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Pérez-Llorca

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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 the Spanish Law 12/1992, of 27 May, on agency contracts (the “ACL”) ("Spanish 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 Spanish 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:*

Law 12/1992, of 27 May 1992, on Agency Contracts (the "ACL"), arose from the initiative to transpose the regulatory content of Directive 86/653/EEC into Spanish law. The rules contained in this Act are mandatory rules (*See* Art. 3 of the ACL), which must be complied with, with the exception of those cases in which the law itself dictates otherwise.

Art. 1 ACL defines an agency agreementas an agreement "whereby a natural or legal person, called an agent, undertakes on a continuous or stable basis" to a third party to promote and/or conclude commercial acts or transactions on behalf of another party in exchange for remuneration (*See* Art. 11 ACL).

As a consequence of the above, the agent is an independent intermediary who acts in the name and on behalf of one or more principals (the so-called "principal"). It is the agent's duty, either personally or through his employees, to negotiate and, if so provided for in the agreement, to conclude the agreements or commercial transactions

entrusted to him on behalf of the principal. To this end, the principal and the agent have legal obligations (*See* Section 2 of the ACL).

In general terms, agency agreements in Spain are governed by the ACL which also applies (some of these provisions may be applicable in certain circumstances) to distribution agreements. However, some specific groups have received individualised legal regulation, such as agents of credit institutions or commercial agents (Royal Decree 118/2005 of 4 February 2005).

b. Link(s) to official publication:

The Spanish version of the Law 12/1992 on Agency Contracts is accessible via this link.

The Spanish version of the Royal Decree 118/2005 approving the General Statutes of the Spanish Commercial Agents' Associations and their General Council is accessible via this link.

The Spanish version of the Royal Decree of 24 July 1889. Spanish Civil Code is accessible via this link.

c. Link(s) to English translation:

An official English translation of the Royal Decree of 24 July 1889 publishing the Spanish Civil Code is accessible via this link.

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 Spanish Agency Law the same?

Yes. The definition of the agency agreement in Spanish Law is found in Art. 1 ACL "*Agency agreement*". Additional provisions which further expand the agency agreement concept:

- Art. 6 ACL: "Conclusion of commercial acts and transactions on behalf of the entrepreneur".
- Art. 9(e) ACL: "Agent's Obligations".

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

No.

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

Yes. Commercial agents who do not exercise their activity as an intermediary on a regular basis are excluded

from Spanish Agency Law (Art. 1 ACL) – “Under an agency agreement, a natural or legal party, known as an agent, undertakes to promote commercial acts or transactions on behalf of others, or to promote and conclude them on behalf of and in the name of others, as an independent intermediary, without assuming, unless otherwise agreed, the risk and uncertainty of such transactions, on a continuous or stable basis in exchange for remuneration”.

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 the Spanish Agency Law provide for such obligation?

Yes. In general, in Spain, the principle of freedom of form applies to agreements. As with distribution agreements, the principle of freedom of form prevails. However, Art. 22 ACL clarifies that each party may at any time require the other party to execute the agency agreement in writing, stating any amendments made to the agreement. However, in subsidiary application of the Spanish Civil Code, (Art. 1278) agreements are binding, regardless of the form in which they have been concluded, provided that the essential conditions for their validity are met.

Q6. Are there any (other) requirements under the Spanish Agency Law as to the form of the agency agreement in order for it to be valid and enforceable?

No. Agency agreements in Spain do not require a special form. In the alternative, the rules of the Spanish Civil Code shall apply. Irrespective of its form, an agreement does not exist unless the following requirements are met: (i) the consent of the contracting parties; (ii) a certain object that is the subject matter of the agreement; (iii) the cause of the obligation that is established. Rules for the interpretation of the contract should be based on Art. 1281 and the subsequent articles of the Spanish Civil Code.

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 the Spanish Agency Law?

Yes. See, Art. 9 ACL “Agent’s obligations”.

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

Yes. See, Art. 9 ACL:

- Section (D): “Receive on behalf of the entrepreneur any claims from third parties regarding flaws or defects in the quality or quantity of the goods or services provided as a consequence of the transactions promoted, even if they have not been concluded”.
- Section (E): “Keep independent accounts of the acts or transactions relating to each entrepreneur on whose behalf he acts. “

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

Yes. Art. 5(1) ACL provides that the agent shall, either himself or through his employees, promote and, where appropriate, conclude the commercial acts or transactions entrusted to him. However, Art. 5(2) ACL stipulates that action through sub-agents shall require the express authorisation of the entrepreneur. When the agent appoints the sub-agent, he shall be responsible for his management.

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 the Spanish Agency Law?

Yes. The same obligations are framed in Art. 10 ACL “Principal’s obligations”.

Q11. Does the Spanish 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 the Spanish Agency Law that limit the freedom of the parties to fix the level of the remuneration of the commercial agent?

No. The ACL does not impose express limitations as to the level of the remuneration of the commercial agent. However, Art. 11 ACL imposes requirements as to the form, but not the level, of this remuneration.

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 the Spanish Agency Law?

Yes. According to Art. 11(1) ACL "the remuneration of an agent shall consist of a fixed sum, commission or a combination of the two. In the absence of any contract, the remuneration shall be fixed in accordance with the accepted business practice in the place where the agent carries on his business. If these do not exist, the agent shall receive such remuneration as is reasonable having regard to the circumstances 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 the Spanish Agency Law?

Yes. Art. 11(2) ACL explicitly provides for this; "any element of remuneration which is variable according to the volume or value of the acts or transactions promoted and, where appropriate, concluded by the agent shall be deemed to be commission."

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

Yes. Ibid. See, Art. 11(1) ACL. The agent's remuneration shall consist of a fixed sum, commission or a combination of the two.

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

No. Concerning the agent's remuneration, the agreement *inter partes* prevails and applies in the first instance. Only in the absence of an agreement will the agent be remunerated in accordance with custom and with that which is "reasonable" (Art. 11(1) ACL).

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

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 the Spanish Agency Law?

Yes. Art. 12(1) ACL establishes that "(a) The commercial act or transaction was concluded as a result of the professional intervention of the agent. (b) The commercial act or transaction was concluded with a party whom the agent had previously promoted and, where appropriate, concluded an act or transaction of a similar nature."

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 the Spanish Agency Law?

Option 2. Art. 12(2) ACL provides that "Where the agent has exclusive rights for a geographical area or a particular group of parties, he shall be entitled to commission, provided that the act or transaction is concluded during the term of the agency agreement with a party belonging to that area or group, even if the act or transaction was not initiated or concluded by the agent."

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

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 the Spanish Agency Law?

Yes. The same two conditions are provided in Art. 13(1) ACL “Commission for acts or transactions concluded after the termination of the agency agreement”. In this vein, it is pertinent to highlight that the Spanish ACL establishes that the “reasonable period” provided in Art. 8(a) of the Directive is three months.

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

Yes. The same content is established in Art. 13(2) ACL, “ the agent shall not be entitled to commission for acts or transactions concluded during the term of the agency agreement if such commission was due to a previous agent, unless, having regard to the circumstances, it would be equitable to divide the commission between the two agents.”

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 the Spanish Agency Law?

Yes. The same content is set out in Art. 14 ACL “Accrual of commission”, “The commission shall accrue at the time when the entrepreneur has executed or should have executed the act or transaction, or when these have been executed in whole or in part by the third party.”

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

No.

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 the Spanish Agency Law apply the same deadline?

No. The Spanish ACL does not provide for this scenario.

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 the Spanish Agency Law apply the same deadline?

Yes. Art. 16 ACL stipulates that the commission shall be paid no later than the last day of the month following the quarter in which it has accrued unless its payment in a shorter period has been agreed.

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 the Spanish Agency Law impose the same restriction on the parties?

No. Not expressly. Art. 3.1 ACL states that its provisions are mandatory. Unless expressly provided otherwise, the parties may not derogate from the provisions (Supreme Court Judgment of 27 January 2003 and Judgment of 14 October 2020).

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 the Spanish Agency Law impose these cumulative conditions?

Yes. Art. 17 ACL provides loss of entitlement to commission. “The agent shall lose the right to the commission if the entrepreneur proves that the act or transactions concluded through his intermediation between the agent and the third party were not carried out due to circumstances not attributable to the entrepreneur. In such circumstances, the commission received by the agent for the act or transaction still to be performed shall be immediately refunded to the entrepreneur.“

Q28. Does the Spanish 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 the Spanish Agency Law also provide for such an obligation of restitution?

Yes. Ibid. See, Art. 17 ACL.

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 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 the Spanish Agency Law?

Yes. See, Art. 15(1) ACL “Agent’s right to information”. “The entrepreneur shall deliver to the agent a statement of the commissions due for each act or transaction on the last day of the month following the quarter in which they are due, in the absence of a contract providing for a shorter period. The statement shall contain the elements used to calculate the amount of commission.”

Q31. Does the Spanish 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?

No. Not expressly. Art. 3.1 ACL states that its provisions are mandatory. Unless expressly provided otherwise, parties may not derogate from the provisions. See, Q26.

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

No.

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 the Spanish Agency Law grant the commercial agent the same right?

Yes. See, Art. 15(2) ACL “Agent’s right to information”. “The agent shall be entitled to demand the production of the accounts of the entrepreneur to the extent necessary to verify all matters relating to the commissions due to him and in the manner provided for in the Commercial Code. He shall also be entitled to be provided with such information as is available to the entrepreneur and is necessary to verify the amount thereof”.

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

No.

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

No. See, Art. 11(2) 2. In general terms, commission remuneration is calculated on the basis of the volume and/or value of transactions.

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

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

No specific rules apply.

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 the Spanish Agency Law impose these cumulative criteria?

Yes. The same two cumulative criteria are found in Art. 21 ACL "Requirements for the validity of the agreement limiting competition".

Q38. Does the Spanish 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 the Spanish Agency Law?

Yes. See, Art. 20(2) ACL.: "A covenant to limit competition may not last for more than two years from the termination of the agency agreement. If the agency agreement has been concluded for a shorter period, the duration of the covenant to limit competition may not exceed one year. "

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 the Spanish Agency Law impose any such restrictions?

No. Spanish Agency Law does not impose any such restrictions.

Q41. Does the Spanish 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 the Spanish 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. 19 ACL "Guarantee of the transactions for which the agent is responsible".

"The contract under which the agent assumes the risk of one, several or all of the acts or transactions promoted or concluded on behalf of an entrepreneur shall be null and void if it is not recorded in writing and with an explanation of the commission to be received."

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

Yes. As provided in Art. 19 ACL, it must be recorded in writing and expressly state the commission to be received.

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 the Spanish Agency Law?

Yes. See, Art. 24(2) ACL "Termination of the fixed-term contract".

"Notwithstanding the provisions of the preceding paragraph, agency agreements for a fixed term that continue to be performed by both parties after the expiry of the initial term shall be deemed to have been converted into contracts of indefinite term."

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

Yes. Art. 23 ACL: "The agency agreement may be agreed upon for a fixed or indefinite term. If no fixed term has been established, it shall be understood that the contract has been agreed for an indefinite term."

Art. 24(1) ACL stipulates that an agency agreement agreed for a fixed term shall terminate on the expiry of the agreed term.

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 the Spanish Agency Law?

Yes. Art. 25(1) ACL provides that an agency agreement of indefinite term shall be terminated by unilateral termination by written notice from either of the parties.

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 the Spanish Agency Law?

Yes. According to Art. 25(2) ACL “The notice period shall be one month for each year of the term of the contract, with a maximum of six months. If the agency agreement has been in force for less than one year, the notice period shall be one month.”

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 the Spanish Agency Law?

Yes. Ibid. Art. 25(2) ACL.

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

No. In accordance with Art. 25(3), the parties may agree on longer periods of notice. However, there is no explicit mention of the shortening of notice periods. The period of notice for the agent may under no circumstances be shorter than the notice period for the entrepreneur.

Q51. According to the Spanish 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 the Spanish Agency Law?

Yes. Ibid. Art. 25(3).

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 the Spanish Agency Law?

Yes. According to Art. 25(4) ACL, “Unless otherwise agreed, the end of the notice period shall be the last day of the month.”

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

Yes. Art. 25(1) ACL: “An agency agreement of indefinite term shall be terminated by unilateral termination by written notice from either party.”

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 the Spanish Agency Law?

Yes. See, Art. 25(5) ACL. "To determine the notice period of fixed-term contracts which have been converted into indefinite contracts by legislation, the duration of the fixed-term contract shall be calculated by adding to it the time elapsed since the conversion into an indefinite contract".

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 the Spanish Agency Law?

No. Art. 26 ACL covers Art. 16, (a) of the Directive. Thus, it does not include an option of "exceptional circumstances", despite the general grounds laid down in the Spanish Civil Code. Instead, it contemplates termination due to bankruptcy as explained in Q57.

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

Yes:

- Termination due to bankruptcy, whereby Art. 26(1)(b) ACL provides that the agency agreement shall be terminated if the other party has been declared insolvent.
- Termination due to death, stipulated in Art. 27 ACL by means of which an agency agreement shall be terminated by the death or the declaration of the agent's death, although it may be repudiated by his successors in the company with the appropriate notice

Q58. Does the Spanish 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. Not exactly. However, Art. 3.1 ACL states that its provisions are mandatory. Unless expressly provided otherwise, parties may not derogate from the provisions, but due to Art. 29 ACL compensation for loss and damage should apply. "Without prejudice to compensation for clients, an entrepreneur who unilaterally terminates an agency agreement of indefinite term shall be obliged to compensate the loss and damage which, where applicable, the agent has suffered due to the early termination, provided that the termination does not allow for the repayment of the expenses which the agent, instructed by the entrepreneur, has incurred in the performance of the contract."

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

Yes. As mentioned before, see, Art. 26(1)(a) ACL, which establishes that "Either party to a fixed-term or indefinite agency agreement may terminate the contract at any time, without notice, where (a) the other party has failed to perform, in whole or in part, the obligations established by law or contract."

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 the Spanish Agency Law provide for this criterion?

Yes. See, Art. 28 ACL "Compensation for customer base".

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 the Spanish Agency Law provide for this criterion?

Yes. Ibid. Art. 28(1) ACL "When the agency agreement, whether for a fixed or indefinite term, is terminated, the agent who has brought new clients to the entrepreneur or has significantly increased the transactions with the pre-existing clients, shall be entitled to compensation if his previous work can continue to produce substantial benefits for the entrepreneur and it is justified due to the existence of contracts limiting competition, the commissions lost or the other circumstances that may arise."

Q64. Is under the Spanish 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. Ibid. Art. 28(1) ACL "[…] is equitably justified by the existence of covenants limiting competition".

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

Yes. According to Art. 28(3) ACL, the indemnity shall under no circumstances exceed the average annual amount of the remuneration received by the agent over the last five years, or for the duration of the agreement, whichever is shorter.

As the Supreme Court held in its Judgment of 29 October 2013, it is sufficient for this purpose "a reasonable prognosis" that the agent's activity "may continue to produce substantial advantages for the employer". In order to set the amount of compensation for the customer base, the Court of Appeal assessed factors such as the agent's dedication, the number of clients provided, the volume of operations that these entail and the other circumstances of the case, among which the Art. mentions "the existence of agreements limiting competition" and "the commissions that [the agent] loses" (Supreme Court Judgments of 31 May 2012 and 27 June 2013).

The agreements contained in agency agreements whereby the agent waives the compensation for the customer base to which he may be entitled are null and void as they are contrary to a mandatory rule, namely Art. 28 ACL. This was affirmed by the Supreme Court in its Judgment of 27 January 2003, where, interpreting Art. 3.1 ACL.

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 the Spanish Agency Law?

Yes. Again, see, Art. 28(3) ACL. "The indemnity shall under no circumstances exceed the average annual amount of the remuneration received by the agent over the last five years, or for the duration of the contract, whichever is shorter." (Supreme Court Judgment of 17 January 2019)

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 parties.

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

Yes. The same three principles may be found in Art. 30 ACL "Cases of the non-existence of the right to compensation".

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 the Spanish Agency Law?

Yes. See, Art. 31 ACL. “Any claim for compensation for clients or compensation for loss and damage shall be time-barred after one year from the termination of the contract.”

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 agreement, failing to respect the notice period, etc. Does the same regime apply under the Spanish Agency Law?

No. Not as such, however, see, Art. 29 ACL “Compensation for loss and damage”.

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 the Spanish Agency Law?

Yes. According to Art. 29 ACL, without prejudice to the customer indemnity, the principal who unilaterally terminates the agency agreement of indefinite duration shall be obliged to pay compensation for any damage that the early termination may have caused to the agent, provided that the early termination does not allow the repayment of the expenses that the agent, instructed by the principal, has incurred for the performance of the agreement.

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 the Spanish Agency Law take the same circumstances into account?

Yes. According to Art. 29 ACL, this indemnity is independent of the client compensation which, if applicable, may correspond to the agent and would only arise in those cases in which the principal unilaterally terminates an agency agreement of indefinite duration, even if the corresponding notice is respected. In this case, the principal must compensate the agent for any damage that the early termination may have caused him by preventing him from amortising the investments necessary for the proper performance of the agreement that were made by order, instruction or suggestion of the principal (specific investments). It should be remembered that, as it is a agreement for an indefinite period, either party may terminate it at any time without just cause, as expressly established in Art. 25.1 of the aforementioned Act. The scope of this compensation does not include current expenses; investments made by the agent that can be used in the service of other entrepreneurs or loss of profit, i.e., the profit that the agent would have expected to obtain until the time of full amortisation of the investment.

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?

Yes. According to the Spanish Supreme Court Judgment of 29 October 2013, “(…) Art. 29 ACLdoes not prevent claims under the general regime of Art. 1101 Civil Code for compensation for any other losses also causally linked to the termination of the contract (...)".

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 the Spanish Agency Law?

Yes. According to Art. 28 ACL, indemnification for damage is available where the agency agreement is terminated as a result of the agent’s death. However, Art. 29 ACL “Compensation for loss and damage” does not contemplate this scenario.

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 the Spanish Agency Law impose the same restriction on the parties?

No. Not expressly. However, Art. 3.1 ACL states that its provisions are mandatory. Both doctrine and jurisprudence consider that the compensation regime contained in the ACL is of an imperative nature in accordance with the provisions of Art. 3.1 ACL.

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

No.

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

Yes. Within a one year period pursuant to Art. 31 ACL. “Any claim for compensation for clients or compensation

for loss and damage shall be time-barred after one year from the termination of the contract."

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 the Spanish 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 the Spanish Agency Law provide for a statute of limitations that is applicable to claims regarding the performance of agency agreements?

Yes. Under Art. 31 ACL, any claim for damages (compensation for clients or compensation for loss and damage) arising from the breach of performance of an agency agreement is limited to 1 year from the termination of the agreement. The statute of limitations to exercise other actions arising from the agency agreement, for example, the payment of overdue commissions, is 3 years, in accordance with Art. 4 ACL, Art. 943 Commercial Code and Art. 1967 Civil Code. (Judgments of the Spanish Supreme Court 25 February 2009 and 29 June 2011).