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unwaivable power of attorney
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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

Does the irrevocable and unwaivable power of attorney exist?

by Juan Antonio Tiscareño.

In daily practice, we see companies granting irrevocable and unwaivable powers of attorney to certain parties, in order to conclude previous transactions executed between them. It is essential to take this into consideration to determine if such powers of attorney are really irrevocable and unwaivable, or what would happen if the principal actually revokes them, or the agent renounces them. In this article I will address this interesting topic.

The general rule is that the power of attorney is granted in benefit of the principal; this rule is inverted in the irrevocable and unwaivable power of attorney, because in this case it is granted to benefit the agent or a third party. This general rule allows the principal to revoke the representation which was transmitted to the agent, when and how he deems appropriate. When the representation is agreed with the characteristic of irrevocability, the assets matter of the representation are subtracted from the unilateral disposition of the principal to translate such capacity in favor of the persons executing the representation.

In order to know in favor of whom the representation will be performed, we must look to the agreement that the interested parties executed, and which is the base or the *underlying business* that caused the irrevocable representation.

The irrevocable representation is a legal instrument that facilitates a great number of transactions. Ideally, the irrevocable and unwaivable power of attorney and the underlying contract of the transaction should circulate together, so that the person who has contact with the power of attorney may determine whether the irrevocable representation is valid or not. It is a special and complex legal figure that should be analyzed case by case.

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As we said the irrevocable and unwaivable representation is necessarily linked with an underlying transaction, normally in the form of a contract. For example, A is obliged to donate a sum of money to B, and for that purpose grants in favor of B an irrevocable power of attorney to sell a real estate property, and the product of that sale will be received by B as the donation. In this case, the underlying transaction is a donation contract which must be linked with the irrevocable power of attorney as the latter is accessory of the former.

Article 2596 of Mexico’s City Civil Code¹ states the following:

“The principal may revoke the mandate when and as he pleases; at least in cases where the granting has been stipulated as a condition in a bilateral contract, or as a means to fulfill an obligation.

1.- Each State of Mexico has its own civil code, therefore it is necessary to review the correspondent civil code, depending to the case. It is important to point out that in most of the cases, the civil codes use the same wording of the Mexico’s City Civil Code.

In these cases the agent may not renounce the power of attorney.

The party which revokes or renounces the mandate at an inopportune time must indemnify the other for the damages and loss profits so caused.”

“While it is true that article 2596 provides two causes for agreeing the irrevocability, nothing prevents enhancing the causes for achieving such purpose, taking into consideration the free will between the parties.”

When the legal provision refers to *cases where the granting has been stipulated as a condition in a bilateral contract, or as a means to fulfill an obligation* it is indicating that the source of the irrevocability is the underlying business, turning the irrevocable and unwaivable power of attorney as accessory of a contract that necessarily should be known in order to justify its validity, inasmuch as the accessory follows the principal –*accessorium sequitur principale*–.

While it is true that article 2596 provides two causes for agreeing the irrevocability, nothing prevents enhancing the causes for achieving such purpose, taking into consideration the free will between the parties.

Unfortunately, it is a standard practice that the irrevocable power of attorney does not indicate the cause of irrevocability with the purpose of concealing fraudulent acts, usually in transactions related to the disposal of real estate properties, however for granting a valid irrevocable power of attorney it should be linked to the transaction that generates it.

Some academics distinguish between *absolute revocability and relative revocability*, stating that *absolute revocability* arises when the power of attorney is linked with the transaction that generates it, and the *relative revocability* emerges when the power of attorney is granted without linking it the underlying transaction that generates it. In the case of Mexico this distinction is only theoretical because article 2596 of Mexico’s City Civil Code does not make that distinction, and in its last paragraph states very clearly that the party which revokes or renounces the mandate (i.e. power of attorney) at an inopportune time, must indemnify the other for the damages and loss profits so caused. Therefore in my opinion, it is clear that the so called irrevocable power of attorney can be revoked, but the principal may be penalized with the payment of damages and lost profits in these cases.

Mexico shares reform strategy.

Social Development Undersecretary Ernesto Nemer Álvarez announced President Enrique Peña Nieto's structural reforms to fight poverty at the Municipal Ibero-American Congress in Argentina on Wednesday. "I have with me a presentation of the president's policies explaining what the reforms will do and where the additional income will be allocated," said Nemer. At the assembly, Nemer discussed the social aspect of sustainable development, social policies and exclusion, saying that the income Mexico receives from structural reforms will be used mainly to fight extreme poverty and improve the quality of education, health services and housing. *The News* 09/10/2014.

Reforms could unlock Mexico's "huge" microfinance potential.

Mexico's financial reforms could help the country's microfinance industry fulfill its "huge potential" for growth, rating agency Standard & Poor's said in a report. Mexico is an ideal place for microfinance to thrive as traditional lenders are reluctant to provide credit to low-income segments of the population. The country has one of the lowest microfinance penetration rates in the region, at 0.5% of GDP. But despite the low penetration rate, the segment is highly competitive, as new players tend to target the same, highly indebted client-pool because of difficulties accessing new customers in remote areas. *The Yucatan Times*. 27/10/2014.

Let the oil tender begin.

The Secretary of Energy has formerly announced that by October 31, the bylaws and rules for the energy reform bill will be published. As soon as they are to be published the second stage, and the most exhilarating for foreign investors is to begin, in order to proceed with the tender of oil deposits. Therefore, the Secretary will now proceed with the formal tender process of over 169 oil blocs, 109 exploration sectors and 60 extraction centers for private companies interested to compete with state oil monopoly PEMEX. The initial bidding process to begin next month is looking, on its initial phase to capture the investment of over 50 billion dollars. *Notimex.com*. 28/10/2014.

Pemex seeks partners to produce oil overseas.

Petroleos Mexicanos, through PMI International Trade, and Kuwait Foreign Petroleum Exploration Company (KUFPEC) signed a memorandum of understanding to exchange technical and commercial information to evaluate and develop business opportunities in oil exploration and production in Mexico and in abroad. The agreement, which is given in the framework of the recently enacted energy reform is the first oil field in history between Mexico and Kuwait. *Milenio*. 29/10/2014.

Mexico: one of the five easiest countries to start a business in Latin America.

Mexico climbed from the 43rd to the 39th spot in "ease of doing business" ranking. In Mexico opening a business takes 6.3 days, six procedures and costs 18.6% of the per capita income. Mexico's reforms helped the country climb four spots in the World Bank's Ease of Doing Business ranking, from the 43rd to the 39th position. According to the report, entitled "Doing Business 2015: Going Beyond Efficiency", Mexico is one of the five easiest countries to open a business in Latin America, along with Colombia, Peru, Chile and Puerto Rico. In Mexico, opening a business takes 6.3 days, six procedures and costs 18.6% of the per capita income. *The Yucatan Times*. 30/10/2014.

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