

An irrevocable power of attorney? What does it mean under Chinese laws?

Description

A power of attorney, POA, is used widely in any jurisdiction in many circumstances where one individual entrust another individual to speak and act in his name or on his behalf and protect their best interests.

As I represent foreign clients in most cases, clients often raise the issue of revocability of power of attorney they are going to grant to me. Recently, in discussing a POA that is to be issued in helping the client to sell his property in Shanghai, the client insisted that the POA be revocable in a bid to reserve the right to cancel the deal if they find anything wrong. It is worthy of note to write about legal rules about creation, cancellation and termination of power of attorney under Chinese laws.

I What is Power of Attorney?

A power of attorney is a necessary document when you appoint an attorney-in-fact or attorney-at-law to represent you either in any deals or in litigation or arbitration proceedings in China. Associated with the issuance of POA is the creation of the principal-agent agency relationship whereby the principal is represented by the agent designated in the POA in dealing with third parties and accordingly the principal will be ascribed the results of such representation by the agent.

II Revocable Power of Attorney

A revocable POA means the POA can be revoked by the principal at any time. According to Article 410 of China Contract Law,

"Either the principal or the agent may terminate the agency appointment contract at any time. Where the other party sustains any loss due to termination of the contract, the terminating party shall indemnify the other party, unless such loss is due to a reason not attributable to the terminating party."

In practice, in the absence of clear clause indicating otherwise, the POA is always revocable by either principal or the agent. Such termination of POA by either party is rather arbitrary without necessitating any legal ground or explanation. In this sense, it is not necessary to state expressly in the POA that this POA is revocable because the law has so stated clearly.

While this arbitrary anytime termination gives flexibility to parties to the agency, it carries obvious risk with it because of uncertainty caused by such anytime termination esp in the context that the principal and the intended third party don't know each other and have no communication between them. For instance, in my case of property sale, the property seller and the buyer have no idea about who the other party is. When I present a POA to buyer, he will have reasonable doubt about my power to represent the seller since the POA could have been terminated already and I did not disclose the termination to buyer. So in this case, the buyer will for sure like to see an irrevocable POA before him.

III Irrevocable Power of Attorney

An irrevocable power of attorney is a POA intended to be that it cannot be arbitrarily revoked by the principal. It has to be noted that the irrevocability of such POA is not absolute in its literal sense. Upon rise of statutory conditions for terminating a contract as prescribed in China Contract Law, a POA is always rescisable.

In fact, in light of the provision of Article 410 of China Contract Law as quoted above, it has been called into question whether such agreement on being irrevocable is legally effective or not. Some hold that the Article 410 is a compulsory provision invalidating any private agreement against it. But there is also the opinion believing that Article 410 is not compulsory and can be set aside by mutual agreement of the parties.

So far, there is not judicial interpretation on the issue giving rise to confusion and controversy in understanding this piece of law.

However, we do notice that a court of China Supreme Court has indicated that they believed that Article 410 is not compulsory and private agreements between the parties can prevail over this provision. Moreover, there is an apparent tendency in both practice and theoretical worlds to favor the latter opinion on the issue, namely, Article 410 is not compulsory and private agreement shall be applied in priority over the provision especially in the context of commercial transactions.

IV Difference between Revocable and Irrevocable

So what is the difference between the two types of power of attorney?

From the above discussion, a revocable POA is somehow more favorable to principal and irrevocable POA is more favored by agents.

The fundamental difference is however lying with legal consequences ensuing after the termination of power of attorneys.

In the case of termination of revocable POA, pursuant to Article 410, direct consequence is that the terminating party shall be liable for indemnifying the other party for its loss that is directly resulted from such termination unless the terminating party can prove that the loss is due to a reason not attributable to the terminating party. Once terminated, the POA cannot be reinstated. The unhappy party may only ask the terminating party to compensate his loss in accordance with Article 410. It has been decided in one of the cases tried and judged by China Supreme Court that the loss referred to in Article 410 means the direct loss only, excluding consequential losses that may be incurred.

In the case of termination of irrevocable POA, the law is not clear about what consequence will follow. Based on the tendentious opinion, if the principal terminates the irrevocable POA, the law shall either allow the agent to claim real performance of the POA or to claim the consequential loss as a result of such termination.

Without such difference, there will be no point in turning a POA into an irrevocable one.

V Tips for Drafting POA in China

Given the unclear legal opinions on irrevocable POA, foreign investors or business man doing business in or with China shall be careful in drafting the power of attorney to your Chinese agents. The best policy is to make things clear where the law is vague.

It is of special importance for business people to use power of attorney in commercial transactions in China. Very often, the authorized agents are at greater peril if the POA is revocable under Chinese laws because the principal may cite Article 410 as legal basis to terminate the appointment while incur relatively small liability for unreasonable termination.

As always at the end of such articles, I will advise you to seek legal assistance when making business with or in China. And of course, for this purpose, you are welcome to contact the author.



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