

§ 7 Agency and representation (sect. 164 et seq., 1629 BGB)

- definition: *agency* [Stellvertretung] is
 - the making or receiving of a declaration of intent
 - by an *agent* (representative) [Vertreter]
 - in the name of a represented party (the *principal* [Vertretener])
 - based on a *power of agency* (power of representation) [Vertretungsmacht]; (sect. 164(1) BGB)

I. Legal representatives, agents and messengers

- agents are all persons who represent (or try to represent) others
- legal representatives are agents who represent the represented party by law, regardless of the party's will
 - parents with parental custody represent their minor children (sect. 1629 BGB)
 - a guardian represents his ward (sect. 1789(2), 1823 BGB)
 - however, boards and directors represent their legal persons as organs, not agents
- messengers do not make an own declaration of intent but just transmit the declaration of another person

II. Own declaration of intent, but in the name of the principal

- the agent makes a declaration of his own intent but in the name and on behalf of the principal; it shall take effect directly for and against the principal
- need for transparency: if agency does not become sufficiently clear, the agent does not bind the principal but himself (sect. 164(2) BGB)
 - exception: business for whom it concerns in daily life (e.g. the husband buying tampons for his wife)
- the agent cannot enter into a legal transaction with himself (sect. 181 BGB)
 - except if specially authorised or solely performing an obligation
- vitiations of intent and relevant knowledge of facts of the agent will be attributed to the principal (sect. 166 BGB)
- if agent acts under the influence of a mistake, deceit or threat (cf. sect. 119, 123 BGB), the principal can avoid the contract

III. The power of agency

1) Statutory power of representation [gesetzliche Vertretungsmacht]

- power of agency granted by the law
- of parents for their minor children (sect. 1629 BGB)
- of guardians for their wards (sect. 1789(2), 1823 BGB)

2) Power of agency conferred by legal transaction

- also called power of attorney or authority [Vollmacht]
- conferred by *declaration to the agent or to the third party* in relation to whom it shall have effect (sect. 167 BGB) or public notice (sect. 171 BGB)
- must not have been expired together with the legal relationship on which its conferment is based (e.g. the employment contract) or have been revoked (sect. 168 - 173 BGB)

3) Fictitious power of agency

- in these cases recognised by jurisprudence, a fictitious power of agency is assumed even though no power of agency was actually granted
- a) **Agency by estoppel for knowingly tolerating alleged agent** [Duldungsvollmacht]
 - someone is treated as principle because he knew that someone else was illegitimately acting in his name but did not intervene, if the partner trusted the alleged agent
- b) **Agency by estoppel for unknowingly tolerating alleged agent** [Anscheinsvollmacht]
 - someone is treated as principle although he did not know that someone else was illegitimately acting in his name, if he could have known and prevented it with due diligence and the partner trusted the alleged agent

IV. The liability of an agent without power of agency

- if the agent acts without having power of agency, the contract will take effect for and against the principal only if the principal approves it (sect. 177(1) BGB; see exceptions under III.3)
 - until approval the other party may revoke it, unless they knew of the missing power of agency (sect. 178 BGB)
- if the principle does not approve, the other party may demand performance or compensation, if the partner trusted the alleged agent from the agent (sect. 179 BGB)