employed general manager, construction project supervisor, or purchasing agent is normally a general agent. On the other hand, a person employed to buy or sell a few objects on a "one shot" basis is usually a special agent. As these examples suggest, general agents tend to serve on a more continuous (uninterrupted) basis than special agents. In close cases, the greater the number of acts to be performed and parties to be dealt with and the longer the time needed to complete the agency business, the likelier it is that the agency is general. The degree of discretion or bargaining freedom given the agent, however, is usually not a test for distinguishing general agents from special agents.

Consideration is not necessary for the creation of an agency. An agent who receives no compensation for his services is called a *gratuitous agent.* Gratuitous agents have the same power to bind the principal as do paid agents with the same authority. However, the fact that the agent is gratuitous may affect the duties the principal and the agent owe each other, and may also increase the parties' ability to terminate the agency without incurring liability.

*A subagent* is a person appointed by an agent to perform functions that the agent is to perform for the principal. For a subagency to exist, the agent must have the authority to make the subagent *by agent for* conducting the principal's business. If you retain an accounting firm as your agent, for example, the accountant actually handling your affairs is the firm's agent and your subagent. Sometimes, however, a

party appointed by an agent is not a subagent because the appointing agent only has authority to appoint agents for *the principal.* For instance, sales agents appointed by a corporation's sales manager are probably agents of the corporation, not agents of the sales manager.

When the agent appoints a true subagent, the agent becomes a principal with respect to the subagent, his agent. Thus, the legal relations between agent and subagent closely parallel the legal relations between principal and agent. But the subagent is also regarded as the *original principal's* agent. Here, though, the normal rules governing principals and agents do not always apply.

**4. Employees and independent contractors.** Many important legal questions hinge on a distinction between two relationships that overlap with the principal-agent relationship. These are an employer's relationship with his employee, and a principal's relationship with an independent contractor. There is no sharp line between these two relationships; the following *VIP Tours* case lists the factors typically considered in making such determinations. By far the most important of these factors is the principal's *right to control the physical details of the work.* Employees typically are subject to such control. Independent contractors, on the other hand, generally contract with the principal to produce some result, and determine for themselves how that result will be accomplished.

Even though many employees perform physical labor or are paid on an hourly basis, corporate officers also usually qualify as employees. Professional such as brokers, accountants, and attorneys are often independent contractors, although they may sometimes be employees. Consider the difference between a corporation represented by an attorney engaged in her own practice and a corporation that maintains a staff of salaried in-house attorneys. Franchisees, finally, are usually independent contractors.

When are employees and independent contractors agents? Although there is little consensus on this question, according to *the Restatement*, employees are *always agents*, while independent contractors *may or may not* be agents. An independent contractor qualifies as an agent when the basic tests for the existence of an agency have been met. In the *Warren* case, for example, the cotton gins were probably agent-independent contractors, while the cotton buyers discussed at the end of the opinion were probably nonagent-independent contractors.

The distinction of employee-independent contractor is often crucial in determining the principal's liability for the agent's torts. The distinction can also be

important in establishing the coverage of some of the employment regulations in which unemployment compensation (the subject of *VIP Tours*) and workers' compensation are two clear examples.

## QUESTIONS FOR EXERCISE

1. Joan Marie Ottensrheyer was a contestant for the title of Miss Hawaii-USA 1974. The pageant was run by Richard You as a franchisee of Miss Universe, Inc. After finishing as first runnerup, Ottensmeyer sued Miss Universe, Inc., arguing that as its agent You had prevented her from winning a title to which she was rightfully entitled and from obtaining the benefits thereof. The franchise agreement between Miss Universe and You contained language explicitly stating that You was not Miss Universe's agent. By itself, is this language sufficient to prevent the formation of an agency relationship between Miss Universe and You?

2. Melabs of California manufactured a portable electric telephone that was designed to fit inside an attaché case and to operate on the same airwaves as fixed telephone installations in vehicles. Melabs and Marlin American Corporation entered into a contract giving Marlin the right to distribute the phone. The contract gave Marlin the exclusive right to establish a sales and marketing program and to develop all brochures, sales aids, forms, advertising materials, and other marketing aids. On the other hand, it gave Melabs the right to approve all contract forms. It also established that uniform terms, conditions, and prices would be offered to the ultimate distributors of the phones. In addition, it transferred ownership of subsequent distributorships established by Marlin to Melabs in the event that Marlin went bankrupt. Finally, there was evidence that, in practice, Melabs exercised approval rights over the use of its trademark in advertising matters. On these facts, did Melabs possess sufficient control over Marlin to create an agency relationship between Melabs and Marlin?

3. Vaughan had a VISA credit card account with the United States National Bank of Oregon. The card account gave Vaughan the ability to make cash withdrawals from the bank's automatic teller machines. On two or three occasions in February and March of 1983, Vaughan gave his card to Riley, his brother's girl friend, so she could make cash withdrawals and purchases on Vaughan's behalf. On each occasion, Riley did exactly what Vaughan had directed her to do.

In April of 1983, Riley moved into the house that Vaughan shared with his brother. On three occasions thereafter, Riley stole Vaughan's card from his wallet and

used it to obtain money from the bank's machines for her own use. After doing so, she returned the card to Vaughan's wallet. Vaughan eventually found out about the withdrawals when the bank billed him for them. He refused to pay, and the bank sued. Vaughan defended under provisions of the Truth in Lending Act limiting a cardholder's liability for unauthorized use of the card to $ 50. Did Riley have express, implied, or apparent authority to use Vaughan's card?

## *CASES FOR SUPPLEMENTARY READING*

### WARREN v. UNITED STATES
### 613 F.2d 591 (5th Cir. 1980)

Bobby and Modell Warren were cotton growers. For two years, they took their cotton crops to certain cotton gins that ginned and baled the cotton. Then, after being instructed to do so by the Warrens, the gins obtained bids for the cotton from prospective buyers and the Warrens told the gins which bids to accept. The gins sold the cotton to the designated buyers, collecting the proceeds. Under the Warrens' instruction, the gins deferred payment of the proceeds to the Warrens until the year after the one in which each sale was made.

The Warrens did not report the proceeds as taxable income for the year when the gins received the proceeds, instead including the proceeds in their return for the following year. After an IRS audit, the Warrens were compelled to treat the proceeds as taxable income for the year when the proceeds were received, and to pay accordingly. The Warrens eventually won a refund action in federal district court. The government appealed. Its position was that: (1) the gins were agents of the Warrens; and (2) because of the established rule that the receipt of proceeds by an agent is the receipt by the principal, the proceeds were taxable income for the year in which they were received by the gins.

**JOHNSON, CIRCUIT JLJDGE.** The relationship between the Warrens and the gins for the purpose of selling the cotton was indisputably that of principal and agent. The Warrens instructed the gins to solicit bids, the Warrens decided whether to accept the highest price offered, and the Warrens determined whether or not to instruct the gins to hold the proceeds from the sale until the following year. The gins' role in the sale of the cotton was to adhere to the Warrens' instructions. The Warrens were the owners of the cotton held for sale; the Warrens were in complete control of

its disposition.

This case is distinguishable from those cases that it was recognized that proceeds from the sale of a crop by a farmer, pursuant to a bona fide arm's-length contract between the buyer and seller calling for payment in the taxable year following delivery, are includable in gross income for the taxable year in which payment is received. In the case at bar the bona fide arm's-length agreement was not between the buyer and seller but between the seller and his agent. The income was received by the Warrens' agents in the year of the sale. The fact that the Warrens restricted their access to the sales proceeds did not change the tax status of the money received.

*Judgment reversed in favor of the government.*

## WALKER BANK & TRUST CO. v. JONES
## 672 P.2d 73 (Utah Sup. Ct. 1983)

In 1977 Betty Jones established VISA and MasterCard accounts with the Walker Bank. On Jones's request, credit cards on those accounts were issued to herself and to her husband in each of their names. In November of 1977, Jones informed the bank that she would no longer honor charges made by her husband on the two accounts. Then, the bank immediately revoked both accounts and requested the return of the two cards. Jones, however, did not return the cards until March 9, 1978. At that time, the balance owing on the two accounts was $2,685.70. Jones apparently claimed that the balance reflected purchases made by her husband after she notified the bank in November of 1977. In any event, she refused to pay the balance.

The bank sued Jones under her credit card contract, which provided that the cards had to be returned to the bank to terminate her liability. Jones argued that her liability was limited to $50 under provisions of the federal Truth in Lending Act (TILA) restricting a cardholder's liability for unauthorized use of the card to that amount. The bank's motion for summary judgment was successful, and Jones appealed.

**HALL, CHIEF JUSTICE.** Jones's sole contention on appeal is that the TILA limits her liability for the unauthorized use of the credit card by her husband to a maximum of $50. The bank's rejoinder is that the TILA does not apply, inasmuch as

Jones's husband's use of the card was at no time "unauthorized use" within the meaning of the statute. The term "unauthorized use" is defined in the TILA as: "Use of a credit card by a person other than the cardholder who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit."

We find the bank's position to be meritorious. Apparent authority exists where a person has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first person. At Jones's request, her husband was issued a card bearing the husband's own name and signature. This card was, therefore, a representation to the merchants (third parties) to whom were presented that defendant's husband (second party) was authorized to make charges upon Jones's (first party's) account. This apparent authority precludes the application of the TILA.

In view of our determination that the TILA has no application, we hold that liability for Jones's husband's use of the card is governed by her contract with the bank. The contractual agreement between Jones and the bank provided that all cards issued upon the account should be returned to the bank in order to terminate Jones's liability. Accordingly, Jones's refusal to relinquish either her card or her husband's at the time she notified the bank justified the bank's refusal to terminate Jones's liability at that time.

*Judgment for the bank affirmed.*

## VIP TOURS, INC. v. FLOPJDA
## 449 So. 2d 1307 (Fla. Ct. App. 1984)

VIP Tours, Inc. arranged tours of central Florida's attractions for visitors to the area. Cynthia Hoogland conducted 29 such tours for VIP between July 1980 and March 1981. Both Hoogland and VIP considered Hoogland an independent contractor. She worked for VIP only when it needed her services, and could reject particular assignments. She was also free to work for other tour services, and did so. Once Hoogland accepted a job from VIP, she was told where to report and given instructions about the job. She was required to use a VIP-furnished vehicle and to wear a uniform with the VIP logo when conducting tours. Aside from ensuring that she departed on time, however, VIP did not tell her how long to stay or what kind of

tour to conduct at each tourist attraction. Hoogland was paid on a per-tour basis.

Hoogland later filed a claim for unemployment compensation benefits with the Florida Division of Labor and Employment Security. The division concluded that she was entitled to these benefits because she was VIP Tours' employee. VIP appealed the division's order to an intermediate appellate court.

**UPCHURCH, JUDGE.** The [Florida] Supreme Court has approved the test set out in *Restatement (Second) of agency* section 220 for determining whether one is an employee or an independent contractor:

In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relationship of master and servant; and

(j) whether the principal is or is not in business.

It has been said repeatedly that of all the factors, the right of control as to the mode of doing the work is the principal consideration. VIP had no right of control over the tour guiders other than to require them to show up at a particular place at a particular time wearing the VIP uniform and to travel in VIP transportation. These latter two factors appear to have been designed to facilitate identification of the guider and control insurance liability. VIP had little interest in the details of the guiders' work, as is illustrated by the fact that the guiders controlled the number of hours