MEXICAN POWERS OF ATTORNEY

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The granting and execution of mandates or powers of attorney constitute one of the most commonly used legal figures in day-to-day matters and in the commercial activities of persons (the term persons as used herein includes both individuals and entities). In Mexico, the Federal Civil Code ("FCC") and the Civil Codes pertaining to the different States govern the generalities, types, obligations, granting, forms of execution and termination of mandates or powers of attorney. Powers of attorney gain importance because thanks to them a number of commercial acts are formalized every day. Due to their common and ordinary nature, we seldomly stop to analyze the ways in which powers are granted or the fact that they are crucial for the commercial activities of entities. The purpose of this brief essay is to analyze the process of granting powers of attorney, which powers are more adequate depending on the activity to be performed, why should they sometimes be limited, which capacities and limitations do attorneys-in-fact have with their different mandates and how can a conferred mandate be terminated.

GRANTING OF POWERS OF ATTORNEY

The FCC clearly sets forth that the mandate is an agreement. It is deemed as such because it evidences the agreement reached by the parties for one of them to execute on behalf of the other, the requested legal acts; such agreement being formalized by the acceptance thereof by the recipient. The acceptance may be express, when the attorney evidences the acceptance of its appointment in writing or before a notary public, or in an implied manner in which case the commencement of the requested legal acts is understood to be an acceptance of the mandate.

The ultimate purpose of powers of attorney is the performance on behalf of a person of certain licit legal acts in which the law does not require the personal intervention of the interested party. In the case of individuals, it may be granted to represent someone who is unable to appear in a certain act or when such appearance could be against such party's interests, or when such person prefers that certain legal acts be performed by experts in a specific field or simply for being more convenient. The case of entities is different, since although by law they are given independent legal character and capacity, they will always be represented by individuals to whom powers of attorney have been granted.

It is our opinion that although the FCC allows for powers of attorney to be granted either verbally or in writing, only written powers of attorney are deem valid, since powers of attorney granted verbaly must first be ratified in writing before the matter or business for which the power was granted is concluded. Below is a brief example to show how such granting method is no longer applicable: if an individual publically requests, authorizes and empowers a third party to sell a real estate property on his behalf before three witnesses, the attorney may start the performance of the requested acts; however, the grantor conserves the option (and hence the authority to cancel) of ratifying or not the mandate granted, and he must do so before the transaction is concluded. This is in addition to the fact that any potential buyer will most likely request to review the written power of attorney of the seller's representative.

It is important to point out that as opposed to many other countries, Mexico does not adopt the apparent authority theory. With respect to entities and corporations, its officers, directors and

even its shareholders are not deemed to have powers for the sole fact of being officers, directors or shareholders; such powers must necessarily be expressly granted in writing.

Article 2551 of the FCC sets forth the ways in which powers of attorney may be formalized in writing:

I. In public deed;
II. In a private document, executed by the grantor before two witnesses and ratified their signatures before Notary Public, Lower Court Judge, Justice of the Peace, or before the corresponding administrative officer or employee, when the mandate is granted for administrative matters;
III. In a proxy letter with no ratification of signatures.

We would like to point out that many times it is believed that for powers of attorney to be properly granted, they necessarily must be conferred in a public deed; the truth is that there are other equally valid granting methods. The reason for requesting a notarized power of attorney may be a result of tradition, or in some other cases, of the requests and methods of certain authorities.

Given the high costs involved in formalizing powers of attorney in a public deed, we recommend that alternate methods of formalization be studied and considered. A less expensive solution is only to ratify the signatures before a Notary Public.

However, the FCC sets forth the circumstances under which powers of attorney must be granted with specific formalities. Powers of attorney must be granted in a public deed or through a proxy letter executed before two witnesses, and ratifying the signatures of the grantor and the witnesses before a notary public in the following cases:

A) When the power of attorney is general;
B) When the value of the business exceeds the equivalent to one thousand times the general minimum wage ("GMW") in the Federal District ("FD") at the time of granting. In September 2006 the GMW in the FD was of $48.67 pesos per day; consequently, the value of the business would need to exceed $48,670.00 pesos (approximately US$4,425.00); and
C) When the attorney must execute an act that pursuant to applicable law must be evidenced in a public instrument.

Pursuant to paragraph B) above, the power of attorney may be granted in a private document executed before two witnesses without requiring the ratification of signatures, if the value of the business does not exceed one thousand times the GMW in effect in the FD at the time of granting. The granting may be done verbally when the value of the business does not exceed fifty times the GMW of the FD, currently being the amount of $2,433.50 pesos (or approximately US$220.00), which does not exempt the obligation of ratifying the power of attorney before the business is concluded and supports our interpretation that verbal grantings are no longer applicable based on the low thresshold amount.

The law is clear in setting forth that a Notary Public must participate in the granting of powers of attorney either executing public deeds or ratifying signatures. It would be wrong to determine that special powers of attorney do not require the involvement of a notary simply because of their nature; we must determine the value of the business to make such decision.

Finally, it is important to set forth that not only must the grantor be concerned with properly granting a mandate; the recipient must also verify the proper formalization. Not meeting with the aforementioned requirements annuls the power of attorney, leaving in effect the obligations reached between the good-faith third party and the attorney-in-fact, as if the attorney-in-fact would have acted on its own behalf.

GRANTING POWERS OF ATTORNEY ABROAD; ACKNOWLEDGMENT THEREOF IN MEXICO

The powers of attorney granted abroad for the performance of legal acts in Mexico will be deemed valid when complying with certain requirements.

For a power of attorney granted abroad to be deemed valid in Mexico, it must be granted before a foreign Notary Public or equivalent party that can attest the act. Such document must then be legalized by the corresponding authority; or in the event that the country of origin is a party to the Hague Convention, the document may be apostilled.

If the power of attorney was granted in a language other than Spanish, the complete document (including the corresponding apostille and notarial certification) must be translated by an official expert translator, which must be appointed by the Supreme Court of the corresponding State. The translator will affix his or her seal on the translation which shall be delivered to the Notary Public of choice, together with the original document with the seal of the foreign Notary Public and the original apostille or legalization document. The Mexican Notary Public will attest the documents submitted before him and will issue the corresponding public deed. If the power of attorney was granted by a company registered to do business in Mexico, it should be registered in the corresponding Public Registry of Commerce.

To consult the list of the countries that are parties to the Hague Convention, you may visit http://www.mec.es/mecd/titulos/hesu/haya.html.

TYPES OF POWERS OF ATTORNEY

The law is very specific with respect to the types of existing mandates, which may be general or special. Only those contained in the first paragraphs of article 2554 of the FCC will be considered as general, and any other will be deemed as special.

Article 2554.- *In all general powers for litigation and collections, it shall be enough to mention that they are granted with all the general and special authorities that require a specific clause pursuant to law, to be understood as being granted without any limitation whatsoever.*

In general powers to administer assets it will be enough to express that they are granted with that character, for the attorney-in-fact to have any kind of administrative authorities.

In general powers for ownership acts, it will suffice that they are granted in this capacity for the attorney-in-fact to have the authority of an owner, both in respect of the assets as in respect of any procedures regarding such assets or their defense.

When the authorities of the attorneys-in-fact are to be limited in the aforementioned cases, the limitations shall be set forth or the powers shall be special.

The Notaries shall insert this article in the testimonies of powers that they grant.

GENERAL LIMITED POWERS OF ATTORNEY, A THIRD KIND OF POWER?

Before describing each type of general power of attorney, we would like to point out that in our opinion, article 2554 of the FCC transcribed above, allows for the existence of a third type of power of attorney, the general limited powers of attorney, when it states: "…*when the capacities of the attorneys-in-fact are to be limited in the aforementioned cases, the limitations shall be set forth or the powers shall be special…"*

The general limited powers of attorney, although of a general nature, set forth the limitations that the grantor deems adequate, however they are not special since they are not granted for a specific act but rather for continuous acts with limitations.

DESCRIPTION OF GENERAL POWERS

The FCC sets forth the three types of general powers of attorney that exist.

The first is the General Power of Attorney for Litigation and Collection. This general power of attorney is commonly granted to the managers of companies and to the litigation attorneys in any matter where they represent a person. The power is granted for the attorney-in-fact to represent the grantor in court and perform collection efforts on its behalf. The recommendation we make with this type of power is that notwithstanding the literal language of article 2554 which states that "…*it shall be enough to mention that they are granted with all the general and special authorities that require a specific clause pursuant to law, to be understood as being granted without any limitation whatsoever…"*, it be granted as broad as possible for the following reasons:

1. The power may be used to represent the persons in trial, hence, granting it in a broad manner does not necessarily represent a liability or damage to the grantor since the interest of representing a person before the courts does not necessarily include the economic benefit of the attorney-in fact. In any event the power of attorney may be limited by setting forth the impediment of judicial or non-judicial collection.
2. The inadequate granting of the power of attorney, for example one lacking authority, may result in the dismissal of the claim for the lack of capacity of the appearing party.
3. There are certain very specific processes such as *amparo* proceedings, arbitrations, proceedings regarding electoral matters, trade and antitrust issues and labor matters, for which it is important to expressly include these and other matters in the power, particularly for labor matters, clearly setting forth that the attorney-in-fact has the labor representation to appear, negotiate and resolve issues before workers and unions in labor proceedings and before competent authorities.

The General Power for Acts of Administration grants the recipient administrative authority in the assets of the grantor. The recipient of this power of attorney is responsible for the general management of a company, such as managers or the members and shareholders. This power allows the day to day operations of the company to take place; in certain cases it is granted with limitations to agents or attorneys for carrying out filings and proceedings before the Ministry of Finance and Public Credit, the Federal Competition Commission, the Ministry of Economy, and others. Our comment with respect to this type of power of attorney is that limitations should be considered when issued by a company or entity with a very broad corporate purpose. As an example, if the corporate purpose includes the purchase and sell of real estate, the legal representative that has a General Power of Attorney for Acts of Administration, could formalize a purchase and sell transaction and such transaction be deemed to be a legitimate transaction.

Finally, we have the General Power of Attorney for Acts of Ownership, which grants authority of an owner, both for selling the assets of the grantor as well as to defend them if such is the case. Without doubt, this is the power of attorney granting the broadest authority to its recipients and is commonly reserved to the board of directors of any given company; in certain cases the exercise of the power must be made jointly by different attorneys-in-fact. I believe that a way of summarizing the scope of this power of attorney is to set forth that it allows the sale of any of the company's assets. We recommend that it is granted with care and if at all possible, that its exercise be limited by requiring that it be exercised jointly by several attorneys-in-fact.

SPECIAL POWERS OF ATTORNEY

Article 2553 of the FCC reads: "*The mandate may be general or special. General mandates are those referenced in the first three paragraphs of article 2554. Any other mandate will be deemed to be special*."

Powers of attorney are special when they are granted for fulfilling a specific purpose which once performed extinguishes the special power. Clear example of this type of power is the proxy to appear in the name and on behalf of a shareholder to a shareholders meeting to be held on a certain date. Regardless if the meeting is or not held on such date, such power will not be valid after such date.

Special powers of attorney are not always revoked based on the reasons set forth above, however, for the granting process we must always analyze its purpose and determine if due to the nature of the business, they must be granted in a public deed or if the signatures must be ratified before a Notary Public.

EXERCISING A POWER OF ATTORNEY

The attorneys-in-fact may exercise their powers of attorney by submitting the document which evidences the due granting process of the power of attorney.

The power may be submitted in a public deed if granted in such, either through the first testimony which as indicated by its name is the original document in which the Notary Public attested the proper granting thereby; or in certified copies of such first testimony which are equally valid for legal purposes as the original. There are cases in which it is sufficient to accompany a carbon copy of the document.

In exercising its mandate, the attorney-in-fact shall be subject to the instructions received by the attorney-in-fact and shall not act against the express provisions thereof.

The attorney-in-fact may confer a third party the authority to exercise the mandate if so set forth in the power of attorney, as described in article 2574 of the FCC. This article provides that the delegational authority may be exercised by attorneys-in-fact, or what we typically refer to as the power of attorney for delegation. The attorneys-in-fact may, if they are given such authority, grant a third party the same power held by them, with the same limitations, if any.

It is important that the attorney-in-fact is aware and understands the scope of its liability in exercising their power as clearly set forth in article 2568 of the FCC:

"The attorney in fact that exceeds its authority, will be liable of all damages and lost profits caused to the grantor and to the third party with whom a legal act is formalized, if such party ignored that the act was beyond the authority conferred in the mandate."

In reference to the judicial mandate, article 2586 of the FCC reads: *"The judicial mandate will be granted in public deed, or in a document submitted and ratified by the grantor before the corresponding judge. If the judge is not acquainted with the grantor, he will request identification witnesses."*

TERMINATION OF A POWER OF ATTORNEY

Pursuant to article 2595 of the FCC, the mandate may be terminated in the following cases:

I. By revocation;

II. By the resignation of the attorney-in-fact;

III. By the death of the grantor or the attorney-in fact;

IV. By the prohibition of any of them;

V. As a result of the expiration of the term and for the conclusion of the business for which it was granted;

VI. In the cases set forth in articles 670, 671 and 672 of the FCC (Declaration of absence).

The grantor may revoke the granted power of attorney when considered appropriate, except when the granting of the mandate is a result of a condition in a bilateral agreement or as a means to comply with an acquired obligation. In such case the attorney-in-fact may not resign.

The law sets forth that the grantor may request the return of the instrument evidencing the power of attorney, likely to avoid a future bad use thereof, however in practice it is uncommon to request such physical return.

The death of the grantor is a cause for termination of the power of attorney, however, the attorney-in-fact must continue with the administration until the heirs become involved in pending businesses. In these cases the attorney-in-fact has the right to request a judge to determine a short period for the successors to appear and take control of pending businesses.

For companies and legal entities it is important to correctly revoke the powers of attorney granted and in all applicable cases register such revocations in the corresponding Public Registry of Commerce. The form of the revocations shall also be carefully observed; only the grantor or a superior corporate body may revoke a power of attorney. If for example, the powers of attorney were granted by the chief executive officer as part of his delegation authority, he may revoke the powers granted with the same formalities as those observed in the granting process. If the powers were granted by the general shareholders meeting or in the incorporation deed of a company, the revocations must be made by a shareholders meeting or unanimous consent, if so allowed by the relevant bylaws.

CONCLUSION

As described above, powers of attorney play an important role in the performance of legal acts in Mexico.

Granting them correctly and being aware of the rights and obligations of the parties involved is of relevance to all parties. Attorneys and notary publics must be deeply informed of their granting and registration process, as well as be familiar with the types of existing powers of attorney, their scope and limitations. Businessmen, professional individuals, housewives, students and others must know at least generally the existing types of powers of attorney and how they should be granted, as it is very likely that at some point in their lives they become involved with this legal figure. Entities of any type, either commercial or non-commercial, and having or not moneymaking purposes must be aware of the scope and responsibilities of its legal representatives, have a proper control of its attorneys-in-fact and revoke them on a timely manner; and finally, all legal representatives must be responsible in the exercise of their legal capacities and understand and be familiar with the rights and obligations that they have been granted.