

Ondřej Frinta

Representation



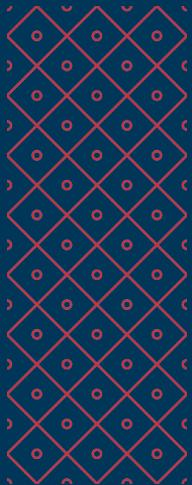
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Chapter 1

Concept of Representation



Concept of Representation

Legal Institution:

1) Facilitates legal interaction between persons

A person could make juridical acts on their own but chooses not to, or it is not advantageous etc.

2) Enables participation in legal relations for persons **lacking** full legal capacity

A person cannot make juridical acts in a given matter

- ▶ **Enables full integration into legal relationships**
- ▶ **Enhances protection of rights and interests**



Concept of Representation

Representation = legal relationship

- ▶ between the person represented and the representative
- ▶ the representative has the legal authority (power, “**force**”) to act on behalf of the person represented

X

Distinction from procedural law:

Legal **force** = attribute of a decision (a decision is final, has binding effect to the parties, cannot be changed)



Concept of Representation

Act on behalf of the person represented

= Effects of the representative's act attach to the person represented

Both

► legal effects

and

► economic effects



Chapter 2

Direct and Indirect Representation



Direct and Indirect Representation

Direct: Representative acts **in the name and on behalf of the person represented**

X

Indirect: Representative acts **in their own name (not the person represented) but on behalf of the person represented**

X

Representative **always expresses their own will**

Civil Code does not use this terminology explicitly, except e.g. § 1681



Direct and Indirect Representation

Civil Code does not use this terminology explicitly, except e.g. Sect. 1681 para 1:

If an heir assumes full administration of the decedent's estate without being entitled to do so, the effects of a reservation as to estate inventory, where made by the heir, are cancelled with effect from the beginning. This applies even where it is proved that an heir has intentionally concealed the decedent's property by mixing parts of the decedent's estate with parts of his property making it impossible to distinguish what belongs to whom, unless this was already the case before the decedent's death. The same effect with respect to the reservation as to estate inventory also occurs with respect to the heir who administered the decedent's estate in this manner **being directly or indirectly represented** by someone else. If the decedent's estate is administered in this manner by a close person of the heir, the person is presumed to also act as his representative.



Direct and Indirect Representation

Direct Representation

Representative acts **in the name** and **on behalf of** the person represented

in the name of the represented:

- Representative indicates acting for another, with effects for that other

on behalf of the person represented:

- Rights and obligations attach directly to the person represented



Direct and Indirect Representation

Theories of Direct Representation:

Principal Theory (Savigny):

Principal (the person represented) acts legally; representative is merely a carrier of will

Representation Theory:

Only the representative acts legally, representing the principal (the person represented)

Intermediary Theory:

Both the person represented and representative juridical acts are legally relevant



Direct and Indirect Representation

Theories of Direct Representation:

Sect. 436 para 2:

If a representative acts in good faith or if he must have known about a specific circumstance, **the same is taken into account for the person represented**; this does not apply in the case of a circumstance which the representative learned before the representation was created. If the person represented does not act in good faith, he may not invoke good faith of the representative.

► **Representation Theory**



Direct and Indirect Representation

Indirect Representation

Representative acts **in their own name (not the person represented) but **on behalf of the person represented****

Acts in own name:

- ▶ does not express intent for legal consequences to arise for (to be attached to) another
- ▶ legal consequences arise for the representative

On behalf of the person represented:

- ▶ representative has an obligation to transfer economic consequences to the person represented



Direct and Indirect Representation

Indirect Representation

On behalf of the person represented:

- representative has an obligation to transfer economic consequences to the person represented

Two juridical acts in total will be made:

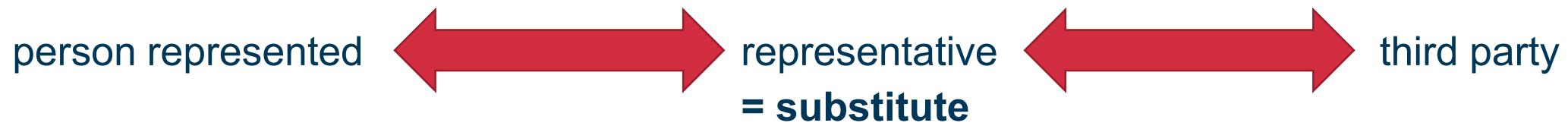
- 1) The representative acts with third person (e. g. acquires an ownership right)
- 2) The representative acts with the person indirectly represented (transfers ownership right to him acquired from third person)



Direct and Indirect Representation

Indirect Representation

Sometimes also referred to as **substitution**



There is **no legal relationship** between the represented and the third party!

Between the person represented and the representative **there is an obligation** (contractual duty) to transfer the economic consequences to the represented.



Direct and Indirect Representation

Indirect Representation

Q.: Think about when can it be useful to be indirectly represented

Q.: Think about nominate contracts based on indirect representation



Direct and Indirect Representation

Indirect Representation

Q.: Think about when can it be useful to be indirectly represented

E.g. You intend to buy an expensive piece of art, but you don't want the public to know that you will be the owner.

= Somebody else will buy it for you (will be obliged to transfer ownership right to you)



Direct and Indirect Representation

Indirect Representation

Q.: Think about nominate contracts based on indirect representation

By a **contract of undisclosed mandate**, a mandatary undertakes to arrange, **in his own name**, a particular matter for an undisclosed mandator **on the undisclosed mandator's account**, and an undisclosed mandator undertakes to remunerate him. (Sect. 2455)

Juridical acts made by the mandatary with respect to a third person **do not oblige or entitle the undisclosed mandator**, but the mandatary himself. (Sect. 2456)
alternative translation: a consignment contract, brokerage contract



Direct and Indirect Representation

Indirect Representation

Q.: Think about nominate contracts based on indirect representation

By a **forwarding contract**, a forwarder undertakes to arrange **for a mandator, in the forwarder's name and on the mandator's account**, the carriage of a consignment from a particular place to another particular place and, where applicable, also arrange or perform acts associated with carriage, and a mandator undertakes to remunerate the forwarder.

(Sect. 2471 para 1)



Direct and Indirect Representation

Principle of Apparency / Manifestation Principle

Q.: Compare two wordings:

1) If it is not evident **from the juridical act** that a person acts on behalf of another, he is conclusively presumed to act in his own name.

(Sect. 406 para 1 **DRAFT** of CC, version April 2005)

2) If it is not evident that a person acts on behalf of another, he is conclusively presumed to act in his own name.

(Sect. 436 para 1, 2nd sentence)



Direct and Indirect Representation

Principle of Apparency / Manifestation Principle

Q.: Compare two wordings:

Ad 1) ... **from the juridical act** ...

= principle of legal certainty

Ad 2) = not only from the content of juridical act, **but also from circumstances**



Direct and Indirect Representation

Principle of Apparency / Manifestation Principle

In this regard, judicial practice has settled on the opinion that it must be apparent from the juridical act that it was performed by the participant's representative. This requirement can also be met if the power of attorney granted by the person represented to the representative for the juridical act forms an integral part of the legal act [...]. However, **the appellant's view that the power of attorney must be part of the written version of the legal act is mistaken.** Such a requirement is not supported by legal regulations; on the contrary, **it follows from the wording of the cited opinion that this requirement can also be met in other ways.** The law does not require that the original written power of attorney be presented to third parties with whom the representative is dealing. [...].

SC Case No 26 Cdo 2857/2007



Direct and Indirect Representation

Principle of Apparency / Manifestation Principle

The establishment of the effects of **direct representation** therefore presupposes, in addition to the objectively given characteristics of direct representation and power of attorney, that the representative acts in the name of (note: on behalf of) the person represented (principal) **in a manner that is apparent** and with at least implied consent, with the entire context of the representative and third party's actions being directed towards the person represented (principal) as a contracting party.

If this condition is not met, then it can only be a case of **indirect representation [...].**



Chapter 3

Active and Passive Representation



Active and Passive Representation

Active:

representative performs juridical acts (in the name of and on behalf of the person represented)

X

Passive:

representative receives expressions of will from third persons (in the name of and on behalf of the person represented)

= juridical acts addressed to the representative, but with effects for the person represented



Active and Passive Representation

Civil Code does not expressly mention passive representation

Q.: Is it admissible?

Q.: Can active and passive representation diverge (in two representatives)?



Active and Passive Representation

Civil Code **does not** expressly mention passive representation

Q.: Is it admissible?

Yes

Q.: Can active and passive representation diverge (in two representatives)?

Yes



Chapter 4

Contractual vs. Non-Contractual Representation



Contractual vs. Non-Contractual Representation

classification by legal title establishing representation:

juridical act (private-law legal title)

X

statute (public-law legal title)

court decision (public-law legal title)



Contractual vs. Non-Contractual Representation

Contractual Representation

If stipulated so by the parties, one represents the other as an agent to the stipulated extent.
(Sect. 441 para 1)

- ▶ bilateral juridical act
- ▶ expression of **autonomy of will**
- ▶ voluntary representation

- ▶ sometimes called “representation based on power of attorney” (this is not precise, see bellow)



Contractual vs. Non-Contractual Representation

Contractual Representation

The principal shall state the scope of **the authority to represent in a power of attorney**.
(Sect. 441 para 2)

Authority to represent is **not acquired** by a power of attorney.

Authority to represent is established in **representation agreement** (e.g. a mandate)
= agreement by which the agent acquires the legal authority (power, “force”) to act in the name of the principal and with direct effects for the principal



Contractual vs. Non-Contractual Representation

Contractual Representation

Power of Attorney (two meanings in Czech):

1) legally granted authority (power, “force”) to act in the name of another with direct effects for that person

Civil Code correct term: authority (NOT power of attorney)

2) “certificate“ about authority (é evidence of item 1)

Civil Code correct term: power of attorney



Contractual vs. Non-Contractual Representation

Contractual Representation

Power of Attorney:

- ▶ certifies existence and scope of authority (to represent)
- ▶ **does not create authority (to represent)**
- ▶ only communicates information about it

- ▶ current doctrine rejects classification as a juridical act
- ▶ does not meet definitional features of a juridical act
- ▶ **“Act analogous to a juridical act“**
- ▶ rules on legal acts apply by analogy



Contractual vs. Non-Contractual Representation

Contractual Representation

mandate **X** **representation agreement** **X** **power of attorney**

Mandate = **obligation, contractual relationship between mandator and mandatary**, mandatary undertakes to arrange a matter for the mandator (Sect. 2430 et seq.), establishes **subjective right** to interfere in the affairs of the mandator (has effects in relationship between mandatary and mandator, i.e. between agent and principal)

Representation agreement (usually included in mandate contract) = authority (power, "force") to act in the name and on behalf of other person (has effects towards third parties), **communicated in power of attorney**



Contractual vs. Non-Contractual Representation

Contractual Representation

Abstract nature of authority (“abstract nature of power of attorney”)

From the **difference between the legal relationship established by a mandate contract** (i.e., the **internal relationship** between the agent and the principal) and **a power of attorney declaring externally the agent's authority to act on behalf of the principal** to the extent specified [...] it necessarily follows that the termination of the legal relationship under the mandate agreement cannot be equated with the termination of the legal effects of the power of attorney.

SC Case No 33 Cdo 4385/2007



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope and types of authority:

(“Scope and types of power of attorney”)

General = All matters of the principal

X

Special = only certain matters

Q.: Try to give an example when special power of attorney is required.



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope and types of authority:

Special: example

The power of attorney must contain information proving identity and other decisive facts relating to both fiancés and to the proxy, and a declaration concerning the surname. It must also state that the fiancés are not aware of any obstacles preventing them from entering into marriage, that they are aware of each other's health condition and that they have considered the arrangement of future property situation, their home and material security after entering into marriage. The power of attorney must be in writing, and the signature thereon must be authenticated.(Setc. 669 para 2).



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope and types of authority:

("Scope and types of power of attorney")

By granting **corporate representation** (note: procuration), an entrepreneur registered in the commercial register **authorises a corporate agent** (note: proctor) **to make juridical acts associated with the operation of a business enterprise or a branch thereof**, including those which otherwise require a special power of attorney. However, a corporate agent may alienate or encumber an immovable thing only if expressly provided. (Sect. 450)

= also, a special kind of power of attorney



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope and types of authority:

Multiple representatives for one matter = joint representation

If a person represented has multiple representatives for the same matter, **each of them is presumed to be entitled to act individually**.

► **Individual representation**

X

If representatives act jointly, or at least express consent with action of one of them

► **Collective representation**



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope and types of authority:

Limited X Unlimited

Whether limits or manner of acting **are imposed on the representative or not**

kinds of limits: **substantive, territorial, temporal**



Contractual vs. Non-Contractual Representation

Contractual Representation

Scope of authority is derived from:

- 1) Representation agreement + internal instructions** (Sect. 447 CC – internal relationship)
- 2) Power of attorney** (towards third persons)
- 3) From statute:** e.g., Sects. 450 (corporate representation; procuration), 696 para 1 (mutual representation of spouses), 892 (parents represent a child), 966 para 2 (foster represents a child)
- 4) Statutory framework + specific court decision:** Guardianship of a child (Sect. 943 et seq.)



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

If natural persons lack legal capacity, their statutory representatives act for them (Sect. 26 CC 1964)

- (1) Who is the statutory representative of a minor is governed by the Family Act
(note: = parent, tutor)
- (2) **The statutory representative** of a person deprived of legal capacity or whose capacity has been restricted by court decision **is a court-appointed guardian**
(Sect. 27 CC 1964)



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

CC 89/2012 Coll., Explanatory memorandum for Sects. 457-464:

“The difference between statutory representation and guardianship lies in the legal basis of their creation. The former arises directly from statute, the latter on the basis of a court decision. For this reason, the draft consistently distinguishes between the two and does not merge them under the single term ‘statutory representation,’ as is currently the case, since that blurs the clarity of the law’s language.”



Contractual vs. Non-Contractual Representation

Book 1: General provisions

Title III: Representation (Sects. 436-488)

Chapter 1: General provisions (Sects. 436-440)

Chapter 2: Contractual Representation (Sects. 441-456)

Chapter 3: Legal **Representation and guardianship** (Sects. 457-488)



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

- 1) **A spouse** has the right **to represent the other spouse** in (note: his/her) usual matters. (Sect. 696 para 1)
- 2) **Parents** have the right and duty **to represent the child** in juridical acts for which the child lacks legal capacity. (Sect. 892 para 1)
- 3) **Tutor** has the right **to represent the child** (Sect. 928 para 2: In principle, a tutor has all the rights and duties towards the child **as a parent** except the duty to maintain and support)
- 4) **A foster parent** shall reasonably perform the rights and duties of parents in the upbringing of the child. He is obliged and entitled to decide **only on common matters** of the child, **represent the child in these matters** and administer his assets and liabilities. (Sect. 966 para 2)



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

5) Entrusting a child to the care of another person: The rights and duties of a caring person are determined by a court (Sect. 955)

Thus, it depends on the specific court decision:

Parents remain statutory representatives ► caring person **does NOT** represent the child

Parents cease to be statutory representatives ► caring person represents the child



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

Features of both contractual representation and guardianship

6) **Representation by a household member:** The representative shall inform the person represented that he will represent him, [...]. **If the person to be represented refuses (= contractual feature)** that, the representation is not created; [...]. (Sect. 49 para 2)

The creation of representation **must be approved by a court (= guardianship feature)**. [...]. (Sect. 50)

7) If one of the parties is comprised of multiple persons, the other party has the right to require that **a joint representative be determined for the purpose of delivery of correspondence**. If the party fails to do so, the representative is determined by a court on application. (Sect. 1868 para 2)



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

8) Sui generis representation

Representation of a legal entity **by a member of its governing body is representation of its own kind (sui generis)**, to which neither the rules on contractual representation (Sects. 441–456) nor those on statutory representation (Sect. 457–488) apply. [...]. If a member of the governing body exceeds their authority or represents the legal entity without authority under the founding legal act, the legal entity may subsequently approve such act. **Since the governing body member is not a contractual representative**, the rules for subsequent approval follow Sect. 440 (note: general provisions on representation), not Sect. 446 (note: contractual repr.).

SC Case No 27 Cdo 4593/2017

- = not a contractual representation
- = not a statutory representation



Contractual vs. Non-Contractual Representation

Non-Contractual Representation

9) Representation of legal entity by an employee, a member, a member of another body not registered in a public register. (Sect. 166 para 1)

10) If an entrepreneur authorises a person to carry out a certain activity within the operation of a business enterprise, that person represents the entrepreneur in all dealings that this activity typically involves. (Sect. 430 para 1)

11) The head of a registered branch may represent the entrepreneur in all matters relating to the registered branch from the date on which he was registered in the commercial register as the head of the registered branch. (Sect. 503 para 2)



Contractual vs. Non-Contractual Representation

Legal Capacity of the Person Represented and the Representative

CZ: Representative expresses their own will ► Must have legal capacity for the legal act they are to perform

Contrast:

German and Austrian doctrine:

Legal consequences do not arise in the representative's sphere ► the representative cannot suffer harm ► provisions on invalidity due to incapacity do not apply



Contractual vs. Non-Contractual Representation

Legal Capacity of the Person Represented and the Representative

Person Represented – Contractual Representation:

must have legal capacity for the legal act by which they authorize their representative (the principal)

X

Person Represented – Non-Contractual Representation:

needs not have legal capacity (even at all)



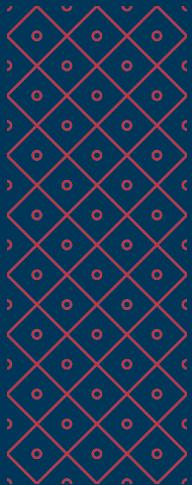
Contractual vs. Non-Contractual Representation

A representative acts personally. He may authorise another representative, if agreed so with the person represented or if required by an urgent need; however, he is responsible for the proper selection of the representative. (Sect. 438)

= **sub-representation, substitution**

main representative = **substituent**

additional (another) representative = **substitute**



Chapter 5

Exclusively Personal Acts



Exclusively Personal Acts

Personal nature of certain legal acts

- **Representation is not possible, or only to a limited extent**
- 1) Affirmative statement on paternity (Sects. 779, 780)
- 2) The right to designate an heir **is a personal right of a decedent**. A decedent may not entrust designation of heirs to another or make a disposition *mortis causa* jointly with another person. (Sect. 1496)
- 3) The parties may conclude an inheritance contract and change an obligation arising therefrom only through a personal act. (Sect. 1584 para 2)



Exclusively Personal Acts

Personal nature of certain legal acts

► **Representation is not possible, or only to a limited extent**

4) Where fiancés express their will to enter into marriage **in person** before a public body performing the wedding ceremony in the presence of a registrar, it is a civil wedding.
Sect. 657 para 1)

(+ cf. Sect. 669 para 1 for the possibility to enter into marriage being represented – see above)

5) **Personal performance of dependent work** (Sect. 2 para 1 and 38 para 1 of Labour Code).



Exclusively Personal Acts

Personal nature of certain legal acts

► **Representation is not possible, or only to a limited extent**

Forgiving, pardon:

6) A person is excluded from his succession right if he commits an act having the nature of an intentional criminal offence against the decedent, his ancestor, descendant or spouse, or a despicable act against the decedent's last will, especially by forcing or deceitfully seducing the decedent to express his last will, frustrating his expression of last will, or concealing, falsifying, forging or intentionally destroying his testament, **unless he was expressly forgiven for such an act by the decedent.** (Sect. 1481)



Exclusively Personal Acts

Personal nature of certain legal acts

- **Representation is not possible, or only to a limited extent**

Forgiving, pardon:

7) If a donee hurt the donor intentionally or through gross negligence in a way that was in clear conflict with good morals, the donor may withdraw from the donation contract due to his ingratitude **unless he has forgiven the donee**. If a gift has already been delivered, the donor is entitled to require to have the entire gift surrendered to him, and if that is impossible, the payment of the usual price. (Sect. 2027 para 1)



Chapter 6

Messenger



Messenger

X NOT a representative

- ▶ merely conveys, communicates, transmits another's will
- ▶▶ does not need not have legal capacity



Chapter 7

Fiducia, Treuhand and Trust



Fiducia, Treuhand and Trust

Roman law: Fiducia

***fides* (faith)** = trust, reliability, credibility

Fiduciant transfers to fiduciary (Quiritary) ownership of a thing for the purpose of pledging, safekeeping, use, or any disposition **solely *fidi fiduciae causa*** (= with the agreement that the thing will be re-transferred back after the purpose has been fulfilled)



Fiducia, Treuhand and Trust

Roman law: Fiducia

The fiduciary is the owner

if fiduciary disposes of the thing, they do so in their own name

but solely *fidi fiduciae causa* (solely „to a faithful hand“)

- ▶ The fiduciary is bound by an obligation to re-transfer the thing
- ▶ Not a kind of representation



Fiducia, Treuhand and Trust

Treuhand (*Treuhandverhältnis, zu treuen Händen*)

Trustee (*Treuhänder*) is limited e.g., by a resolute condition or time clause

Treuhänder exercises their own right

► **Not a kind of representation**

(Not expressly stipulated in BGB)



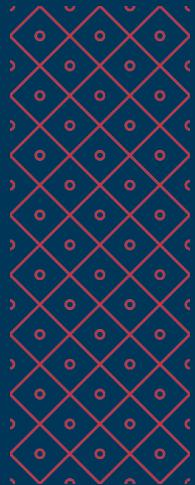
Fiducia, Treuhand and Trust

Trust (common law, equity)

Settlor transfers legal title of ownership to **trustee** to manage property (corpus, trust property) for the benefit of another (**beneficiary**)

Trustee exercises their own right

► **Not a kind of representation**



Chapter 8

Performance through another person



Performance through another person

If a debtor performs through another person, the debtor is liable in the same way as if he performed himself. (Sect. 1935)

= **adiektus solutionis causa**

may (but need not) be a representative within the meaning of Sect. 436 et seq. on representation



Chapter 9

Representation in Civil Procedure



Representation in Civil Procedure

Representation of a party in civil proceedings

(Sect. 22 et seq. Civil Procedure Code - CPC)

a) based on a statute

b) based on a power of attorney (based on a contract)

A party may always appoint an attorney. An attorney may only be granted a power of attorney for the entire proceedings (a “**procedural power of attorney**”).

(Sect. 25 para 1 CPC)

c) based on a court decision



List of Sources – Civil Code, Case Law

Relevant provisions of Czech Civil Code:

Sects. 436-488

Sects. 49, 166, 430, 503, 657, 669, 696, 779, 780, 892, 928, 966, 955, 1481, 1496, 1584, 1868, 1935, 2027, 2455-2456, 2471

Case law:

CZ: SC Case No 26 Cdo 2857/2007

CZ: SC Case No 33 Cdo 4385/2007

CZ: SC Case No 27 Cdo 4593/2017

CZ: SC Case No 28 Cdo 2649/2018



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