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Q&A on Agency Agreements

Part 1: Introduction

Council Directive 86/653 (EEC) on the coordination of the laws of the Member States relating to self-employed commercial agents (the "Directive") harmonizes the laws, regulations and administrative provisions of Member States governing the relations between the parties to commercial agency agreements.

As the Directive constitutes a minimum harmonization, the Member States are free to set higher standards applicable to agency agreements. In addition, on various aspects the Directive leaves room for further elaboration in national law.

In order to facilitate the use of this Q&A, for each relevant issue the position under the Directive is compared with the position under the relevant implementing rules of Polish law ("Polish Agency Law"). The starting point is always the minimum harmonisation reflected in the Directive. The Q&A then aims to identify any deviations or additions from the regime reflected in the Directive.

Part 2: Legislative framework

Q1. Which rules constitute the transposition of the Directive into Polish Agency Law (a)? Where available, please also include a link to the official publication of the applicable rules (e.g., relevant link to the Official Gazette) (b) and to the English translation of the regulatory framework (c).

a. *Legislative framework:*

Agency is regulated by Arts. 758 to 764(9) of the Polish Civil Code ("CC").

b. Link(s) to official publication:

The Polish version of the CC is accessible via the Internet System of Legal Acts (ISAP).

c. Link(s) to English translation:

No official English translation is available.

Part 3: Scope

Q2. The Directive (Art. 1(2)) defines a commercial agent as a self-employed intermediary who has continuing authority to negotiate the sale or the purchase of goods on behalf of another party (the "principal"), or to negotiate

and conclude such transactions on behalf of and in the name of that principal. Is the definition in the Polish Agency Law the same?

Agency is defined in Art. 758 § 1 CC in the following manner:

"By an agency agreement, the recipient of the order (agent) agrees, within the scope of his enterprise, to act as a permanent intermediary, for remuneration, when concluding agreements with clients for the benefit of the undertaking giving the order or to conclude them on its behalf."

Thus, Polish law per definition limits agency agreements to dealings between commercial parties. "Enterprise" is defined in Art. 43^1 CC as a natural person, a legal person and an organizational unit that is not a legal person, but to which an Act grants legal capacity, conducting business or professional activity on its own behalf. However, under Art. 764^9 CC certain provisions on agency will apply also to agreements between an agent and a person that is not an enterprise (a business), with the notable exceptions of provisions related to non-compete obligations, indemnification and commission.

It is worth noting that Polish law agency is not, unlike under the Directive, limited to the sale or purchase of goods – intermediation with respect to services is also covered.

Importantly, and as made clear by Art. 758 § 2 CC, an agent is only authorised to enter into agreements and receive statements in the name and on behalf of the principal where he has been granted the necessary authorisation (see answer to Q6 below).

Q3. Do other intermediaries fall within the scope of Polish Agency Law?

Yes. See, Q2. Polish law does not limit agency to the sale/purchase of goods.

Q4. The Directive (Art 2(2)) entitles the Member States to exclude from the scope of application persons whose activities as commercial agents are considered secondary in nature. Has your country made use of this possibility?

No. As explained in Q2, the Polish Agency law limits agency per definition to dealings between businesses ("enterprises").

Part 4: Agreementual phase

A. Form of agency agreements

Q5. The Directive (Art 13) provides that, as a minimum, each party shall be entitled to receive from the other on request a signed written document setting out the terms of the agency agreement including any terms subsequently agreed. Does Polish Agency Law provide for such obligation?

Yes. See, Art. 758[2] CC.

Q6. Are there any (other) requirements under Polish Agency Law as to the form of the

Yes. In principle, agency agreements do not require any special form. There are two notable exceptions to this principle. First, a non-compete obligation imposed on an agent has to be made in writing and signed (see Art. 764[6] CC). Second, under Art. 761[7] CC, a *del credere* provision (whereby the agent acts as a guarantor for the third party with whom he brokered the agreement with the principal) is effective only as part of an agency agreement that is signed and in writing.

Moreover, if the agent is to have a power of attorney to enter into an agreement binding the principal, and that agreement requires a particular form, the power of attorney must also be granted in that particular form (see Art. 99 § 1 CC). A general power of attorney must be granted in writing (see Art. 99 § 2 CC). Sale of goods (chattel) does not require a special form.

B. Content of agency agreements

B.1 - RIGHTS AND OBLIGATIONS OF PRINCIPAL AND COMMERCIAL AGENT

Q7. The Directive (Art 3) provides that a commercial agent has the following minimum obligations:

- to look after his principal's interests and to act dutifully and in good faith;
- to make proper efforts to negotiate and, where appropriate, conclude the transactions he is instructed to take care of;
- to communicate to his principal all the necessary information available to him;
- to comply with reasonable instructions.

Are these minimum obligations provided for in Polish Agency Law?

Yes. The duty to act with due care is a general principle of the Polish law set out in Art. 355 CC. The duty to act in the principal's interests, with due care and in good faith stems from the broader duty of loyalty which is imposed on parties to an agency agreement by virtue of Art. 760 CC. The other duties of an agent set out in Q7. are imposed by Art. 758 § 1 and 760[1] § 1 CC.

Q8. Does Polish Agency Law explicitly impose any other obligations on the commercial agent that go beyond the aforesaid minimum?

No.

Q9. Does Polish Agency Law provide that a commercial agent may appoint sub-agents?

No. There is no specific provision which would deal with the question of sub-agents. Under Art. 356 § 1 CC a

creditor may require personal performance of the obligation by the debtor only where this right results from the content of the legal act, from law or from the nature of the obligation. While the CC does not mandate personal performance of agency agreements, it is assumed that the agent should, due to the element of trust necessary in the agency agreement, in principle perform them personally, without entrusting them to a third party (Supreme Court judgment of 24 November 2011, I PK 62/11).

Q10. The Directive (Art 4) provides that a principal has the following minimum obligations:

- to act dutifully and in good faith;
- to provide his commercial agent with the necessary documentation relating to the goods concerned;
- to obtain the information necessary for the performance of the agency agreement;
- to notify the commercial agent within a reasonable period once he anticipates that the volume of commercial transactions will be significantly lower than that which the commercial agent could normally have expected;
- to inform the commercial agent within a reasonable period of his acceptance, refusal, and of any non-execution of a commercial transaction which the commercial agent has procured for the principal.

Are these minimum obligations provided for in Polish Agency Law?

Yes. See, Art. 760 and 760^2 CC. There is a general obligation to act with due care under Art. 355 CC.

Q11. Does Polish Agency Law explicitly impose any other obligations on the principal that go beyond the aforesaid minimum?

No.

B.2 - LEVEL AND CALCULATION BASIS OF REMUNERATION

Q12. Are there mandatory rules under Polish Agency Law that limit the freedom of the parties to fix the level of the remuneration of the commercial agent?

No. However, a strikingly low remuneration may, in certain circumstances, constitute exploitation. Under Art. 388 CC “if one of the parties, taking advantage of the other party's forced position, infirmity or inexperience, accepts or reserves for himself or a third party a benefit in return for his own benefit, the value of which at the time of the conclusion of the agreement exceeds the value of his own benefit to a gross degree, the other party may demand that his benefit be reduced or that the benefit due to him be increased or, if both would be excessively difficult, he may demand that the agreement be rescinded.”

Q13. The Directive (Art. 6(1)) provides that, in the absence of an agreement on the level of the remuneration, the commercial agent is entitled to the remuneration that is customarily allowed in the place where he carries on his activities and, in the absence of such customary practice, to a reasonable remuneration taking into account all the

aspects of the transaction. Do these principles also represent the default regime under Polish Agency Law?

Yes. See, Art. 758^1 § 3 CC. A minor difference is that Art. 758^1 § 3 CC which implements Art. 6(1) of the Directive and refers to “all circumstances directly related to the performance of the activities assigned to him” rather than "all aspects of the transaction.”

Q14. The Directive (Art 6(2)) provides that any part of the remuneration which varies with the number or value of business transactions shall be deemed to be commission. Does this principle also represent the regime under Polish Agency Law?

Yes. See, Art. 758^1 § 2 CC.

Q15. Does Polish Agency Law impose any criteria with regard to the type of the agent’s remuneration (i.e. fixed amount or commission)?

No.

Q16. Does Polish Agency Law impose any criteria with regard to the calculation of the agent’s remuneration?

No.

B.3 - REMUNERATION BY MEANS OF A COMMISSION (DURING AGENCY AGREEMENT)

Q17. According to the Directive (Art 7(1)) a commercial agent is entitled to a commission during the period covered by the agency agreement:

- where the transaction has been concluded as a result of his action; or
- where the transaction is concluded with a third party whom he has previously acquired as a customer for transactions of the same kind.

Are both cases reflected in Polish Agency Law?

Yes. See, Art. 761 § 1 CC.

Q18. The Directive (Art 7(2)) provides for an additional case of entitlement to a commission and has left it to the Member States to choose between two options:

- Option 1: the transaction is entered into with a customer belonging to a specific geographic area or group of customers entrusted to the commercial agent; or
- Option 2: the transaction is entered into with a customer belonging to a specific geographical area or group of customers in respect of which the commercial agent enjoys exclusive rights.

Which option has been retained in Polish Agency Law?

Option 2. See, Art. 761 §2 CC.

B.4 - REMUNERATION BY MEANS OF COMMISSION (AFTER TERMINATION OF AGENCY AGREEMENT)

Q19. According to the Directive (Art 8) a commercial agent is entitled to a commission after the agency agreement has terminated if:

- the transaction is mainly attributable to the commercial agent's efforts during the period covered by the agency agreement and if the transaction was entered into within a reasonable period after that agreement terminated; or
- the order of the third party reached the principal or the commercial agent before the agency terminated and the conditions applicable to entitlement during the term of the agency are met.

Are both cases reflected in Polish Agency Law?

Yes. See, Art. 761^1 CC.

Q20. Are there any additional cases provided for in Polish Agency Law?

No.

Q21. According to the Directive (Art 9) a commercial agent is not entitled to the commission, if that commission is payable, to the previous commercial agent, unless it is equitable because of the circumstances for the commission to be shared between the commercial agents. Do these principles also represent the regime under Polish Agency Law?

Yes. See, Art.761^2 CC.

Q22. According to the Directive (Art 10(1)) the commission shall become due as soon as and to the extent that one of the following circumstances obtains:

- the principal has executed the transaction; or
- the principal should, according to his agreement with the third party, have executed the transaction; or
- the third party has executed the transaction.

Are these circumstances reflected in Polish Agency Law?

Yes. For the avoidance of doubt it should be clarified that under Art. 761^3 § 1 CC the circumstances listed in points a)-c) above entitle the agent to commission. Under Art. 761^3 § 3 CC the payment of the commission is due (payable) on the last day of the month following the quarter in which the agent became entitled to the commission. A provision of the agreement less favourable to the agent is null and void.

Q23. Are there any additional circumstances provided for in Polish Agency Law?

Yes. Under Art. 761^3 § 2 CC if the agreement between the principal and the client (third-party) is to be performed in parts, the agent is entitled to the proportion of commission as the agreement is performed.

Q24. The Directive (Art 10(2)) provides that the commission shall be due at the latest when the third party has executed his part of the transaction or should have done so if the principal had executed his part of the transaction, as he should have. Does Polish Agency Law apply the same deadline?

Yes. See, Art. 761^3 § 1 3rd sentence CC.

Q25. The Directive (Art 10(3)) provides that the commission needs to be paid no later than on the last day of the month following the quarter in which it became due. Does Polish Agency Law apply the same deadline?

Yes. See, Art. 761^3 § 3 1st sentence CC.

Q26. The Directive (Art 10(4)) stipulates that parties cannot by agreement derogate from the principles included in Art 10(2) and 10(3) to the detriment of the commercial agent. Does Polish Agency Law impose the same restriction on the parties?

Yes. See, Art. 761^3 § 1 2nd sentence and § 3 2nd sentence CC.

Q27. According to the Directive (Art 11(1)) the right to commission can be extinguished only if and to the extent that:

- it is established that the agreement between the third party and the principal will not be executed; and
- that fact is due to a reason for which the principal is not to blame.

Does Polish Agency Law impose these cumulative conditions?

Yes. See, Art. 761^4 1st sentence CC.

Q28. Does Polish Agency Law allow for other cases where the agent's entitlement to commission is extinguished?

No.

Q29. According to the Directive (Art 11(2)) any commission which the commercial agent has already received must be refunded in case the right to it is extinguished. Does Polish Agency Law also provide for such an obligation of restitution?

Yes. See, Art. 761^4 1st sentence CC.

Q30. The Directive (Art 12(1)) provides that the principal must supply his commercial agent with a statement of the commission due. This statement must be supplied no later than on the last day of the month following the quarter in which the commission has become due, and shall set out the main components used in calculating the amount of the commission. Do these principles also represent the default regime under Polish Agency Law?

Yes. See, Art. 761^5 § 1 1st and 2nd sentence CC.

Q31. Does Polish Agency Law impose that the parties cannot by agreement derogate from the principles included in Art 12(1) of the Directive to the detriment of the commercial agent?

Yes. See, Art. 761^5 § 1 3rd sentence CC.

Q32. Does Polish Agency Law impose any additional requirements with regard to the statement of the commission due?

Yes. Under Art. 761^5 § 1 2nd sentence CC the statement of commission should indicate all data on which the calculation of the commission due is based, not only the main components used in the calculations.

Q33. The Directive (Art 12(2)) entitles the commercial agent to demand to be provided with all the information, and in particular an extract from the books, which he needs to check the amount of the commission due to him. Does Polish Agency Law grant the commercial agent the same right?

Yes. See, Art. 761^5 § 2 1st sentence CC.

Q34. Does Polish Agency Law broaden this right to information of the commercial agent?

Yes. Under Art. 761^5 § 2 1st sentence CC the agent can also demand that the books be made available for review by an expert auditor jointly appointed by the parties.

Q35. Does Polish Agency Law impose any criteria with regard to the calculation of the commission?

No.

Q36. Do specific rules and/or restrictions apply to:

- non-solicitation clauses;
- minimum sales quota;
- specific sectors?

No. But, see, Q6 referring to the form requirements for agency concerning non-compete, *del credere* commission and the form of authorization.

B.5 - NON-COMPETE CLAUSE

Q37. The Directive (Art 20(2)) provides that a non-compete clause shall only be valid if and to the extent that:

- it is concluded in writing; and
- it relates to the geographical area or the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by the agency agreement.

Does Polish Agency Law impose these cumulative criteria?

Yes. See, Art. 764^6 § 1 CC. Please note that the non-compete clause needs to be concluded in signed written form.

Q38. Does Polish Agency Law impose any additional criteria in order for a non-compete clause to be valid?

No.

Q39. The Directive (Art 20(3)) provides that a non-compete clause shall be valid for not more than 2 years after termination of the agency agreement. Does the same maximum period apply under Polish Agency Law?

Yes. See, Art. 764^6 § 2 CC.

Q40. The Directive (Art 20(4)) provides that national law may impose other restrictions:

- on the validity or enforceability of non-compete clauses, or
- which enable the courts to reduce the obligations on the principal or the commercial agent.

Does Polish Agency Law impose any such restrictions?

No. Note that under Art. 764^8 CC if the agent has terminated the agreement as a result of circumstances for which the principal is responsible, the agent may release himself from the obligation to comply with the restriction on competitive activities by giving the principal a written statement within one month from the date of termination. Moreover, under Art. 764^6 § 3 CC the principal is obliged to pay the agent an appropriate sum of money for the restriction on competitive activities during its term, unless otherwise specified in the agreement or the agency agreement is terminated due to circumstances for which the agent is responsible.

Q41. Does Polish Agency Law provide any criteria with regard to the calculation method of the indemnification in case of a violation of the non-compete clause?

No.

B.6 - LIABILITY

Q42. Under Polish Agency Law, can the parties agree that the commercial agent shall be liable (in whole or in part) for the breach of third party-customers with whom he/she has negotiated and/or concluded an agreement on behalf of the principal, by including a so-called *del credere* clause?

Yes. See, Art.761^7 § 1 CC.

Q43. If yes, are such clauses subject to certain rules and/or restrictions?

Yes. In order to be valid a *del credere* clause has to be included in a written and signed agency agreement (see, Art. 761^7 § 1 1st and 3rd sentence CC). According to Art. 761^7 § 2 CC the agent's liability may relate only to a

specific agreement or agreements with a specific customer, at the conclusion of which he has acted as an agent or has entered into on behalf of the principal.

Q44. Are there liability-related clauses that must be mandatorily included in agency agreements?

No.

C. Term and termination

C.1 - TERM

Q45. According to the Directive (Art 14) an agency agreement for a fixed period which continues to be performed by both parties after that period has expired shall be deemed to be converted into an agency agreement for an indefinite period. Does this principle also represent the default regime under Polish Agency Law?

Yes. See, Art. 764 CC.

Q46. Does Polish Agency Law contain particular rules and/or restrictions in relation to the term (incl. renewal) of agency agreements?

No.

C.2 - TERMINATION BY NOTICE

Q47. According to the Directive (Art 15(1)) an agency agreement that is concluded for an indefinite period may by either party be terminated by notice. Does this principle also represent the regime under Polish Agency Law?

Yes. See, Art. 764^1 § 1 1st sentence CC.

Q48. According to the Directive (Art 15(2)) the notice period is 1 month for the first year, 2 months for the second year commenced, and 3 months for the third year commenced and subsequent years. Do these notice periods also represent the regime under Polish Agency Law?

Yes. See, Art. 764^1 § 1 1st sentence CC.

Q49. According to the Directive (Art 15(3)) the notice period for the fourth, fifth and sixth year and subsequent years may be respectively 4, 5 and 6 months. Do these notice periods also represent the regime under Polish Agency Law?

No. However, under Art. 764^1 § 2 CC the parties may agree to a notice period longer than that provided for in Art. 764^1 § 1 CC. An extension of the notice period for the agent results in an equal extension for the principal.

Q50. If yes, can the parties agree to a shorter notice period?

No. See, Art. 764^1 § 1 2nd sentence CC.

Q51. According to Polish Agency Law, if no notice period has been agreed, is there a notice period that always

applies irrespective of the duration of the agency agreement?

No.

Q52. According to the Directive (Art 15(4)), if a principal and commercial agent agree on longer notice periods than those laid down in Art 15(2) and (3) of the Directive, the notice period to be respected by the principal must not be shorter than that to be observed by the commercial agent. Does the same default regime apply under Polish Agency Law?

Yes. See, Art. 764^1 § 2 1st sentence CC.

Q53. According to the Directive (Art 15(5)), unless otherwise agreed by the parties, the end of the notice period must coincide with the end of a calendar month. Does the same default regime apply under Polish Agency Law?

Yes. See, Art. 764^1 § 3 CC.

Q54. Does Polish Agency Law provide how the termination notice must be notified to the other party?

No. In accordance with the general provision governing the declarations of will set forth in Art. 60 CC, subject to the exceptions provided for in law, the will of a person performing a legal action may be expressed by any behaviour of that person which reveals his or her will sufficiently, including the disclosure of that will in electronic form. The declaration which is to be made to another person (as is the case with termination notice) will be effective as of the moment when it reaches the other party in a way that he or she may become aware of its contents. For electronic means of communication this will be the moment when the declaration was introduced into the means of communication in such a manner that the other party was able to become aware of its contents (see, Art. 61 CC).

With regard to the form of the termination notice, Art. 77 CC must be noted. Under § 2 of that provision, if an agreement was concluded in signed written form, documentary or electronic form, its termination with the consent of both parties, as well as withdrawal from it or its termination requires a documentary form, unless law or the agreement stipulates another form (see answer to question 6 on form required for agency agreements). Documentary form requires that the declaration of will be made in a document in a manner that makes it possible to determine the person making the declaration (see, Art. 77^2 CC). A document is an information carrier enabling to get acquainted with its contents, e.g. email or a text message (see, Art. 77^3 CC).

Moreover, pursuant to Art. 77 § 3 CC, where the agreement was concluded in a different special form, termination should be made in signed written form.

Q55. According to the Directive (Art 15(6)), the answers to questions 47 to 53 also apply to agency agreements having a fixed term if they are converted to agency agreements having an indefinite term due to the continuation of the agreement beyond the fixed term, provided that the earlier fixed period must be taken into account in the calculation of the notice period. Does the same default regime apply to agency agreements having a fixed term

under Polish Agency Law?

Yes. See, Art. 764^1 § 4 CC.

C.3 - TERMINATION FOR CAUSE

Q56. According to the Directive (Art 16) an agency agreement may immediately be terminated:

- because of the failure of one party to carry out all or part of his obligations; or
- where exceptional circumstances arise.

Are both termination grounds reflected in Polish Agency Law?

Yes. See, Art. 764^2 § 1 CC.

Q57. Are there additional termination grounds provided in Polish Agency Law?

Yes. Under the general provisions of Polish contract law, an agency agreement can be terminated due to a delay in performance (after an additional deadline has been set, unless the parties have agreed that time is of the essence – Art. 491 and 492 CC), renunciation (Art. 492^1 CC) and impossibility caused by the party that is due to perform (Art. 493 CC).

In addition, under Art. 495 § 2 CC, if the performance of one of the parties has become impossible only partially, that party loses the right to the corresponding part of the consideration (i.e. the performance by the other party). However, the other party may terminate the agreement if partial performance would be irrelevant to him because of the nature of the obligation or because of the purpose of the agreement intended by that party, known to the party whose performance has become partially impossible.

Q58. Does Polish Agency Law provide that the parties may not derogate from the regime on termination for cause to the detriment of the commercial agent before the agency agreement is terminated?

No. There is no explicit provision in Polish law that would limit the right of the Parties to derogate from the regime on termination for cause. However, the settled view in the case law and in the doctrine is that the Parties may not by agreement exclude (to the benefit of both or either party) the right to terminate for cause foreseen in Art. 764^2 § 1 CC, as the provision is considered mandatory law. However, once circumstances giving a party the right to terminate for cause have arisen, that party may renounce this right (i.e. decide not to terminate the agreement and carry on with the agency).

Q59. Is it possible to terminate the agency agreement based on certain grounds for termination (breach or other) included in the agency agreement?

Yes. The guiding principle of the Polish contract law is freedom of contract. As stated in Art. 353^1 CC, the contracting parties may arrange the legal relationship as they see fit, as long as the content or purpose of the

relationship does not contradict the nature of the relationship, the law or the principles of social coexistence. Therefore, the Parties are in general free to include certain further grounds for termination in the agency agreement in addition to the mandatory grounds set forth in in the Art. 764^2 § 1 CC.

Q60. If yes, is prior judicial intervention required in order for the termination of the agreement to take effect?

No.

Q61. Are there any other particular rules and/or restrictions as regards the termination of the agency agreement (e.g. trial period, etc.)?

No.

C.4 - INDEMNIFICATION

Q62. The Directive (Art 17(2)(a)) provides that the commercial agent is entitled to an indemnification if and to the extent that he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers. Does Polish Agency Law provide for this criterion?

See, Art. 764^3 § 1 1st sentence CC. For the avoidance of doubt it should be clarified that the agent is entitled to indemnification only if the condition specified in Q63 below (equity) is satisfied.

Q63. The Directive (Art 17(2)(a)) also provides that the commercial agent is entitled to an indemnification if and to the extent that the payment of this indemnification is equitable having regard to all circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. Does Polish Agency Law provide for this criterion?

Yes. See, Art. 764^3 § 1 2nd sentence CC.

Q64. Is under Polish Agency Law the application of a non-compete clause a circumstance on the basis of which the commercial agent is presumed to be entitled to an indemnification (cfr. Art.17(2)(a), second indent of the Directive)?

Yes. See, Art. 764^6 § 3 and 4 CC.

Q65. Other than the criteria set forth in Art. 17(2)(a) of the Directive, are there any specific rules or precedents derived from Polish case law on the basis of which the indemnification is calculated?

Yes. The issue of calculating the amount of indemnification is a controversial matter, debated both in jurisprudence and in legal literature. Specific circumstances of each case as well as considerations of equity will play an important role in setting the amount.

One of the early views refers to the so-called “German clause”, which takes into account many different factors,

such as the commission derived from agreements concluded with new clients in the last 12 months, the expected period of obtaining benefits by the principal, the percentage of client migration, the sum of commission lost in each year after termination of the agency agreement. The sum of these factors is then compared with the upper limit of the agent's average annual remuneration over the total duration of the agency agreement (see, for example, Supreme Court judgment of 8 November 2005, I CK 207/05).

The more recent position is to base the amount of the indemnification on the number of agreements concluded, continued or renewed during the agency agreement, adjusted to take into account the client migration, and the extent of the agent's contribution (efforts), which is reflected in subsequent benefits obtained by the principal after termination of the agency agreement (see for example Supreme Court judgment of 27 January 2012, I CSK 211/11, Court of Appeal in Warsaw judgment of 18 March 2014, I ACa 1423/13, Court of Appeal in Warsaw judgment of 6 February 2009, I ACa 752/08, Court of Appeal in Cracow judgment of 28 May 2013, I ACa 349/13).

Latest jurisprudence also considers how to account for the costs that the agent would have to bear in relation to the agency agreement, and which s/he will not bear as a result of the termination. In a 2021 judgment the Supreme Court found that such costs can, as a matter of fairness, constitute one of the relevant factors in determining the level of indemnification. However, this should not lead to automatically limiting the indemnity to the pure profit that the agent could have obtained (Supreme Court judgment of 7 October 2021, I CSKP 115/21). By contrast, in a 2019 judgment the Warsaw Court of Appeal ruled that the amount of indemnification should be equal not to the gross remuneration (income), but to the profit made by the agent after the costs have been deducted (Warsaw Court of Appeal judgment of 28 March 2019, VII Aga 1132/18).

Q66. The Directive (Art 17(2)(b)) provides that the amount of the indemnification may not exceed a figure equivalent to an indemnification for 1 year calculated from the commercial agent’s average annual remuneration over the preceding 5 years, and if the agreement goes back less than 5 years the indemnification shall be calculated on the average for the period in question. Does the same regime apply under Polish Agency Law?

Yes. See, Art. 764^3 § 2 CC.

Q67. According to the Directive (Art 18), indemnification or compensation for damage is not payable where

- the principal has terminated the agency agreement because of default attributable to the commercial agent which would justify immediate termination of the agency agreement;
- the commercial agent has terminated the agency agreement, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent in consequence of which he/she cannot reasonably be required to continue his/her activities; and/or
- with the agreement of the principal, the commercial agent assigns his rights and obligations under the agency

agreement to another person.

Do these principles also represent the default regime under Polish Agency Law?

Yes. See, Art. 764^4 CC. The slight difference in relation to point b) is that under Polish law indemnification is payable where it would not be equitable (rather than reasonable) to require an agent to perform in light of his/her age, infirmity or illness (see, Art. 764^4 point 2) CC).

Q68. According to the Directive (Art 17(5)), a commercial agent may lose his/her entitlement to the indemnification or compensation for damage if within 1 year following termination of the agency agreement he/she has not notified the principal of his/her intention to pursue the entitlement. Does this principle also represent the default regime under Polish Agency Law?

Yes. See, Art. 764^3 § 5 CC, under which the possibility of asserting a claim for indemnification depends on the agent or his notifying the principal of his intention to pursue the entitlement to the indemnification before the expiration of 1 year following the termination of the agency agreement. However, the abovementioned 1 year period refers only to the claim for indemnification and does not refer to the claim for compensation. Therefore, claim for compensation could be pursued on general terms and is limited only by the general limitation period (see answer to Q82).

C.5 - ADDITIONAL COMPENSATION

Q69. The Directive (Art 17(2)(c)) provides that the commercial agent, in addition to the indemnification, is entitled to seek damages for breach of contract, failing to respect the notice period, etc. Does the same regime apply under Polish Agency Law?

Yes. See, Art. 764^3 § 3 CC.

Q70. If yes, do specific rules and/or restrictions apply to the damage that can be compensated in addition to the indemnification under Art. 17(2) of the Directive?

No.

Q71. The Directive (Art 17(3)) provides that the commercial agent is entitled to compensation for damage suffered as a result of the termination of the agency agreement. Does the same default regime apply under Polish Agency Law?

No. See, Art. 764^2 § 2 CC, which refers to both parties to the agency agreements i.e. agent and principal. This provision states that if the termination has been effected due to circumstances for which the other party is responsible, the latter is obliged to compensate for the damage suffered by the terminating party as a result of the termination.

Q72. According to the Directive (Art 17(3)) such damages shall be deemed to occur particularly when the

termination takes place in circumstances:

- depriving the commercial agent of the commission which proper performance of the agency agreement would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities; and/or
- which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency agreement on the principal's advice.

Does Polish Agency Law take the same circumstances into account?

No. The CC doesn't specify the circumstances in which damages shall be deemed to occur. Under Art. 361 § 2 CC, which is the general provision on the scope of compensation, in the absence of a different provision of the act or agreement, compensation for damage covers the losses suffered by the aggrieved party and the benefits that could have been achieved if the damage had not been caused.

Q73. Are there any other specific rules or precedents, than the criteria set forth in Art.17(3) of the Directive, derived from case law on the basis of which the compensation is calculated?

No.

Q74. The Directive (Art 17(4)) provides that a commercial agent is entitled to indemnification or compensation for damage where the agency agreement is terminated as a result of the commercial agent's death. Is this default entitlement available under Polish Agency Law?

Yes. The provisions of the CC concerning agency agreement do not deal with the effect of the parties' death on the existence of an agency relationship. The literature indicates that in this respect, relying on an analogy, the provisions concerning the mandate agreement should be applied accordingly. As stated in the Art. 748 CC in the absence of a different agreement, the contract of mandate expires as a result of the death of tandatetee or as a result of his loss of full legal capacity. However, the parties may regulate this issue differently in the agreement.

Under Art. 764^3 § 4 CC, in the event of the agent's death, the entitlement to the indemnification may be pursued by his/her heirs. Under Art. 764^3 § 5 CC the possibility of asserting a claim for indemnification depends on the agent's heirs notifying the principal of their intention to pursue the entitlement to the indemnification before the expiration of 1 year following expiration of the agency agreement as the result of the agent's death.

Q75. The Directive (Art 19) stipulates that the parties may not derogate from Art. 17 and 18 to the detriment of the commercial agent before the agency expires. Does Polish Agency Law impose the same restriction on the parties?

Yes. See, Art. 764^5 CC.

Q76. Are the parties under Polish Agency Law free to opt for either indemnification or compensation?

Yes. As stated in Art. 764^3 § 3 CC, obtaining indemnification does not deprive the agent of the possibility of claiming damages on the basis of general rules of liability.

Q77. Must the commercial agent under Polish Agency Law claim the indemnification or compensation within a certain period of time after termination of the agency agreement?

Yes. As for the claim for indemnification according to the Art. 764^3 § 5 CC, the possibility of asserting a claim for indemnification depends on the agent or his notifying the principal of his intention to pursue the entitlement to the indemnification before the expiration of 1 year following the termination/expiration of the agency agreement.

As for the claim for compensation such claim is not limited by the abovementioned 1 year period. Therefore, claim for compensation could be pursued on general terms and is limited only by general limitation period (see answer to Q82).

Q78. Are there other specific rules with respect to compensation or indemnification following the termination of the agency agreement?

No.

Part 5: Dispute resolution

Q79. Do any specific rules and/or restrictions apply as regards the choice of forum and/or jurisdiction under Polish Agency Law?

No.

Q80. Can the parties opt for arbitration?

Yes.

Q81. If yes, are there any rules and/or restrictions as regards the enforceability of arbitration clauses in agency agreements?

No.

Q82. Does Polish Agency Law provide for a statute of limitations that is applicable to claims regarding the performance of agency agreements?

No. The general limitation periods provided in Art. 118 CC shall apply to the agency agreement. Under Art. 118 CC the limitation period for claims related to carrying out the commercial activity is three years. Having regard to the fact that Polish law per definition limits agency agreements to dealings between commercial parties the limitation period for claims regarding performance of agency agreement is three years.