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Powers of Attorney in Foreign Countries

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POWERS OF ATTORNEY IN FOREIGN COUNTRIES

INTRODUCTION AND HISTORY

This note is intended to be of some assistance to international practitioners who are called upon to draft powers of attorney for use in civil law countries. In the modern world, society is international rather than national. With every country dependent economically, socially, and politically upon the others, there has been an accelerated decline of isolationism. American businessmen in increasing numbers are engaging in commerce outside the continental United States, furthering these activities to a great extent through use of the power of attorney. However, to understand its operation in civil law countries, it is first necessary to trace its historical background.

A "power of attorney" is an instrument authorizing another to act as one's agent.[1] In early Roman law there existed the principle of *mandatum*. A mandate is a contract whereby one person (*mandator*) gives another (*mandatarius*) a commission to do something for him without reward and the other accepts the commission.[2] The mandate is essentially a contract of employment; its rules are concerned only with the reciprocal rights and duties of the *mandator* on one hand, and the *mandatarius* on the other. The officials and lawyers responsible for the development of the Roman law were slow in recognizing the principle of agency: that a contract or other transaction entered into by X could or should create rights and duties for Y.[3] During the period of the Justinian Code, it was finally recognized that this situation could exist.[4] The power by which X was able to change the rights and duties of his principal Y was called *procuratio*. However, the distinctions between the *mandatum* and the *procuratio* were forgotten in the Civil Law codifications of the early nineteenth century,[5] and the French Civil Code[6] uses the terms interchangeably.

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1. Black's Law Dictionary, 1393 (3rd ed. 1933).
2. R. W. LEE, THE ELEMENTS OF ROMAN LAW, 327-330 (1945).
3. Riccobono, *Reception of Forms of Agency in Roman Law*, 9, N.Y.L.Q. 271 (1932).
4. HOLMES, THE COMMON LAW, 228 (1881).
5. SCHLESINGER, COMPARATIVE LAW, CASES & MATERIALS 387 (1950).
6. FRENCH CIVIL CODE, art. 1984, Translation by Cachard, "An authority or power of attorney is the act of law whereby one person gives another

The principle of *procuratio* is based on the theory that the agent's power to create rights and duties directly for his principal is a by-product of the contractual relationship existing between the two. Although subjected to considerable criticism, this theory has been adopted by all of the nineteenth century codes influenced by the French.[7]

In the German Civil Code of 1896, it was provided that one who acts through an agent must in law be deemed to have acted for himself.[8] This principle protects third parties, who will be relieved from inquiry into the legal relationship existing between the principal and agent. Thus if a third party enters into an agreement with an agent, it would not be the duty of the third party to inquire into the limitations imposed by the principal. The Code is construed to the effect that all agents have certain general powers which are inherent within a principal-agent relationship. The German Code considers the agent's power of representation largely independent of the agency contract ("Auftrag") existing between the principal and agent.[9] A power of representation created by the principal is called "Vollmacht," which is merely the power of an agent to change rights and duties of principal; it does not refer to the contractual relationship of principal and agent.[10] This German idea has greatly influenced the newer Codes of the civil law countries[11] which are also qualified by the Commercial Codes on the same subject.[12]

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the right to do something for him and in his (the principal's) name. A contract of agency is concluded by the agent's acceptance."

7. See note 5, *supra.*

8. GERMAN CIVIL CODE, Art. 164. Translation by Loewy. "A declaration made by one, within the delegated althority in the name of his principal, results directly for and against the principal. There is no difference, whether the declaration is made expressly in the name of the principal, or whether it appears from the circumstances, that it is to be made in his name.

If the intention of the representative to act in the name of another is not recognizable, the absence of intention to act in his own name, is immaterial.

The provisions of par. I, correspondingly apply, if a declaration to be made to another is made to the representative of the latter.

9. SCHLESINGER, *op. cit. supra* note 5, at 338.

10. I STAUDINGER-REIZLER, COMMENTARY ON THE GERMAN CIVIL CODE, Annotations 2 and 3 to Sect. 167 (10th ed.).

11. For example, see New Italian Code, articles 1187, 1400 and 1703.

12. See Wood & Selick Inc. v. Compagnie Generale Trans Atlantique, 43 F.2d 941 (2d Cir. 1930).

FORM REQUIREMENTS

A. Form requirement in continental Europe.

France: Civil Code, art. 1985. A power of attorney can be given either by a public instrument, or by a writing under private signature, even by letter. It can also be given verbally; but the proof thereof by witnesses is only admitted in accordance with the title Of Contracts or Conventional Obligations in General.[13]

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13. See Articles 1341-1348 of the French Civil Code which are similar to American Statute of Frauds. Translation by Henry Cachard:

Art. 1341. It is necessary to execute an instrument drawn up in the presence of notaries or made under private signature in all matters when a sum or value exceeding five hundred francs is involved, even for voluntary deposits; and no proof by witnesses against or beyond the contents of an instrument, nor as to what is alleged to have been said previously, at the time of or since it was drawn up shall be allowed, even if the sum or value in dispute is less than five hundred francs: All of which is without prejudice to what is specified in the laws relating to commerce.

Art. 1342. The above rule applies in case the action is brought not only for the payment of a capital, but also for the payment of interest, which, added to the capital exceeds the sum of five hundred francs.

Art. 1343. A person who has brought an action for more than five hundred francs is not allowed to produce oral evidence, even by reducing his original claim.

Art. 1344. Oral testimony cannot be allowed in an action for a sum even less than five hundred francs, when such sum is declared to be the balance or to form part of a larger claim which is not substantiated by a writing.

Art. 1345. If, in the same action, a party asks for several things, for which he holds no written instrument, and which, added together exceed the sum of five hundred francs, no oral testimony can be allowed, even if the party alleges that the claims emanate from different sources and have arisen at different times, unless such rights are derived from a succession, donation, or otherwise, from different persons.

Art. 1346. All actions whatever, which are not entirely substantiated by writings, shall be brought by the same writ; after which the other actions which are not substantiated by written proofs shall not be maintainable.

Art. 1347. The above rules are subject to exceptions, when there is a commencement of written proof.

[This term includes] any written instrument which emanates from the person against whom the action is brought, or from the person he represents, and which tends to make the alleged fact probable.

Art. 1348. Such rules are also subject to exceptions whenever it has not been possible for the creditor to procure written proof of the obligation which has been contracted towards him.

This second exception applies:

1. To obligations arising from quasi-contracts and torts or quasi-torts;

2. To deposits necessarily made in case of fire, destruction, disturbance or wreck, and to those made by travellers when stopping in an hotel; always taking into account the standing of the persons and circumstances of fact;

3. To obligations contracted in case of unforeseen accidents, when instruments in writing could not have been made;

The acceptance of the power may be tacit and result from the fact that the attorney in-fact has acted thereunder.

Germany: Civil Code Section 167. The giving of the power of attorney is effected by declaration to the person or persons to be empowered or to the third party toward whom the representation is to take place.

The declaration need not be in the form which is required for the transaction to which the power refers.

Italy: Civil Code Art. 1392. Form of power of attorney: An agent's power of attorney has no effect unless it is granted with the formalities prescribed for the contract which is to be entered into by the agent.

Civil Code Art. 1393. Verification of powers of agent: A third party who is contracting with an agent may always demand that the powers of such agent be demonstrated and, if the agency is based on a written document, he may demand display of a copy signed by the agent.

Spain: Civil Code Art. 1280. A power must be executed in a public instrument when it embraces an authorization to contract marriage in the name of the principal, when it is to cover general representation in judicial cases or in a special case; and when it gives authority to manage property, or to execute a document which must itself be drawn in a public instrument or may prejudice a third party.

B. Form requirements in Latin American countries.

The form requirements prevailing in Latin American jurisdictions are a mixture of the French, German, Italian and Spanish rules. The Spanish rule, which is more formal than other continental rules, has had more influence than the others,[14] since the Spaniards were the foremost colonizers of South America.

Argentina: A power produces the same effects whether expressed in a public or in a private instrument.[15]

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4. In case the creditor has lost the instrument which served as written proof in consequence of an unforeseen accident resulting from superior force.

14. OBREGON-BORCHARD, LATIN AMERICAN COMMERCIAL LAW, 319-21 (1st ed. 1921).

15. ARGENTINA CIVIL CODE, art. 1873. See also CIVIL CODE HAITI, art. 1749, SANTO DOMINGO CIVIL CODE, art. 1955.

Chile: Similar as to Spain. Code merely provides that a power must be granted in a public instrument when the donee of the power must execute an instrument of that kind.[16]

Costa Rica: Powers are divided into three general classes, special, general and most general. Powers of the last two classes require incorporation in a public instrument and inscription in the corresponding section of the Registry of Property.[17]

Columbia: Powers may be either express or implied without any limitation.[18]

Mexico: A power must be expressed in a public instrument:

(a) when it is general;
(b) When the amount of the transaction for which it is granted exceeds one thousand pesos;
(c) when by virtue therof, the agent must execute in the name of the principal a document which must be expressed in a public instrument according to law;
(d) when it is granted for a judicial matter, provided the amount claimed is one thousand pesos.[19]

Peru: A power must be incoporated in a public instrument when the grantee must execute a public instrument on behalf of the principal when the amount claimed in a law suit exceeds fifty pounds sterling.[20]

Brazil: A power of attorney can be given orally, in a private or public istrument, by means of a letter, under the form of a commission, a request or even an indirect petition.[21]

C. Form Requirements in Common Law Countries.

England: The instrument conferring authority by deed is termed a power of attorney.[22] An agent whose duty is to execute a deed, such as a conveyance of land or a deed of partnership; must likewise derive his power from a deed.[23] Therefore, in cases

16. CHILE CIVIL CODE, art. 2133. See also ECUADOR CIVIL CODE 2110, NICARAGUA CIVIL CODE, art. 2123; SAN SALVADORE CIVIL CODE, art. 2031, URUGUAY CIVIL CODE, art. 2053.
17. COSTA RICA CIVIL CODE, art. 1251.
18. COLOMBIA CIVIL CODE, art. 2149. See also HONDURAS CIVIL CODE, art. 1889, VENEZUELA CIVIL CODE, art. 1651.
19. MEXICO CIVIL CODE, art. 2352, 2353.
20. PERU CIVIL CODE, art. 1297cc.
21. Brazil, Trib. de S. Paulo, Nov. 10, 1905, Sao Paulo Judiciaro, Vol. IX p. 311.
22. Withington v. Herring, 5 Bing. 442 (1829).
23. Berkeley v. Hardy, 5 B. & C. 355 (1826).

where the legal act must be accomplished by deed, it is essential that the agent's authority should be similarly conferred, by instrument under seal. The following are examples:

(1) Conveyance of any interest in land.
(2) Leases of land which exceed three years.
(3) Transfers of shares in companies.
(4) Transfer of a ship.
(5) Bill of sale.
(6) A contract of a corporation.
(7) A contract without consideration.[24]

United States: The rules as to form of power of attorney in the United States are similar to those of Great Britain. In the United States, agents need no fomal requirements except when

(a) State statute requires the power to be executed with formality; as, for example, the Statute of Frauds.
(b) Where power is to execute a sealed instrument. The power of attorney is subject to the same requisite of formality as is the act which the agent is thereby authorized to do.[25]

In practice these execptions cover the majority of the cases, so in reality the American law is similar to the countries in which formal requirements are needed. One will find almost all powers of attorney executed in the United States in a formal form.[26]

CONSTRUCTION AND SCOPE

The power of an agent is construed according to the law of the place where the power is to be exercised. It is very possible that the extent of such power is greater there than in the country where the principal originally executed the power.[27].

A general power of attorney in the civil law sense is a power which authorizes the agent to do anything and everything in the name of the principal which the principal can do. General powers of attorney have much more practical importance in civil law countries than in the common law world.[28] This is mainly due to the fact that the trust is not recognized in the civil law, hence broad powers of attorney must serve many

24. HALSBURY'S LAWS OF ENGLAND, 213 (2d. ed. 1931).
25. RESTATEMENT, AGENCY, § 26-30 (1934).
26. LORENZEN, READINGS IN COMPARATIVE LAW, 338.
27. OBREGON-BORCHARD, *op. cit. supra* note 14, at 321-325.
28. SCHLESINGER, *op. cit. supra* note 5, at 401.

purposes which under the common lay system would be satisfied by trusts.[29]

In most civil law countries, general powers of attorney apply only to acts of management, not to acts of disposition.[30] It is important therefore to distinguish acts of disposition from acts of management. Planiol, professor of civil law at the School of Law of the University of Paris, in a recent commentary said:[31]

> In a general way we can say that under acts of disposition besides all alienations of property so called (sales, barters, gifts, contributions to associations, etc.) a certain number of acts are included which affect definitely the property of a person for the future; a mortgage and the constitution of an easement or servitude being among the principal acts of this kind. The characteristic feature of acts of management is that they do not tie up the property for more than a very short period and therefore they are frequently renewed.

A. On European Continent

Spain. A general power implies only acts of management or administation.[32] To undertake acts which cannot be classified as those of administration or management a special power is required. It is necessary in Spain to draw a special power or insert a special clause in a general power in order to authorize an agent:

(a) to compromise a claim,
(b) to sell or in any other way dispose of property,
(c) to mortgage property,
(d) to submit cases of the principal to arbitration,
(e) to do any other act which may affect the ownership of property of the principal.[33]

France. The French rule, as stated in Article 1988, together with the Spanish rule, forms the basis of the majority rule fol-

29. Nussbaum, *Sociological and Comparative Aspects of the Trust*, 38 COL. L. REV. 408 (1938).
30. FRENCH CIVIL CODE, art. 1988, translated by Cachard, "A power of attorney made out in general terms only applies to acts of management. If it is intended to sell or mortgage, or to do other things connected with ownership, express authority must be given."
31. I TRAITE ELEMENTAIRE DE DROIT CIVIL 966.
32. See note 14 *supra*.
33. *Ibid.*

lowed in most civil law countries.[34] Under this rule a broad power of attorney will be interpreted very strictly, and will not be considered an unlimited general power, unless every act of disposition in which the agent may engage in conducting all affairs of the principal is listed in the grant of power.[35]

Germany. The German rule, which is adopted by a minority of civil law countries, is different from the majority rule. The German law contains no statutory rule of construction limiting the meaning of general terms in a power of attorney. Therefore the language of such a power of attorney will be given its natural meaning regardless of whether the power given is special or general.[36]

In practice the difference between the German and French systems is minimized by the use of forms. When a client desires to confer a general power of attorney in France, the lawyer will draw up an extensive document which has lists and lists of acts which can be done by the agent, in order to circumvent article 1988. This causes the document to be quite lengthy. In Germany all that is necessary is a short form conferring a general power of attorney.

B. In Latin American Code Countries

In nearly all the Latin American states, the construction and scope of powers of attorney is the same as that of Spain. This is undoubtedly attributable to the predominant influence of Spain in the settlement and growth of these countries.

C. Common Law Countries

Great Britain. Powers of attorney are construed very strictly in England. Regard is first had to the recitals which, showing the general object, control the general terms in the operative part of the deed.

General words are construed as having reference only to the special powers, but include incidental powers necessary for carrying out the authority. Thus a power granted to manage certain property, followed by general words giving agent full

34. For a good discussion on a similar provision of Louisiana Civil Code, see Comment, *Construction of Powers of Attorney in Louisiana,* 23 TULANE L. REV. 242 (1948).

35. SCHLESINGER, *op. cit. supra* note 5, at 402.

36. *Ibid.*

power to do all lawful acts relating to grantor's business, of what nature or kind soever, does not include authority to endorse bills, for the general words are construed as having reference only to managing the grantor's property, for which indorsing bills may not be incidental or necessary.[37] But a power to complete all contracts which the grantee may deem necessary for a specific object includes authority to obtain money for payment in respect of such contracts, where payment is incidental and necessary to the completion.[38]

The authority conferred by power of attorney must be adhered to strictly. If the authority is excercised in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principal liable.[39] However, the construction of powers of attorney under the strict rule will allow actual expressions to imply incidental powers.[40]

United States. The law of powers of attorney in the United States is very similar to that of Great Britain. In the United States, as well as Great Britain, general powers of attorney with unlimited authority are very rare. Under a New York statute it is possible to confer powers of unlimited scope upon an attorney-in-fact, by the use of a statutory form which must contain bold face type that the powers granted are broad and sweeping.[41] Without such statutes however, foreigners are usually unsuccessful in attempting to apply the civil law institution of general power of attorney into American domestic law. For example, in *Von Wedel v. McGrath,*[42] plaintiff was suing the Attorney General to recover personal property vested in the defendant, which had been given to the plaintiff by her husband's power of attorney. The Court of Appeals held that the power of attorney did not authorize the attorney-in-fact to make a gift, notwithstanding its broad general authority "to do all acts which I could do if personally present." Therefore, it may be generalized that absent any specific statute to the contrary, a power of attorney though general and unlimited in scope, will frequently be limited by judicial interpretation.

37. Esdaile v. La Nauze, 1 Y & E, 394 (Ex. 1835).
38. See note 22 *supra.*
39. Jacobs v. Morris, 1 Ch. 816 (C.A. 1902).
40. Hawkly v. Outram, 3 Ch. 816 (C.A. 1892).
41. N.Y. GEN. BUSINESS LAW, art. 13. See also N.Y. Law Revision Committee, 1946 Report 653, 1947 Report 27, 1948 Report 39.
42. 180 F.2d 716 (3rd Cir. 1950).

CONCLUSION

Since the requirements and effects of powers of attorney vary with every jurisdiction throughout the world, it is imperative to adhere to the code of the particular country where such power is to be exercised. Where the power is to be used internationally in many foreign jurisdictions, the problem is then one of creating an instrument which will have full force and effect, regardless of the country in which it is utilized. The solution is to draft the instrument in conformity with the provisions of the strictest code; hence the requirements of the more liberal jurisdictions would *a fortiori* be satisfied. Therefore, the instrument should be drafted with maximum formality, under seal, to insure compliance with the form requirements of every country. In addition, powers conferred should be expressed generally, then listed specifically, in order to avoid the consequences of a strict construction likely to be imposed by a conservative jurisdiction. In this manner, it may be assured that the power of attorney will be valid regardless of the country in which it is employed, and the normal course of business will not be hindered by dilatory and expensive litigation.

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