Power of attorney

1. Authority to conclude a contract on behalf of another person

- to carry out a transaction in the name of the principal
- to attribute the legal effect of the transaction to the principal

2. Creation of authority

- By law or by appointment of the court
  - parent, guardian, husband and wife
  - court-appointed manager of an absentee, court-appointed receiver

- By contract (mandate, employment, partnership, etc. Art. 709: presumption of agency)
  - mandate may be terminated at any moment
  - termination of a mandate does not have retroactive effect on transactions entered into before the mandate is terminated
  - agent may resign at any moment
  - cf. Art. 689
  - death of the principal or the agent (exc. commercial contracts, legal representative, emergency, Art. 691)

3. Ostensible authority

- Art. 125
  - Principal’s representation to the counterpart
  - handing over the documents showing the power of

attorney to the 'agent' may also qualify as principal's representation (indirect representation) to the counterpart. 2000Da2566 (principal told the creditor that he would be the guarantor; but later realised that the debt was too much and told the debtor that he cannot be the guarantor; the debtor, however, acted as the 'agent' of the principal to conclude the guaranty contract using the principal's seal certificate and other documents)

- principal will be bound by the transaction of the 'agent' as long as it falls within the 'represented' power
- If the principal does not wish to be bound by the transaction, the burden of proof lies with the principal to show the counterpart's knowledge (of the lack of power of attorney) or negligence

- Art. 126
  - When agent's transaction falls outside his power of attorney
  - the 'power of attorney' for this purpose would include the 'ostensible power of attorney' as well; 69Da2149 (former agent overstepping his power)
  - power of attorney created by law (parent, guardian, lawful wife and husband, etc.) would also provide a basis for this purpose. 81Da524 (mistress purporting to represent her lover in borrowing money and offering security)
  - If the counterpart wishes to compel the principal to perform, the burden of proof lies with the counterpart to show that there was "justifiable ground" to believe that the transaction was within the agent's power of attorney.
  - 98Da18988 (Daehan Guarantee Insurance; wife

purporting to represent husband to guarantee her brother's debt)

- Art. 129
  - Where the power of attorney has expired, the principal may be bound by the agent's transaction which was made after the expiry.
  - If the principal does not wish to be bound, the burden of proof lies with the principal to show the counterpart's knowledge (of the expiry of the power of attorney) or negligence.
  - 97Da55317 (Land Development Corp; KEB, who was the agent, appointed sub-agent after the death of the principal)

4. Liabilities of an "agent" who cannot prove power of attorney (Art. 135)

- Where the principal denies the validity of the transaction on the ground of a lack of power of attorney, the counterpart may:
  - seek to compel the principal's performance on the ground of the ostensible authority under Arts. 125, 126 and 129
  - sue the 'agent' under Art. 135

- the 'agent' may be compelled to perform the contract instead of the principal (in this case, the 'agent' may, while not a party to the contract, avail himself of the contractual rights as if a party to the contract), or
- the 'agent' may be asked to pay damages (performance measure)
- the 'agent' may avoid liabilities by showing
  - that the counterpart should have known that the

‘agent’ had no power of attorney, or

- the ‘agent’ was not of full capacity, or
- the agent had the power of attorney