



Tax&Legal Highlights

Poland

New entitlements of court-appointed agents are to make debt collection more effective

New amendments that, inter alia, are aimed to considerably extend the rights vested in agents of companies appointed pursuant to Article 43 of the Civil Code (CC) and Article 69 of the Code of Civil Procedure (CCP) came into force as from 15th March 2018. The changes seem especially favourable for those creditors that find it difficult to collect their receivables because of unfair hindering practices applied by debtors.

In business dealings it is not uncommon to encounter companies whose representative bodies do not consist of the required number of members or even companies that do not have such bodies at all. These situations occur not only when the shareholders cannot come to an agreement, but also when they deliberately take steps aimed to disrupt the company's management and thus hinder creditors from pursuing claims in court.

According to legal regulations, lack of a management board renders it impossible for the company to make declarations of will (e.g. in respect of contract termination), while in court litigation it results in staying the proceedings *ex officio*. From the creditor's perspective, staying the

proceedings entails the need to activate the court procedure of appointing of an agent that will act for the company, and to bear the associated costs. Following the appointment, the creditor must wait while the agent attempts to establish a management board, which - if the shareholders choose not to cooperate - may prove rather futile. Until now, even if the creditor took all these steps and bore the attendant costs, satisfaction of claims was uncertain.

The amending act substantially extends the scope of rights granted to the agents appointed by the court in line with the CC and CCP regulations, and it removes any doctrine and practice related doubts concerning the practical application of the relevant laws.

The court appoints an agent to act for a legal person (Article 42 of the CC) when a body to represent it has not been set up and when the composition of the relevant representative body is inadequate. As a consequence, the new legislation expressly permits appointment of the agent if, according to the rules of representation laid down in the Articles of Association, two management board members acting jointly are required to represent the company and the management board consists of only one person (the so-called non-quorum board).

The rights of agents appointed based on that provision were often challenged under the old regime, as the prevailing opinion was that the agents could only take steps with a view to appoint the relevant body and, if need be, to wind up the entity.

Under the new wording of Article 42 § 2 of the CC, **until the body (management board) is established or until it is made up of the required number of members or until a liquidator is appointed, the court-appointed agent for the company represents it and conducts its affairs within the constraints set by the court.** As a consequence, within the scope defined by the court, the court-appointed agent, inter alia, represents the company by making and collecting declarations of will on its behalf, which in turn renders it possible for creditors to take out-of-court steps (such as e.g. effective contract termination, entering into arrangements, extension of payment deadlines and obtaining additional collaterals), and institute court proceedings against the debtor.

The authority vested in the agent ceases only upon selection or appointment of a new body entitled to represent the entity or alternatively upon the decision (taken by the court or the authorised company's body) to wind up or liquidate the company. Until then, the agent is able to take all the necessary management activities on behalf of the company.

The agent is subject to court supervision. Activities such as acquisition or transfer of an enterprise or its organized part, acquisition, transfer or encumbrance of real property, perpetual usufruct or share in the ownership of real property unconditionally require the court's approval.

The additional rights granted to agents appointed pursuant to Article 42 of the CC also allow continuation of court proceedings. Increasingly often, just before issuing the first-instance decision or in the course of appellate proceedings, the defendant motions for the stay of the proceedings on the argument that all management board members have resigned from their office. This practice enables the losing party to prevent the court decision

from becoming final and binding and buys time to remove from the company any assets that the plaintiff may try to recover.

Irrespective of the agent to act for the company appointed under the provisions of the CC, it is also possible to establish an agent in litigation pursuant to Article 69 of the CCP. The amending act introduces a new regime to govern this institution, namely, the possibility to appoint an agent *ex officio* in certain predefined situations, although the general rule that the court takes action in this respect at the request of the adverse party still remains unchanged. Under the new wording of Article 69 of the CCP, the court-appointed agent is authorised to take all steps in connection with the case. The amendments also expressly provide for the possibility to establish an agent if the composition of the company's governing body is inadequate (the so-called no-quorum board).

If it is required to establish an agent to act for the company, the court will need to check whether an agent has not been appointed earlier under Article 42 of the CC. If it proves so, the court notifies the agent about the pending proceedings and the agent appointed pursuant to Article 42 of the CC becomes a party in the litigation. Then, the said agent can take all activities in place of the defendant, which means that the litigation will proceed without interruption and creditors will not be deprived of their rights to be satisfied.

Facing the sudden obstacle in the form of the lack of management board or inadequate composition of the board (especially where the situation lasts for a prolonged period) puts the contractor in highly disadvantageous position, all the more so considering that they have no influence on when the management board is to be set up, if at all.

Hence, the amendments coming into force on 15th March 2018 may contribute to making court proceedings with debtors more efficient and support creditors in their out-of-court actions. They will also help take away some of the means of sabotaging creditors' pursuit of claims.

Nonetheless, to see whether the new law will really help creditors recover their dues, we will need to wait for the courts to apply the new law in practice. Since the scope of the entitlements granted to court-appointed agents depends on the court's decision, active participation of creditors in the procedure will be of key importance.

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The Revised Payment Services Directive (PSD2) - responsibility for unauthorised transactions

PSD2 is an important step towards the implementation of a Single Euro Payments Area (SEPA). It is also the response to the dynamically developing market for payment services. Apart from regulating the activity of the institutions defined as third party providers (TPP) and the services rendered so far, such as account information services (AIS) and payment information services (PIS), PSD2 will modify the scopes of the liability for unauthorised payment transactions to be borne by payment service providers and payers.

It needs to be pointed out that - as in the case of the previous directive - **the rules concerning responsibility for unauthorised transactions apply to consumer contracts**, whereas in professional trading, the liability may be determined based on the mutual agreement of the parties involved, in line with the general contract practices.

The notion of authorisation of payment transaction under PSD2 is understood in the same way as in the previously binding laws. Pursuant to Article 40.1 of the Act on payment services, "a payment transaction is deemed to be authorised if the payer has expressed consent, in the manner provided for in the contract between the payer and his provider, to execution of the payment transaction. This consent may also apply to a series of payment transactions". **Hence, unauthorised transactions are those carried out without the consent of the payer, and it is assumed that such a classification of a transaction does not depend on the fact whether the transaction is executed with or without the use of a payment instrument.**

Payment service provider's liability for unauthorised payment transactions

PSD2 upholds the rule that the provider of payment services bears responsibility for unauthorised transactions, and the payer becomes liable only in exceptional circumstances. **In the case of an authorised payment transaction, the service provider should immediately refund the transaction amount to the payer and only then investigate whether the refund is justified or not.** Furthermore, in recital No. 72 of the Payment Services' Directive the legislator observes that in order to protect the payer from any disadvantages, the credit value date of the refund should not be later than the date when the amount has been debited.

Under PSD2 **'immediate refund' is understood as no later than by the end of the following business day, after noting or being notified of the transaction.** This definition of the refund date is new, as the previously binding regime did not provide any specific indication of the meaning of the phrase: 'immediate refund'.

PSD2 also introduces a 15-day timeframe for the settlement of complaints of payment service users concerning refunds of the amounts of unauthorised transactions. As per the new regulation, **the payer will be able to dispose of the amount of the unauthorised transaction also while their complaint is being resolved.**

The new EU legislation also introduces rules governing the payment service provider's liability for unauthorised payment transactions. Under Article 73.2 of PSD2, where the payment transaction is initiated through a payment

initiation service provider, the account servicing payment service provider shall refund immediately, and in any event no later than by the end of the following business day the amount of the unauthorised payment transaction and, where applicable, restore the debited payment account to the state in which it would have been had the unauthorised payment transaction not taken place.

Payer's liability for unauthorised payment transactions

The payer is obliged to notify the provider of payment services of an unauthorised transaction no later than within 13 months of the debit date or - where the payer does not use the specific account - of the transaction date. If the payer fails to make the notification, they bear all the losses and the liability for the unauthorised transactions.

PSD2 restricts the amount of the payer's liability for unauthorised transactions down to the equivalent of the maximum of EUR 50 (from EUR 150 under the previous regime). The above rule does not apply if:

1. the loss was caused by acts or lack of action of an employee, agent or branch of a payment service provider or of an entity to which its activities were outsourced;
2. the loss, theft or misappropriation of a payment instrument was not detectable to the payer prior to a payment, except where the payer has acted fraudulently.

Moreover, once the payer has notified a payment service provider that their payment instrument may have been compromised, the payment service user should not be required to cover any further losses stemming from unauthorised use of that instrument. At the same time however, the payment service user will be liable for any losses linked with unauthorised payment transactions, if they acted fraudulently or failed with intent or gross negligence to fulfil one or more of the statutory obligations.

The same as under the previously binding regulations, PSD2 stipulates that if the payment service provider does not provide appropriate means for the notification at all times of a lost, stolen or misappropriated payment instrument, the payer shall not be liable for the financial consequences resulting from use of that payment instrument, except where the payer has acted fraudulently.

Liability in case of failure to use strong customer authentication

If the payment services provider fails to use strong customer authentication procedure, the payer will not bear any financial losses unless the payer has acted fraudulently. Where the payee or the payment service provider of the payee fails to accept strong customer authentication, it shall refund the financial damage caused to the payer's payment service provider.

Even though the amendments introduced by PSD2 in respect of the liability for unauthorised transactions may seem minor, they are bound to be fairly significant from the viewpoint of the operations of the payment services' market. This is so because they will bring about the need to make modifications in contract templates and internal procedures followed by payment service providers. What is more, the new regulations will also impact many legal and business decisions relating to the operations of enterprises.

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Transfer prices - the Minister of Finance signed the Regulation extending the time-frame for preparing transfer pricing documentation

The Polish Minister of Finance – Ms. Teresa Czerwińska – signed the Regulation of 14 March 2018 on extension of the time-frames allowed for performance of some of the tax documentation-related duties.

According to the Regulation, the deadlines for performance of the duties below will be extended until the end of the ninth month following the end of the financial year:

- preparation of tax documentation;
- filing a statement confirming preparation of tax documentation with the tax office;
- attaching simplified CIT-TP/PIT-TP report to the tax return.

The Regulation was promulgated on 15th March 2018 and has been in force since that day.

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