

## СРАВНИТЕЛЬНО-ПРАВОВЫЕ ОБЗОРЫ ПО БЕЗОТЗЫВНЫМ ПОЛНОМОЧИЯМ

Анализ сравнительно-правовых обзоров, подготовленных составителями Принципов европейского контрактного права (PECL) и Модельных правил европейского частного права (DCFR), показывает, что безотзывные доверенности в той или иной форме или степени признаются в подавляющем большинстве европейских странах: Австрия, Бельгия, Болгария, Дания, Англия, Германия, Греция, Ирландия, Италия, Голландия, Польша, Шотландия, Испания, Франция, Швеция. В большинстве этих стран оговорка о безотзывности имеет силу, если полномочие не носит фидуциарный характер, а предоставляется на совершение сделок в интересах представителя или некоторых третьих лиц. В ряде стран при наличии такой оговорки заявление об отзыве доверенности не имеет юридической силы. В ряде других доверенность все-равно считается отозванной, но представляемый обязан возместить убытки.

Подробнее см. ниже

### 1. СРАВНИТЕЛЬНО-ПРАВОВОЙ ОБЗОР ИЗ PECL

#### *Irrevocable authority*

Exceptionally, an authority may be granted as irrevocable. In GERMANY, ITALY and PORTUGAL, the irrevocability of the authority is a matter of agreement between agent and principal. However, such a clause has different effects: while in Germany a revocation is ineffective (BGB § 168 sent. 2), in the other two countries the principal's revocation (Italy and Geneva Convention, supra) or either party's revocation terminates the agent's authority (Italy: CC art. 1723(1); Portugal: CC art. 265(2)). But in Italy the principal is liable to compensate the agent for any damage suffered, unless there was an important reason for the revocation; in Portugal, the revoking party is liable to the other party (CC art. 1172 lett. b).

In most countries the granting of an effective irrevocable authority is possible only in certain conditions. One typical condition is an authority granted in the agent's interest (The NETHER-LANDS: BW art. 3:74(1); GREECE: CC art. 218 sent. 2 and AP 187/1983, NoB 1983.1550-1551; DENMARK: Ussing, Aftaler 309 f; FINLAND: Kivimaki & Ylostalo 271-272; ENGLAND: Bowstead & Reynolds, § 10-007). In GERMANY and GREECE, irrevocability of an authority given in the agent's interest may even be implied (Germany: BGH 13 December 1990, NJW-RR 1991,439; Greece: Thessaloniki 1236/1990, Harm 1990.214, 215 I). In ITALY and PORTUGAL an authority granted in the agent's or a third party's interest cannot, as a rule, be revoked without the consent of the person interested in its granting (Italy: CC art. 1723(2); Portugal: CC art. 265(3)). FRANCE and BELGIUM have come to the same result by declaring an authority given in the common interest of principal and agent to be irrevocable (France: Malaurie & Aynes, Special Contracts no. 557; Belgium: Cass. 28 June 1993, Pas. 1993 I 628,630). In AUSTRIA, an authority granted for a limited period of time may be made irrevocable (Rummel (Strasser) § 1020-1026 no. 4).

However, exceptionally even an irrevocable authority may be revoked for an important reason (Germany: BGH 12 May 1969, WM 1969, 1009; BGH 8 February 1985, WM 1985, 646; Austria: OGH 1 September 1954, SZ 27 no. 211; Greece: AP 1108/1984, NoB 1985.771 (772 I); Italy and Portugal: cf. provisions cited supra). In the Netherlands, an irrevocable authority may only be terminated by a court decision upon an important reason; the principal has to file a petition at the recht-bank (BVJ art. 3:74(4)).

### 2. СРАВНИТЕЛЬНО-ПРАВОВОЙ ОБЗОР ИЗ DCFR

1. In AUSTRIA though an agent's authority is normally revocable at any time (CC §1020) without prejudice to the right to damages for breach of contract, there is an exception if the authority is coupled with an interest outside the contract for mandate, the irrevocability is stipulated and the contract is for a definite period of time. In such a case the authority is irrevocable (Schwimann (-*Apathy*), ABGB V<sup>3</sup>, § 1020, no. 7; Straube (-*Griss*), HGB I<sup>3</sup>, § 383, no. 13).

2. The parties can validly agree upon irrevocability of the contract for representation in BELGIUM (*de Page and Dekkers*, *Traité élémentaire de droit civil belge* V<sup>2</sup>, 463-464; *Foriers and Glansdorff*, *Contrats spéciaux*, 640-641; *Wéry*, *Le mandat*, 275-283).

3. In BULGARIA the general rule is that the principal can revoke the mandate at any time (LOA art. 288(1)), but the parties can explicitly stipulate otherwise. Irrevocability of the mandate can also be implied, e.g. if both the principal and the agent or the principal and a third party have a legitimate interest in the mandate (Mevorah/Lidji/Farhi, *Komentar III*, 170). Legal doctrine distinguishes between absolute and relative irrevocability of the mandate and the authority (Mevorah/Lidji/Farhi, *Komentar III*, 171). In case of absolute irrevocability, the principal's withdrawal from the mandate or the authority does not have any legal effect. In case of relative irrevocability, the principal can end the mandate and the authority with unilateral notice to the agent, but will be liable for damages. According to legal writings, the irrevocability of the mandate contract is always relative (Mevorah/Lidji/Farhi, *Komentar III*, 171).

4. According to DANISH law the parties can validly agree that the mandate cannot be revoked. There are no statutory rules on this matter. According to case law a general mandate (general power of attorney) cannot be irrevocable.

5. In ENGLAND, it is possible in certain circumstances for the parties to agree that authority cannot be revoked, but this is only where the notion of agency is used as a legal device for a different purpose from that of normal agency, i.e. to confer an interest or a security on the agent. In such situations, the agent is regarded as using agency not for the benefit of the principal but for the agent's own benefit (Bowstead (- *Reynolds and Graziadei*), *Agency*<sup>18</sup>, 555-556). There are essentially two situations where the agent's authority may be irrevocable. First, the authority of the agent cannot be revoked when the agent's authority is coupled with an interest, e.g. if the principal owes money to the agent and appoints the agent to sell property in order to pay the debt to the agent. However, this is only valid when the interest exists at the time that the principal gives the agent authority; the mere right to earn commission is not regarded as an interest (*Doward, Dickson & Co v Williams & Co* (1890) 6 TLR 316). Second, when a mandate is given to secure a proprietary interest of, or some obligation owed to, the donee, it cannot be revoked without the consent of the donee (Powers of Attorney Act 1971, s. 4).

6. In ESTONIA, the parties can agree that the contract cannot be terminated (other than for a fundamental breach). The principal may conclude the prospective contract personally even in the case of an irrevocable mandate, but the parties can agree otherwise.

7. In FINLAND, it is generally thought that an irrevocable grant of authority is not possible.

8. In FRANCE, the rule entitling the parties to freely terminate the mandate or agency is a matter of mandatory public policy and the parties cannot validly agree that the agency is irrevocable. In practice, there are clauses in contracts entitled 'irrevocabilité', but these are interpreted as simply giving rise to compensation for the agent (Civ. 1<sup>ère</sup> 5 Feb 2002, Bull. civ. I, n° 40), and do not prevent the principal from carrying out the transaction personally (Civ. 1<sup>ère</sup> 16 Jun 1970, D. 1971, 261).

9. Under GERMAN law, which strictly distinguishes between the authority and the contractual relationship between agent and principal, this is largely a matter of the law of authority (as the parties want to make sure that the agent can continue to conclude contracts with

the third party) – CC § 168 implicitly anticipates that the parties may exclude revocability of the authority and the courts have long upheld this possibility (since RGZ 109, 333).

10. In GREEK law an irrevocable mandate for representation can be agreed on if the mandate also concerns the interest of the agent or of a third party (CC art. 724). According to CC art. 218 an irrevocable grant of a mandate can be agreed only if the mandate also concerns the interest of the agent or of a third party (Georgiadis/Stathopoulos/Doris, Art. 218-221 GCC nr. 9). In such cases of irrevocable mandate a revocation by the principal is void and the agent is entitled to conclude the prospective contract for which the representation was granted (Supreme Court decision no. 197/1983, EEN 1983, 714). In the area of intellectual property rights there are specific rules with regard to the contracts entrusting the administration of copyright to an ‘organisation of collective administration’. In such contracts an analogous application of the principle of free revocation of the mandate (CC art. 724) is not accepted. A free revocation does not comply with the nature of those contracts which require stability and continuance of the contractual relationships between the parties.

11. The HUNGARIAN CC art. 223(2) establishes that ‘[a] mandate shall be valid until withdrawn, unless otherwise provided; its withdrawal that concerns a bona fide third person shall be operative only if he has been informed thereof. The right of withdrawal cannot be validly waived’. Concerning the authority of the agent, CC art. 483(4) establishes that ‘[a]ny limitation or exclusion of the right of cancellation shall be null and void; however, the parties shall be entitled to agree on the limitation of the right of cancellation with regard to continuous agencies’. In case of commission agency, CC art. 512(2) provides that ‘[a]ny limitation or exclusion of the right of rescission shall be null and void’.

12. In IRELAND agency may be irrevocable where e.g. (i) the agent is given a ‘power with an interest’, that is, where an agent is given power and has a personal interest, as where the principal owes the agent money, and appoints the agent to sell property of the principal and thereby raise funds to pay the debt; or (ii) where a power of attorney is expressed to be ‘enduring’ or irrevocable under the Powers of Attorney Act, 1996. It should be noted regarding (i) where the agent is given ‘power with an interest’, that this is not a ‘true’ agency but agency being used as a device. In these cases it is intended that the agent use the ‘power’ not for the benefit of the principal but for the agent’s own benefit.

13. In ITALY, the parties can validly agree on an irrevocable mandate. However, even in this case the principal may revoke the mandate, but, unless there is a just cause, is liable for damages vis-à-vis the agent (CC art. 1723(1)). Representation contracts which are also in the interest of the agent or of a third party (*in rem propriam*) are considered irrevocable *ex lege* (CC art. 1723(2)).

14. In the NETHERLANDS, the parties may agree that the agent will act in the agent’s own name and with exclusion of the principal’s authority to act personally. If this is agreed, even as regards third parties the principal is not entitled to conclude the prospective contract; the exclusion of the principal’s power to conclude the prospective contract can however only be invoked if the third party knew or should have known of the exclusion (CC art. 7:423(1)). Specific provisions apply if the agent is an organisation which has as its statutory purpose to act on behalf of the joint interests of principals by exercising their rights collectively (CC art. 7:423(2)). Such organisations exist specifically in the area of intellectual property rights.

15. In POLAND the principal’s right to revoke may be limited, but the principal will always retain the right to revoke the contract due to “important reasons” (CC art. 746(3)).

16. SCOTTISH law does recognise an irrevocable mandate, known as a procuratory *in rem suam* (e.g. Premier Briquette Co Ltd v Gray 1922 SC 329; Stair, Institutions I10, 12, 8). It arises where the authority has been granted to the agent to achieve an outcome in which the agent has an interest. This concept has benefited from very little analysis in Scottish legal writing. It is described as ‘absolute,’ suggesting that it may not be revocable even in cases of material breach by the agent (Black, para. 551; Gow, Mercantile and Industrial Law of Scotland, 536). In cases where the agent has no interest in performance, there would seem to be nothing to

prevent principal and agent from agreeing between themselves that the agency will be irrevocable.

17. In SLOVAKIA the principal cannot validly waive the right to revoke the authority granted (CC § 33(b)(3)), nor validly agree that the relationship under a contract for representation may not be terminated; an irrevocable granting of authority is void.

18. In SPAIN, the parties can validly agree on an irrevocable mandate (CC art. 1733; STS 31 October 1987; 11 May 1993, 19 Nov 1994, and 20 Jul 1995; see also Sierra Gil de la Cuesta (-*Hernández Gil*), Código Civil VII<sup>2</sup>, 514; *Lete del Río*, Derecho de obligaciones III<sup>4</sup>, 414). However, even in this case the principal may revoke the mandate, but, unless there is a just cause, is liable for damages vis-à-vis the agent. Representation contracts which are also in the interest of the agent or of a third party (*in rem propriam*) are considered irrevocable (any purported revocation being ineffective) when the irrevocability serves the underlying protected interest as a device to reach the purpose intended by the parties (SSTS 20 April 1981, RJA 1981/1658, 3 September 2007, RJ 2007/4709; 30 January 1999, RJA 1999/331; *Díez-Picazo*, La representación, pp. 305 ff; Paz-Ares/Díez-Picazo/Bercovitz/Salvador (-*Gordillo Cañas*), Código Civil II, 1585).

19. In SWEDEN there are no special rules on irrevocable grants of authority. A mandate is considered to be revocable in nature since the commission is a type of contract that rests on personal trust. An irrevocable grant of authority is, however, considered allowed to the extent it is due to another underlying legal relationship between the parties and aims at a determined part of the principal's financial sphere and circumstances (*Bengtsson*, Särskilda avtalstyper I<sup>2</sup>, 54 and *Grönfors and Dotevall*, Avtalslagen<sup>3</sup>, 134). A general mandate can always be revoked.