CLIFFORD
CHANCE

Real Estate Investment in Poland
Your Legal Guide

Introduction

Dear Friends and Business Partners,

Poland is the largest economy in Central Europe, with a population of ~38 million. The implementation of large urban and infrastructure projects is one of the pillars of the new economic policy that the Polish government has recently adopted to meet the UEFA requirements (Poland is one of the countries co-organizing UEFA EURO 2012 Football Championship) and to minimize the negative influence of the turmoil in global markets on the Polish market. Large investments are expected to reduce the unemployment rate and secure the further growth of Poland's economy. It is estimated that the value of the infrastructure projects implemented in Poland within the next 7-8 years will amount to at least EUR 60-70 billion. The sectors of vital importance for the further Poland's development will be: real estate, energy & infrastructure, as well as transport & logistics.

Our Clifford Chance Warsaw Real Estate, Construction & Infrastructure Department covers all legal aspects related to the successful completion of large real estate and infrastructure projects. We have the same business objectives as both private and public investors: working on a better infrastructure in Poland.

We advise investors, developers, contractors, financial institutions, and professional consultants involved in the development process.

We have a wide range of expertise in relation to the development of retail, office, warehouse, residential, mixed-use, energy, industrial plant as well as PPP and infrastructure projects, as well as a long record of experience in contracts based on forms such as FIDIC and AiA. We also offer unique expertise in negotiating contracts with marquee international architects and engineers as well as in negotiating contracts concerning PPP projects.

We hope that our publication covering major legal and tax issues related to the real estate and construction sector in Poland will become your guide helping with planning new investment projects on this promising and rapidly developing market.

We will be delighted to join our capabilities with you working together on Poland's development.

Daniel Kopania

Partner
Head of the Real Estate, Construction & Infrastructure Department
Clifford Chance, Warsaw

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securing the land

1.1 Titles

1.1.1 Introduction

The existence and form of legal title to land is a vital issue that any developer or investor must be clear about before becoming involved in a new project. This involves answering a number of important questions: How does the legal title secure the position of the beneficiary? Can it be mortgaged? Can construction works be carried out on the basis of a given legal title? What are the costs of maintaining the title? How attractive is the form of title for a prospective buyer?

The forms of legal title to the land under Polish law include:

- ownership *(własność)*;
- perpetual usufruct *(użytkowanie wieczyste);*
- usufruct *(użytkowanie);*
- easement *(służebność);*
- 30-year lease *(dzierżawa);*
- 30-year lease *(najem).*

Ownership and perpetual usufruct are the only titles to the land that can be mortgaged and that are recognised by institutional lenders and investors. The ownership of buildings and other structures is always vested with the owner (or perpetual usufructuary) of the land. Other titles mentioned above either serve an accessory role (e.g. road easements) or are temporary (temporary leases before the acquisition of ownership or perpetual usufruct).

1.1.2 Ownership

Ownership is the broadest right in property, enjoying full constitutional protection. Public owners of real estate (the State Treasury, local authorities, other public bodies) are not privileged over private owners. Private ownership of land is becoming more and more popular (as a matter of fact, it was quite popular even during the communist era, especially with respect to farmland).

1.1.3 Perpetual usufruct

One of the most important property interests in land, specific to Poland, is the right of perpetual usufruct to land *(użytkowanie wieczyste).*

The concept of the right of perpetual usufruct to land arises from the historical reluctance of the State to hand over control of properties to full private ownership. Perpetual usufruct has now become a strong and stable right in property, far removed from its origins, the closest relation to ownership of all property rights.

Perpetual usufruct may only be created on land belonging to the State Treasury or local authorities. Once created, it can be inherited, transferred to third parties and encumbered (mortgage, easements, usufruct). The perpetual usufructuary is the owner of buildings and other constructions erected on the land. In comparison with the wide powers granted to the holder of the perpetual usufruct right, the owner of the land (the State Treasury or the local authority) is substantially restrained in its powers: it cannot encumber the property or sell it to an entity other than the holder of perpetual usufruct. Only the holder of the perpetual usufruct right is entitled to use and collect income from the land.

One of the fundamental differences between perpetual usufruct and ownership is that perpetual usufruct is supposed to be created for a defined purpose (the development of a project or for conducting some sort of activity) as set out in a contract. The period may vary from 40 to 99 years depending on the purpose of its creation, but usually it is 99 years.

If the holder requests an extension within five years before the scheduled termination date, the owner must extend the term, unless there are serious "social reasons" for not doing so. The perpetual usufructuary may also request an extension earlier if developments are planned on the land, which will be depreciated over a period longer than the remaining term of this right.

If the holder of the title breaches the provisions of the contract concerning the development, it could lead to an increase in annual fees, or even the termination of the contract.

Upon the creation of a right of perpetual usufruct by virtue of contract, the perpetual usufructuary is obliged to pay an "initial fee" amounting to from 15% to 25% of the value of the land. Thereafter, he pays annual fees of 3% of the land value. The percentage of those fees may be lower in certain specific cases, for example in relation to some non-profit organisations and for historic monuments. Please see section 8.2.2 for more details.

Upon termination of a perpetual usufruct contract, the perpetual usufructuary loses his right, and the land (together with the buildings and other improvements) is taken over by the owner. The owner is, however, obliged to reimburse the perpetual usufructuary for the current market value of the buildings and other improvements legally made on the land.

1.1.4 Usufruct

Usufruct grants its holder the right to use and collect income from the property in compliance with a notarised usufruct contract. Under the contract, the usufructuary is granted full economic use of the property, along with all responsibility for making improvements or repairs to the property. Usufruct cannot be transferred to a third party, which is a major inconvenience of this right. There is no maximum time limit for which usufruct may be created.

1.1.5 Easements

Polish law recognises three types of easements: ground easements, personal easements and transmission easements. Ground easements are established for the benefit of the owner (or perpetual usufructuary) of neighbouring land, personal easements are established for the benefit of an individual and transmission easements are established for the benefit of a business entity which intends to build, or owns on the third party land, utilities infrastructure. Ground easements are transferred together with the property (whether dominant or servient) and personal easements may not be transferred. A transmission easement is transferred to (i) a purchaser of an operating business, part of which shall constitute utilities equipment or installations or (ii) a purchaser of just utilities equipment. Depending on the easement deed, the holder of the dominant property may exercise various rights such as: using the servient property to a defined extent (e.g. road easement) or requiring the holder of the servient property not to exercise some of his rights to his property (e.g. not to build closer than x metres from the boundary). As a rule, any installations necessary to exercise the easement should be financed, maintained and repaired by the holder of the dominant property. Ground and personal easements expire if they are not exercised for more than 10 years. A transmission easement expires at the latest with the end of the liquidation process of the beneficiary of such easement. In general, an easement is not a suitable title for a development, but it does have a subsidiary function, which among other things enables the provision of connections to the municipal utilities network or an access road, for example.

1.1.6 Leases

The basic contractual right allowing the use of a property is a 30-year lease *(najem)*, granting the right to use the object unless a party to the lease is not a business entity or a sole trader, in which case the maximum (statutory) fixed period of the lease is 10 years. The other basic contractual right is a 30-year lease *(dzierżawa)* granting the right to use and to collect income from the object. The main practical difference between them lies in the scope of the tenants' rights. After the lapse of their statutory maximum terms, both contracts transform into agreements for an unspecified period of time (and are thus subject to termination upon notice). Without entering into theoretical nuances, it is fair to say that *dzierżawa* may be signed with respect to farmland and operating businesses, rather than green-field intended for development.

1.2 Registration of real estate

There are two parallel types of land register in Poland: (i) the land and mortgage register or "perpetual book" *(księga wieczysta)*, registering titles, encumbrances and claims, maintained by the courts, and (ii) the land register *(ewidencja gruntów i budynków)*, whose main purpose is to describe the physical features and the use of the land and buildings.

1.2.1 Land and mortgage register

Land and mortgage registers (further "mortgage registers") are kept by special divisions of district courts competent in the relevant area. They include a description of the property and register titles, claims and encumbrances. The long-term target of the mortgage register system is to have all properties registered.

Reform of the mortgage register system is still in progress; about half of traditional "hard copy" mortgage registers have now been converted into electronic registers. The conversion of all land and mortgage registers will probably take 2–3 more years. Recently, on-line access to all electronic mortgage registers has been opened. Via the Ministry of Justice website (www.ms.gov.pl) anyone can check, free of charge, the current status of the entries in a relevant mortgage register. The search is only possible if one knows the number of the mortgage register. The next stage of the reform aims to allow print outs of the content of the mortgage register, which will have the status of original excerpts.

The mortgage register is broken down into four sections. The first section contains a physical description of the property and lists the rights attached to the property as a dominant one (e.g. granted easements). In section two, the owner (and perpetual usufructuary, where appropriate) is specified. Section three contains all encumbrances other than mortgages (easements, usufructs, leases, pre-emption rights etc.). It also includes restrictions in disposal, such as warning notices (e.g. enforcement proceedings, or

the status of the register not being in conformity with the actual legal status). Section four contains mortgages.

Certain rights are created or, as the case may be, transferred upon registration (e.g. perpetual usufruct, mortgage etc.). The sequence of registration determines the ranking of the rights. Registered rights rank higher than unregistered rights.

According to the "public warranty of land and mortgage registers", everybody may rely on the contents of a mortgage register with respect to registered rights. A good-faith purchaser of a registered right acquires this right in the shape described in the mortgage register and from the person registered as the holder of the right (even if such person did not actually hold it). It should also be noted that there is a legal presumption of good faith in Polish civil law, i.e. the burden of proof is on the party questioning good faith.

1.2.2 Land register

Land registers, in comparison to mortgage registers, have a rather technical function. The registers concern physical features of the land (surface, borders etc.) as well as its use (agricultural, forest, construction purposes etc.) and the class of land etc. Land registers are kept by *powiats* (local-government units at a level between *gmina* – district, and *województwo* – region or voivodeship).

The land register is used for reference only and is not conclusive in all circumstances. The information evidenced in the land register is binding only for the purposes of, for example, economic planning, zoning, tax assessment and classification of land in the mortgage register. The mortgage register is the only register that defines the legal status of land.

The land register is supposed to be converted into a cadastral register; however this is not likely to happen soon because of the huge amount of work necessary to value properties.

1.3 Unregistered land

There is no official statistical data as to what percentage of the land in Poland has been recorded in mortgage registers. A new register is set up only when an application is made in respect of a particular plot(s) of land. For those plots of land that do not have a mortgage register, there should be a collection of documents *(zbiór dokumentów)* kept by the court until a mortgage register is established. The rules regarding reliance on entries in mortgage registers do not apply to these collections of documents. When buying unregistered land, a thorough title due diligence (including a report on title) is advisable.

1.4 Restitution claims

Restitution claims are a repercussion of the nationalisation processes under communist Poland. There is no reprivatisation law that would generally solve this problem, and restitution occurs through individual court claims. Although restitution claims are a fact of life throughout Poland, and especially in Warsaw, it should be stressed that real property may be securely acquired, provided that the buyer acted in good faith (i.e. the buyer did not know, despite due diligence, about any restitution claims).

Vistula River in Warsaw
(one of the last major unchannelled rivers in Europe)
Photo by Paulina Matuszewska

The current situation regarding Warsaw real estate is a consequence of the city's destruction during the Second World War and the effect of a nationalisation law, justified at that time by the need for the entire reconstruction of the destroyed city. On the basis of the "Warsaw Decree" of 1945, all properties in Warsaw located within the post-war boundaries of the city, were "municipalized", i.e. seized by the City of Warsaw. The Decree, while "municipalising" the land granted then owners of the buildings and their legal successors, the right to claim a perpetual lease *(dzierżawa wieczysta)* or a right to build *(prawo zabudowy)*, which were unified in 1961 and became perpetual usufruct – for a symbolic fee. The owners and their successors had the right to file an application within six months from the City's taking over the land, unless it was not in compliance with the zoning of that time. Unresolved applications or applications resolved contrary to the provisions of the Decree are currently the most common reasons for re-establishing the rights of previous owners (or their successors) to their properties or for the payment of compensation.

A legal due diligence in Poland will necessarily involve an assessment of the risk of restitution.

1.5 Title insurance

Over the past few years, title insurance has become an option for resolving title and off-title matters as specialised insurers have entered the market. There are situations where even a thorough legal due diligence cannot conclusively determine whether or not there are outstanding or unknown third party challenges to the legal title to the land. Similarly, there are scenarios where known title issues and contraventions are identified in respect of title, such as encroachments, deficiencies in the conveyancing/auction procedure, lack of permits required by law, restitution issues and other situations which result in the incoming purchaser being unable to rely upon the "public warranty of land and mortgage registers".

Title insurers have developed a series of products to cover these risks; ranging from Single Risk Indemnity Policies (known in the UK as Defective Title Policies), which will cover identified title or off-title flaws, to comprehensive title covers offered through Owner and Lender Title Indemnity Policies, which are closely modelled on the US full title policies.

1.6 Preliminary agreement

Where the immediate acquisition of a property (or shares in a company holding real estate) is not possible because of certain circumstances or not desirable because of the need to complete a due diligence, the parties may conclude a preliminary purchase agreement. Commonly, the function of this agreement is to fill the time gap between drawing up a letter of intent (which, apart from clauses on exclusivity and confidentiality, is not usually binding on the parties) and executing a final purchase agreement. A preliminary purchase agreement solves the problem of legal uncertainty remaining between the parties during this period.

Buyers are sometimes reluctant to go to the expense of conducting a due diligence review unless they know that they will have an enforceable right to acquire the property if their due diligence does not reveal any unacceptable risks.

As well as a title due diligence, it is usually advisable to undertake an environmental due diligence (see 2.6 and 9.12 below) and, in the case of developed land, a technical due diligence of the improvements on the land.

A preliminary agreement must include the essential content of the final agreement in order to be valid. In the case of a preliminary purchase agreement, this is the subject of the sale and the purchase price. It is also advisable to provide for a long-stop date by which the parties should execute the final agreement.

If a preliminary purchase agreement is not notarised and one of the parties rescinds it, the other party may claim only compensation for damage (basically limited to the costs related to negotiations). If, however, a preliminary purchase agreement is signed in notarial deed form, then it is possible to claim a specific performance, so that a court verdict substitutes the signature of the reluctant party.

1.7 Purchase from public bodies

The largest Polish landowners are public bodies, i.e. the State Treasury and local authorities (mainly *gminas*). The acquisition of real estate from public bodies (or the granting of the right of perpetual usufruct to their land) is regulated by the same civil law regime that is in place for transactions between individuals. However, because of the public status of the land, it is additionally subject to specific regulations contained in the 1997 Real Estate Management Act.

As a rule, the acquisition of public land is subject to the principle of transparency eflected by a general obligation to dispose of land via public tenders. The relevant authority selects the purchaser of the land from bidders in an oral or written tender. An oral tender is used if the highest price is considered, while a written tender is used if there are aspects to take into account other than simply price.

The Act exempts certain disposals from the tender procedure. The most important exemption is an in-kind contribution to a company. As a matter of fact, several reputable developments have been carried out in this more flexible way: Municipalities selected developers in a less formal procedure, set up common SPVs and sold their stake of the shares once the rdevelopment was completed. However, this scheme is no longer popular because of the recently introduced restrictions on the acquisition of shares held by public bodies. They must be sold via a public tender, or another public procedure, in other words a private shareholder already holding shares in such an SPV has no priority in the acquisition.

1.8 Pre-emptive right

In certain cases, public bodies may have a statutory pre-emptive right to properties put up for sale. If such a property is sold without observing this right, the sale is null and void. This involves the district's *(gmina's)* pre-emptive right (almost always waived) applying to the sale of the following kinds of properties: (i) undeveloped land previously acquired from the State Treasury or from a local authority; (ii) undeveloped land held in perpetual usufruct; (iii) land for which a public use is provided for in the local master plan (if the pre-emptive right is registered in the mortgage register); and (iv) historical monuments (if the pre-emptive right is registered in the mortgage register). The district in question has one month following the notification of the conditional sale agreement by the notary to exercise its right, failing which the parties may enter into the final sale agreement.

In addition, the 2003 Agricultural System Act introduced a pre-emptive right for tenants of agricultural land. If there are no qualifying tenants, the pre-emptive right may be exercised by the Agricultural Properties Agency. However, the pre-emption right of the Agricultural Properties Agency applies to agricultural properties bigger than five hectares. Both the tenant and the Agency have one month to exercise their rights. A disposal of agricultural land in violation of the Act or without notifying the entitled tenant or the Agency is invalid.

1.9 Acquisition of real estate by foreigners

The 1920 Act on the Acquisition of Real Estate by Foreigners provides for restrictions on the acquisition of real estate by foreign nationals or companies. Based on this Act, before acquiring land in Poland, a foreigner is obliged to obtain a permit from the Ministry of Internal Affairs and Administration ("MOI"). The same act of law imposes restriction on foreigners who are not citizens or business entities from the European Economic Area ("EEA") acquiring shares in a company with its registered office in Poland having ownership or perpetual usufruct right to property. The obligation to obtain an MOI permit applies if as a result of acquisition of shares by a foreigner, the company becomes controlled by a foreign shareholder. The obligation to obtain an MOI permit for share acquisition is very rare nowadays as the Ministry of Internal Affairs considers Polish-based SPVs acting as purchasers as undertakings from the EEA, even if they are fully controlled by entities from outside the EEA.

A property sale agreement or share purchase agreement executed without a required MOI permit is null and void.

However, following Poland's accession to the EU, the Act was changed to include wide exemptions to the requirement to obtain an MOI Permit. According to the Accession Treaty (which prevails over national legislation) undertakings from the EEA cannot be prevented from purchasing real estate in Poland, apart from agricultural land and forests. The obligation to obtain an MOI Permit for agricultural land and forests by undertakings from the EEA expires on 1 May 2016.

1.10 Energy Efficiency Certificate

As a part of a "going green" policy, Poland implemented EU Directive 2002/91/EC referring to the energy efficiency characteristics of buildings. On the basis of this directive, from 1 January 2009 new buildings have to have Energy Efficiency Certificates. The law also requires the seller of a building or a flat or a part of a building constituting an independent unit to deliver to the purchaser a relevant Energy Efficiency Certificate. Similarly, landlords should make available to tenants copies of their respective Energy Efficiency Certificates for each subject of lease – be they flats or buildings or a part of a building constituting an independent unit. Even though this legislation has been in force for nearly two years, it is still uncommon in non-institutional transactions for a seller to hand over a relevant Energy Efficiency Certificate to the buyer. This results from a lack of sanction in the law. The situation is different with institutional transactions, in which buyers are more aware of their rights and require the Certificate to be delivered as part of the basic property documentation. The Certificates are valid for a period of ten years.

development procedure

2.1 Required Permits

In general, development of land requires a building permit (see 2.4 below) and, in many cases, it also requires a planning permit (see 2.3 below) and an environmental impact assessment (see 2.6 and 9.9 below). The development must conform to the local development plan for the area in which the property is situated, if there is one.

2.2 Zoning issues

2.2.1 Zoning situation in general

The zoning situation in Poland has not been very stable for the past few years. In 2003, a new Zoning Law came into force replacing the one from 1994. There have been discussions about changes in the planning system in Poland, but they have not translated into any official draft legislation yet. A number of changes have been made to the Zoning Law after 2003 but in general, the zoning situation has not improved. Recent changes to the law will allow local communities to adopt master plans in a shorter period of time but still the overall complex implementation process and cost of it are the main factors why most of Poland is not covered by local master plans.

By virtue of the 2003 Zoning Law, all master plans adopted before 1 January 1995 ("old" master plans) expired on 1 January 2004. The practical impact of this law was quite damaging – only about 20–30% of the territory of Poland (and about 20% of Warsaw – mainly residential districts on the outskirts of the city) is now covered by master plans.

Various aspects of urban planning are regulated in many other Acts, such as secondary legislation ordinances to the Zoning Law, Environmental Protection Act, Protection of Nature Act, Protection of Monuments Act, and various Acts concerning the security of the State etc. These are Acts of "general" application that should be taken into account when a zoning study or master plan is being prepared. Subordinate to the Acts of general application are various "local laws", the most important of which are the master plans and, in some locations, landscape protection ordinances.

2.2.2 Zoning study

Before adopting a new plan a municipal unit is obliged to develop a so-called zoning study. The zoning study is an internal document of the City that third parties cannot rely upon. It sets general zoning guidelines for the whole of a local district's (*gmina's*) territory and determines the content of the master plan. Under the current law, a master plan cannot be in contradiction to the provisions of the zoning study; previously a master plan had to comply with the provisions of the zoning study. As explained in the justification to the recent amendment to the Zoning Law, the requirement of a master plan to be in compliance with the relevant zoning study was a major burden affecting the adoption of master plans because if a certain issue was not clearly regulated in the zoning study, a master plan could not be adopted to regulate something which was not provided for in the zoning study. The procedure for adopting a zoning study under the 2003 Zoning Law is quite similar to the procedure for adopting a master plan (public review, motions, external approvals/opinions etc.).

2.2.3 Master plan

The master plan is voted on by the City council and constitutes the most important zoning tool, as well as being an act of local law. The new Zoning Law describes in detail matters regulated by the master plan (i.e. they are mandatory). The "new" procedure (under the 2003 Law) of voting on the master plan is quite complicated and can take more than seven months. The draft master plan must take into account all general and specific constraints applicable to the given site. As mentioned earlier, it cannot be contrary to the provisions of the zoning study, either. (See section 2.2.2 above.)

The draft master plan is subject to a "public review" procedure. Any interested party may file motions regarding the draft master plan, concerning any specific zoning issue in any area, but the City is not obliged to take such motions into account. Then the draft master plan is sent for approval/opinion to various public bodies and finally voted on by the City council.

Any interested party may appeal against the master plan to the administrative court. It will be invalidated if there has been any (even insignificant) breach of the law or a significant breach of procedure.

f the adoption of the master plan restricts the use of the property, the owner may require the authorities to compensate him for his loss or to buy the land (and the authorities may, in return, propose a land swap). If the new master plan reduces the value of the property and the owner sells it, the seller may require the City to pay the difference in value. Conversely, if the value increases, the seller may be asked to pay a so-called "zoning fee". The new master plan becomes an act of local law at the earliest 14 days after it is published in the voivodeship journal of laws.

2.2.4 Specific constraints: shopping centres

Large retail units may only be developed if the site is covered by a master plan providing for retail space in excess of 2,000 square metres. It is a subject of dispute in the relevant jurisprudence and legal doctrine as to whether a shopping centre development on a site not covered by a master plan is possible or not (i.e. based on a planning permit – see section 2.3 below).

2.3 Planning permits

If the land is not covered by a master plan (and, as mentioned, this is the case for most land in Poland), a planning permit must be obtained before the building permit documentation is submitted. The law makes a distinction between planning permits for public developments and those for private schemes. "Private" planning permits are much more difficult to obtain. This has been widely criticised and this criticism will probably lead to changes in the legislation.

Obtaining a "private" planning permit requires a number of conditions to be fulfilled, including: securing utilities connections and ensuring architectural compliance, including height parameters, density and functions, with neighbouring developments (although the City may decide not to apply this criterion in "justified cases"). The local authority architecture department has to prepare a "zoning analysis" in order to verify whether those conditions are met, and if not, whether they can be waived.

The planning permit procedure may be suspended (at the City's discretion) for up to nine months. If a master plan for a given development or territory is "obligatory", the planning permit procedure is suspended until the adoption of the master plan.

In summary, a planning permit makes it possible for the authorities to approve only those developments that they consider appropriate. Obtaining a planning permit may also prove risky for the developer, as the developer has to satisfy claims relating to restriction of use or loss of value of neighbouring plots caused by this decision.

Any interested party may obtain a planning permit, irrespective of whether it holds legal title to the site. Planning permits are also transferable to third parties.

A planning permit expires if another developer obtains a building permit for the site, or if a master plan is adopted that is inconsistent with the planning permit (unless a final building permit has already been granted).

2.4 Building permits

Building permits may be obtained if the project complies with the master plan. If there is no master plan, then a building permit may be obtained if it complies with the planning permit.

A building permit is usually composed of two basic elements: approval of the designs and permission to start the works. If the project is phased, the developer may request permission to start the works for the initial phase(s) only. In this case, the building authority must approve the "site development plan" (which is part of the building documentation) and detailed architectural designs for the initial phase. This flexibility allows considerable savings in terms of the preparation of architectural designs for subsequent phases (which may be approved at a later stage, when permission to start the works for such future phases is granted).

In order to obtain a building permit, the developer should hold legal title to the site (not necessarily freehold – it may even be a simple lease), but it is also acceptable if the owner of the site gives its approval in writing.

Building permit documentation must be approved in advance by various authorities, including (as applicable): the sanitary inspector, environmental protection inspection, the cultural and heritage inspector, the road management authority, the work safety administration, the fire brigade etc. A large part of the land in Poland is considered "agricultural" (the formal criterion is a relevant entry in the land register). In the case of a site located outside the boundaries of a town or a city, before a building permit can be issued, the land should be excluded from agricultural use (otherwise the building permit would be null and void). This involves payments from the owner, in ten annual instalments, depending on the category of the land. (See section 8.2.5 for details.)

In most cases, building permits are issued by the *starosta* (head of a mid-level administrative unit called *powiat*). In bigger cities, the mayor exercises the functions of the *starosta*. As with a planning permit, a building permit may be transferred to a third party, provided that it holds title to the site.

2.5 Construction works exempted from building permits

Certain construction works do not require a building permit, but simply a notification to the building authority. The notification should include appropriate drawings, as well as opinions and approvals from various administrative bodies (if applicable). The works may be started if the building authority does not raise any objections within 30 days from the notification.

Such works include: car parks with no more than 10 spaces, certain temporary objects, fencing, renovation works (except for structures entered in the register of historical monuments), certain advertising billboards, reconstruction and modernisation of roads etc. The list of construction works that may be commenced via the notification procedure has been extended in recent years. In particular, the general rule of a building permit being required no longer applies to the construction of power, water, sewage, gas, heating and telecommunications connections, irrespective of whether such works are related to the construction of the building or work performed on an undeveloped piece of land.

2.6 Environmental procedures (see also section 9)

Developments that may have an impact on the environment (listed in a special ordinance) are subject to special rules. The procedure is open to the public (public announcements are placed in the City hall and on the City's website) and environmental NGOs have the right to take part in it.

Developments which may require the preparation of an environmental impact assessment report include:

(i) fun parks, golf courses and accompanying infrastructure;

(ii) garages, car parks or car park complexes, with accompanying infrastructure, with a usable area no smaller than 0.5 ha (0.2 ha in areas covered by the nature protection and their buffer zones); usable area means the sum of the footprint and area occupied by other above-ground and underground levels along the external footprint of the elevation of the building facility;

(iii) shopping centres and accompanying infrastructure with a usable area no smaller than 2 ha (0.5 ha in areas covered by the nature protection and their buffer zones); usable area means the sum of the footprint and area occupied by other above-ground and underground levels along the external footprint of the elevation of the building facility;

(iv) industrial or warehouse developments with accompanying infrastructure, with a footprint no smaller than 1 ha; footprint means the area of land occupied by the building facilities and other areas intended for transformation as a result of the implementation of the project;

(v) residential developments with accompanying infrastructure:
- covered by the arrangements of the local master plan – no smaller than 2 ha in areas covered by the forms of nature protection or their buffer zones and 4 ha in other areas;
- not covered by arrangements of the local master plan or local reconstruction plan – with a footprint no smaller than 0.5 ha in areas covered by the nature protection forms and their buffer zones and 2 ha in other areas.

There is also a separate environmental procedure in the case of the developments mentioned above. The developer has to obtain a "decision on environmental conditions" ("EIA decision") before applying for a building permit (without the need to secure the title to the site). The EIA decision must be consulted upon with the sanitary and environmental authorities. The EIA decision is valid for four years and is binding on the building authority granting the permit. The 4-year term may be extended if the conditions specified in the EIA decision do not change and the project is developed in phases. Environmental NGOs have the right to participate in the environmental procedure. They have to submit specific remarks and motions (within a certain deadline) in order to take part in the procedure. Environmental NGOs do not participate in the building permit procedure.

2.7 Time factor and appeals

2.7.1 Duration of the procedure

The duration of the procedure depends on the location of the development (some authorities are busier than others) and on the complexity of the project. The statutory term for issuing a building permit is 65 days (provided that the documentation is complete), but in practice it may take longer. Although there is no statutory guideline for planning permit proceedings, their duration is comparable, or slightly longer (because of the need to prepare a zoning analysis – see above).

If an appeal is filed, the matter is sent to second instance proceedings conducted by the voivode (head of region). Such proceedings usually take two months.

2.7.2 Ordinary appeals

Any party to the procedure can submit ordinary appeals. This includes: the developer, the owner of the site (which might not be the developer) and other parties having a "legal interest" in the proceedings. In planning permit procedures, this last category covers the owners of adjacent properties. Concerning the building permit procedure, the 2004 amendment to the Building Law defines the parties as owners of properties located within the "development impact zone". This zone is determined on a case-by-case basis according to various technical regulations and, in principle, is narrower than simply all the neighbours of the site.

Ordinary appeals must be filed within 14 days from receipt of the building permit by the party. If no party has filed an appeal within this period, the permit becomes final.

2.7.3 Appeals to the Administrative Courts

There are two "stages" as regards administrative courts in Poland: the voivode administrative courts and the Supreme Administrative Court.

Once ordinary appeals have been exhausted, a party may file a lawsuit with a voivodeship administrative court. The lawsuit must be submitted within thirty days from delivery of the second instance decision.

The lawsuit does not automatically suspend the building permit (which means that the works may be commenced), but the court may decide to suspend it. In such a case, the appellant may be obliged to pay a cash deposit to secure potential claims of the developer in relation to the suspension of the permit. If the court rules that the lawsuit is entirely or even partially justified, the cash deposit will be repaid. If the lawsuit is dismissed, the developer may satisfy its claims from the cash deposit. Cash deposits were designed to stop the parties from appealing against building permits just for sake of making the developers' life harder.

In principle, decisions of the voivodeship administrative courts may be appealed to the Supreme Administrative Court. If the ruling of the voivodeship administrative court is cancelled, this court should issue a new ruling taking into account the instructions of the Supreme Administrative Court.

2.8 Changing designs and illegal constructions

A building permit includes an approval of the design. If the developer decides to depart from such approved designs, it should consider whether such an alteration is "material". Material alterations are allowed only after an amendment to the building permit is issued. If the developer makes material alterations without a prior amendment of the building permit, such works will be considered illegal. In such a case, the building authority requests the developer to submit an amending design and requests fulfilment of other conditions necessary to bring the works to the state compliant with law, within the specified period of time. Failure to comply with the building authority's requirements may lead to demolition of the completed works or issuance of a decision disallowing continuance of the building works.

Any construction works requiring a building permit or a notification (in the case of smaller works) carried out without such permit or notification are also illegal. If, however, the construction works were carried out pursuant to a building permit that has been declared invalid during the works, works executed until that time are not deemed illegal.

A developer (members of the management board) of an illegal construction risks criminal prosecution and a penalty of up to two years' imprisonment. In principle, any illegal construction (whether completed or not) should be demolished, though a legalisation procedure may be initiated if the project complies with the master plan or with the provisions of the final planning permit and it is possible to make the construction fully compliant with the law, i.e. the existing infringements of building and technical requirements may be cured. During the legalisation procedure, the developer must file complete building documentation. The authority will impose a "legalisation fee", the amount of which depends on the scale of the project and its function.

2.9 Change of use of the building

The owner or authorised occupier of a building or premises is entitled to make improvements and alterations in the building or in the premises. If the alterations are aimed at changing the current use of the building or the premises, it is necessary to notify the relevant building authority before actual change of use. According to the Building Law a change of use of a building or its part is action or omission leading to change of fire safety, labour safety, sanitary or other legal requirements. If the scope of alterations or improvements requires receipt of a building permit or the intended change of use is contrary to provisions of the master plan or planning permit or if the intended change of use may lead to inadmissible consequences specified in the Building Law, the building authority issues an objection.

If a notification concerning change of use of the building or its part is lodged with the building authority and is not objected to in the form of a decision within 30 days from receipt of notification, the change of use of the building can be effected within the following two years. If the alterations were made without a required building permit, the building authority may order them to be removed, and the owner of the building also risks criminal prosecution.

2.10 Permit for use

Use of the completed building or structure may be commenced upon notifying the relevant authority (i.e. construction supervisory), subject to cases specified in the Building Law. The investor may take occupancy if the authority has not reported any objections within 21 days of delivery of the notification. However, in some cases notification is not sufficient and an occupancy permit is required. This applies to the following: (i) where a building permit was required for the erection of the structure and the structure falls within the relevant category as stipulated in the Article 55 (1) of the Building Law, (ii) where use of the structure is to be commenced before the completion of all construction works, (iii) illegal construction projects, if the body conducting the legalisation proceedings imposes such an obligation on the investor, and (iv) when the building works were temporarily halted owing to "material" deviations from the approved design or other conditions as indicated in the building permit.

The issue of an occupancy permit requires a mandatory inspection by the relevant authorities provided for in the Building Law.

Moreover, if the investor is obliged to obtain an occupancy permit, it should also inform the Environmental Protection Inspectorate, the Sanitary Inspectorate, Labour Inspectorate and fire brigade of the completion of the construction works and of the intention to use it. If there are no objections or official statements from the relevant authorities within 14 days of the notification date, this is to be treated as tacit consent to use the building structures.

Use of the building structures without notifying the relevant authorities or without a required permit for use is considered illegal. Apart from the administrative consequences of illegal use, such as a fine, which may be imposed by the relevant authorities, the lack of notification or occupancy permit causes fundamental problems where leasing the building is concerned.

For most forms of development there is a requirement that before the completed development may be brought into use, an occupancy permit should be obtained from the relevant authority. This is in effect a "sign off" by the authorities that the development has been constructed in accordance with the consents issued and conforms to all relevant planning and building regulations.

2.11 Land subdivision

Needless to say, the proper configuration of plots is essential in many various respects. This concerns access to public roads and other infrastructure (and the necessity, or not, to establish easements), the phasing of the project (and allocation of various phases to various SPVs) and cutting out plots dedicated to specific functions (e.g. roads) etc.

As a rule, land subdivision must comply with the master plan. This means that it is generally more difficult (sometimes impossible) to subdivide an unzoned site. Unzoned land may be subdivided if the City has not yet started the master plan procedure (otherwise, the subdivision procedure will be suspended), and if it complies with the applicable regulations or if it complies with the provisions of the planning permit.

Regardless of the provisions of the master plan or lack of it or the planning permit, the regulations also allow the subdivision of co-owned land on which there are two buildings (to enable termination of the co-ownership). There are ten (10) other circumstances provided in the Real Estate Management Act in which the subdivision of the property can be achieved.

The subdivision process has two stages. In the first stage, the City confirms the projected subdivision's compliance with the master plan (if applicable). In the second stage, the draft subdivision prepared by a professional surveyor is finally approved by the mayor.
It is possible to subdivide a plot within the footprint of a building. However, the borders of new plots should run along vertical walls of the building and the parts of the building located on separate plots must be fully independent, including separate entrances and installations. This should be taken into account while designing buildings with a view to their future legal subdivision.

If, following the subdivision of a piece land, its value increases, the mayor of a municipality may impose a betterment levy (*opłata adjacencka*). The amount of the betterment levy is established in a resolution of the municipality council and it cannot exceed 30% of the difference in the land value after subdivision. The betterment levy can be imposed within three years from the date the subdivision decision became final.

real estate financing

3.1 Introduction

Since the mid-1990s, the Polish real estate financing market has been developing strongly, and a wide range of products is available to developers and investors. Banks, both Polish and foreign, offer a variety of construction and refinancing facilities, mixtures of the two, as well as various hedging options. As a rule, banks are prepared to finance up to 80% (depending on the risk profile of a project) of the total investment costs, and the investor is expected to provide its own equity to finance the remaining costs. Debt to equity ratios for construction facilities are usually lower and are connected to the pre-let.

Equity may be financed through mezzanine lending. Mezzanine lending is characterised by a low security level and the mezzanine lender is sometimes able to have second ranking security over the assets encumbered in favour of the senior lending bank(s). It should be noted, however, that there are not many mezzanine lenders on the Polish market. Quasi-mezzanine financing may be provided by parent companies or affiliates through subordinated loans or other forms of equity contribution. In this respect, thin capitalisation rules should be taken into account at the stage of structuring forms of equity. Those rules apply to loans that exceed three times the share capital of the borrower, and disallow the tax deductibility of interest allocated to the excess. Interest on loans granted by unrelated entities will not be subject to thin capitalisation.

3.2 Loan Agreement

3.2.1 Types

There are three main types of loan documentation reflecting the type of transaction: (i) financing the construction of a development; (ii) refinancing an existing development (including acquisition) and (iii) convertible facilities which initially finance the construction of the development, and are then converted into investment loans.

3.2.2 Floating rate and fixed rate facilities

The vast majority of commercial loans for construction purposes will bear interest at a floating, rather than a fixed rate. The floating rate will vary periodically to reflect the cost to the banks of providing the money. In respect of euro loans, it will be usually based on EURIBOR, with US dollar and Polish zloty loans at LIBOR and WIBOR respectively.

A fixed rate is more likely to be selected in transactions where the borrower's cash flow generated from its main activities is expected to reach a certain level (e.g. if the loan is intended to refinance the acquisition or construction of an office building in which the rental payments are fixed).

As the fixing mechanism requires the lenders to take refinancing for a long term (in line with the fixed rate term selected in the loan agreement), the loan documentation will normally either prohibit the borrower from making prepayments of the loan, or will require the borrower to bear all costs resulting from such prepayment.

3.2.3 Currency

The market offers loans in various currencies. To decrease foreign exchange risks, the currency of the loan should match the currency of the rents payable by tenants in the property concerned. As buildings are usually rented in euro, it is advisable to match the currency of the income with currency of the loan.

3.2.4 Financial Covenants

All types of facility agreements most often include two financial ratios that the borrower needs to maintain during the lifetime of the loan: (i) debt service cover ratio and (ii) loan to value ratio.
Debt service cover ratio is usually the ratio between the amount of the outstanding loan and the rental income on the property, decreased by the operating costs of the property. The borrower is required to maintain the ratio at a certain agreed level.

Loan to value ratio is the ratio between the amount of the outstanding loan and the value of the property established through a valuation completed by a reputed valuer.

In the case of construction loans, the debt to equity ratio is also introduced.

If any ratio provided for in the agreement is not respected, an event of default is triggered. It is, therefore, vital from the borrower's point of view, that the facility agreement envisage a cure period to remedy the level of the ratio.

3.2.5 Default

Facility agreements preview standard representations and warranties as well as events of default. It is worth noting that most facility agreements include the concept of a potential event of default, meaning a situation in which it might be expected that an event of default will occur shortly. Furthermore, an event of default is triggered if any circumstances occur that have an adverse effect on the borrower's performance of obligations under the facility.

3.3 Interest Hedging

Hedging is a way of reducing some of the risk resulting from a fluctuation of interest rates, which, if they go too high, will result in debt service obligations that may not be met by cash flow generated by an asset. The benefit of interest hedging must be weighed against the hedging cost. If the marginal benefit of reducing the risk with an individual transaction is less than its marginal cost, it is not worthwhile hedging that risk.

The most popular interest hedging transactions in property financing transactions are (i) interest rate swaps ("IRS") and (ii) "cap and collar" transactions.

3.3.1 IRS transactions

An interest rate swap is, in fact, an exchange. In an interest rate swap, two parties agree to swap their interest obligations. During the term of the swap, the borrower pays a fixed interest to the swap provider (who sometimes is the lender). The level of the fixed interest is agreed in the swap agreement. Standard ISDA agreements are often used for these purposes. In return, the swap provider pays the borrower variable interest (LIBOR or EURIBOR, as applicable).

3.3.2 "Cap and collar" transactions

The borrower purchases the "cap", placing a ceiling on the interest rate he will pay, and sells the "floor" to obtain a premium to pay for all or part of the cap. A collar transaction limits the borrower's interest rate payments to a range bounded by the agreed strike rates of the cap and floor. If the floating rate rises above the cap strike, the contract provides for payments from the swap provider to the borrower, constituting the difference between the floating rate and the cap strike. If the floating rate falls below the floor strike, the borrower pays the swap provider the difference between the floor strike and the floating rate.

Warsaw's Old Town
Photo by Paulina Matuszewska

3.4 Cost of lending

3.4.1 Fees

A bank may charge a fee in return for the initial work it must do to put the loan together (e.g. due diligence and negotiation). In a syndicated loan, there may be several bank fees, including an arrangement fee (since the arranger bank is responsible for the initial work in constructing the facility, taking a lead role in due diligence and negotiating, and also for putting together the syndicate).

A bank which takes on an agency role (e.g. administrative or security agent) will demand an agency fee to compensate it for the extra responsibilities involved.
A "commitment fee" may also be charged, calculated as a percentage of the undrawn facility from time to time. The commitment fee is sometimes drafted to run from the signing of the loan agreement, even if the borrower has not yet satisfied the conditions precedent.

If a borrower cancels any part of the loan, it will be required to pay a "cancellation fee" If the loan is prepaid, the borrower will pay a "prepayment fee".

3.4.2 Expenses

In any transaction, it is necessary to consider who is to bear the costs relating to the performance of the agreement. On general legal principles, the costs of performing an agreement, in the absence of specific provisions to the contrary, lie where they fall. Express provisions will be included in most facility documentation making the borrower liable for further costs. Usually the banks agree to cover any syndication cost themselves.

3.4.3 Stamp duty and value added tax

There is currently no stamp duty payable on the execution of a straightforward loan instrument, but usually banks cover the risk of potential stamp duty in the future, or foreign stamp duty, by shifting it onto the borrower.

Under current Polish law, there is no VAT payable on bank fees, but banks usually cover the risk of potential VAT in the future in facility agreements.

3.5 Security

3.5.1 Mortgages

A mortgage is the most typical security in the case of real property financing, and a lending bank almost never agrees to finance a real property without this type of security. On 20 February 2011, the laws amending the existing regulations on Polish mortgages took effect. The existing distinction between a ceiling mortgage *(hipoteka kaucyjna)* and a fixed amount mortgage *(hipoteka zwykła)* has been abolished as there is now just one type of mortgage, its features resembling the existing ceiling mortgage. Under the new law a mortgage may secure multiple claims of a single creditor arising under various contractual relationships. The new regime makes it possible for multiple creditors financing the same "undertaking" to have a single mortgage securing their claims. To this end, the creditors will need a mortgage administrator to exercise their rights and claims on their behalf. The mortgage administrator will be registered in the land and mortgage register. The creditors could appoint the mortgage administrator among themselves or a third party.

The amendment to the mortgage law introduces the concept of the disposal of "released mortgage position". Each mortgage is allocated a specific "position" in the land and mortgage register in which it is evidenced. When an original mortgage expires (for example as a result of the repayment and discharge of the original secured claim) the original position allocated to the original mortgage becomes vacant because the secured claim ceases to exist. In such a case the holder of the title to the real property encumbered with an original mortgage may create another mortgage (up to the original amount) and allocate the original position to such newly created mortgage.

The possibility to effect such disposals is designed to provide more options to the holders of title to real properties.

As a rule, and subject to certain exceptions, a mortgage created before 20 February 2011 is governed by the new laws (if such mortgage was created as a ceiling mortgage [*hipoteka kaucyjna*]) or by the old laws (if such mortgage was created as fixed amount mortgage [*hipoteka zwykła*]).

A mortgage may be established either in the form of a notarial deed or through a written statement of the borrower (with a Polish bank). It will be possible to express a new mortgage in a currency different than the currency of the secured claims.

It is a matter of negotiation whether filing a motion to register the mortgage or the actual registration thereof is a condition precedent for the draw-down of the facility. Usually it is the filing. At the same time, the lending bank(s) may require that a gap insurance agreement be entered into for the purpose of insuring against the occurrence of the situation where the court refuses to register the mortgage.

The speed of registration of a mortgage depends on the court. In big cities, it may take several months, in smaller ones – a week. Mortgages in favour of banks have registration priority according to the court's internal by-laws. If the process is really in delay, it may help to address an "acceleration motion" to the president of the court. As mentioned in section 1.2.1, the courts are gradually introducing an electronic mortgage register system, which substantially shortens the registration period.

3.5.2 Pledges

Polish law recognises three types of pledges: (a) registered pledge, (b) ordinary pledge and (c) financial pledge. It has become market practice that banks granting property financing secure their claims with a registered pledge and a financial pledge over shares in the company to which the facility is granted, as well as a registered pledge over the rights and assets of that company. Sometimes they require separate financial pledges over bank accounts. The sub-sections below present the main information on the three types of pledges:

(a) Registered pledge over shares

Until recently, banks accepted registered pledges only over shares in limited liability companies and joint stock companies. However, when, for tax reasons, borrowers began to develop property belonging to limited partnerships, there were attempts to pledge interests in limited partnerships.

Registered pledges over shares established by the parent company(ies) of the borrower, allow the lending bank, upon enforcement of the loan, to seize the shares or sell them at public auction. The value of seized shares is established by the parties.

A standard registered pledge agreement includes (i) a negative pledge clause where any form of disposal of shares is forbidden without the prior written consent of the bank, (ii) an obligation to pledge any new shares created in the company, and (iii) an ordinary or financial pledge clause with expiry upon registration of the registered pledge.

A pledge agreement must be entered into in written form and registered with the National Pledge Register.

(b) Registered pledge over assets

Under this agreement, the company pledges all of its current and future assets, including any rights, especially rights to the accounts. It is the equivalent of a floating charge under common law.

Upon enforcement of the loan, the bank may sell the enterprise at public auction, lease the enterprise or take over administration of the enterprise.

A standard registered pledge agreement includes a negative pledge clause where any form of disposal of shares is forbidden without the prior written consent of the bank.

The pledge agreement should be entered into with a date certified by a notary and registered on the same terms as described above.

(c) Financial pledge

This is a relatively new form of security, resulting from the implementation of the EU Financial Collateral Directive. It may be established on monies (bank accounts), financial instruments and shares. Upon enforcement of the loan, the encumbered assets will be seized or sold in an enforcement procedure as provided for by the Code of Civil Procedure.

3.5.3 Submission to execution

This instrument is very popular with lenders and allows the lending bank(s) to shorten any enforcement procedures.

In submission to execution, the borrower makes a statement to the lender in which it allows the lender to enforce all its claims under the facility to a certain amount (or up to a certain amount) and by the date stipulated in the statement.

Polish banks are allowed to accept written submissions to execution under the Polish banking law provisions, whereas foreign banks and other entities may accept such submissions only in the form of notarial deeds.

3.5.4 Assignment

Typically, the borrower assigns to the lender – as security for the claims arising under the facility – its rights under lease agreements, bank account agreements, insurance agreements, construction agreements and management agreements. The assignment includes a clause in which the borrower agrees to assign its future rights immediately upon entering into any future agreement of a given kind.

Assignment agreements should be entered into with a date certified by a notary.

3.5.5 Other collateral

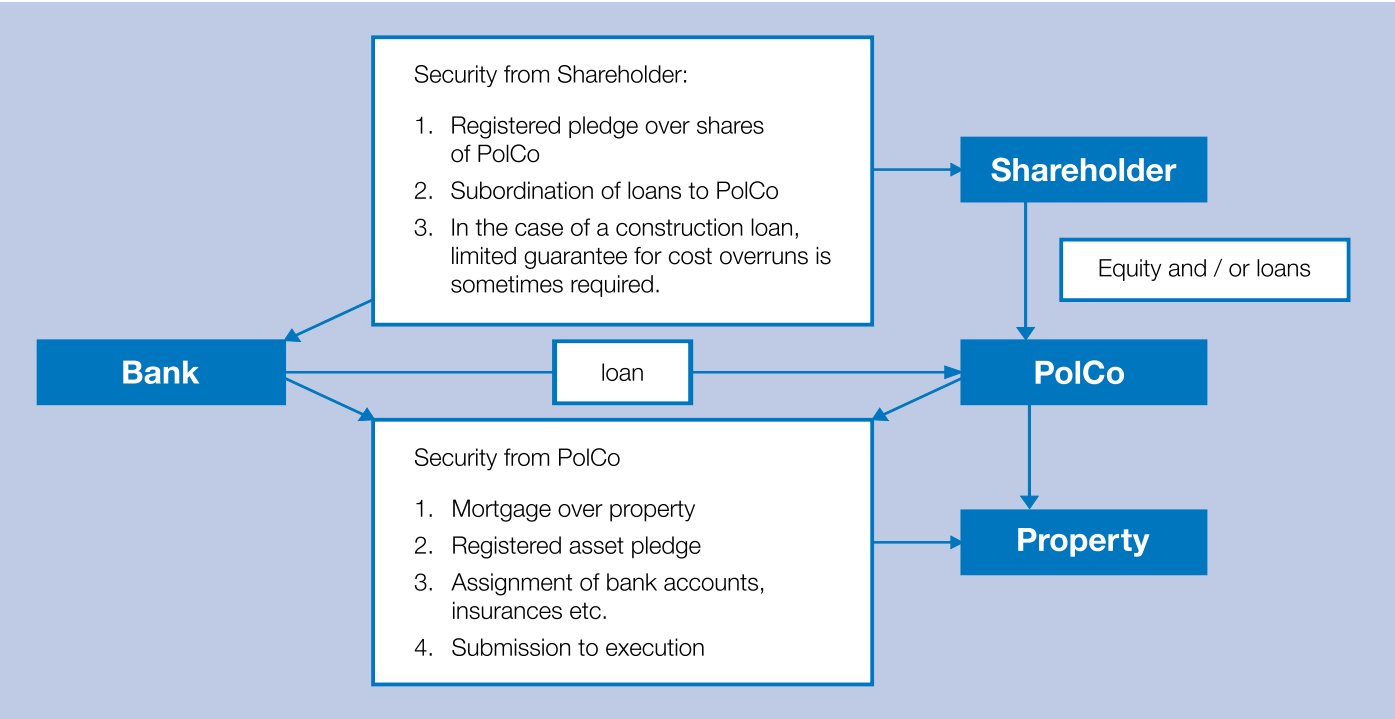
Other collateral includes: (i) suretyships and corporate guarantees, (ii) subordination agreements and (iii) a power of attorney for bank accounts.

3.6 Usury interest

According to law (Art. 359 § 2^1 of the Civil Code), the maximum annual interest rate amounts to four times the Lombard rate published by the National Bank of Poland (i.e. as at 25 January 2011: 4 x 5.25% p.a.). If the parties to a contract provided for an interest rate higher than the maximum interest rate, then the debtor is obliged to pay only the maximum rate (i.e. currently 21% p.a.). The provisions of the law prevail if the parties choose a foreign law. Lenders of non-consumer loans may try to compensate for the effects of this maximum interest rate by increasing various fees, commissions and costs related to the preparation and continuation of the loans.

3.7 Typical real estate loan structure Bank

Chart 1



construction issues

4.1 Market standards

In principle, construction contracts relating to developments carried out in Poland operate in the manner anyone with practical experience with development projects in other jurisdictions in the EU would expect.

There is no standard form of construction contract used in Poland, but major construction projects are mainly based on international standard contracts from the FIDIC (Orange Book, Red Book, Yellow Book and Silver Book). (From time to time, AIA contract documents are in use.)

Employers and developers need to be aware that Polish law may significantly affect the use of standard international forms of construction contracts. This stems from the fact that the above-mentioned standard forms do not automatically take account of specific Polish legal institutions and requirements regulated by the Civil Code and the Building Law.

Areas of international standard construction contracts that primarily need to be fine-tuned in Poland are: warranty, defects notification period, payments issues and dispute resolution.

4.2 Warranties in construction contracts

Under Polish law, warranty *(rękojmia)* is structured as the contractor's liability for defects revealed after the building has been delivered and accepted at hand-over, and entails strict liability. The statutory warranty time limit is three years for buildings and one year for the fittings of a building. The parties may vary this 3-year period by agreement. Typical market practice in Poland is to expand the contractor's liability for defects by extending the warranty period in respect of specific elements of the construction works to up to 10–12 years.

Standard construction contracts, like FIDIC, that are used in Poland contain defects liability clauses. Defects liability clauses essentially confer a right on the employer to call for the physical return of the contractor to the construction site to rectify defects for an agreed period of time after take-over of the works. Such corrective works are almost always carried out more cost-effectively by the original contractor than by a new one. Under Polish law, it is of vital importance to clearly determine the defects liability period in the construction contract.

Additionally, clauses concerning the contractor's guarantee for construction materials and installations in the constructed buildings are usually included in the construction contracts as a market standard. The detailed scope and time limit of the above guarantee *(gwarancja)* is always subject to a contractual arrangement, but is usually for one year and entails an exchange of the defective elements or installations at the contractor's cost.

4.3 Employer's liability to subcontractors

The legal relationship between employers, general contractors and subcontractors on construction projects are regulated by the Civil Code's provisions introduced in 2003, which were designed to create joint and several liability of both employer and general contractor to subcontractors on construction projects. The employer and general contractor are jointly and severally liable for the payments of remuneration to subcontractors, provided that the employer has approved the contract between a relevant subcontractor and the general contractor. (The employer's failure to give an answer within 14 days is treated as approval.)

National Stadium in Warsaw, being built for UEFA EURO 2012 and a railway passage
Photo by Michał Matera

It needs to be highlighted that, pursuant to the Civil Code, despite the liability for fees towards a subcontractor, the employer does not have any right to claim the performance directly from a subcontractor and does not directly benefit from the warranties issued by the subcontractor. (This issue may be resolved only if the agreement between the general contractor and subcontractor takes into account the necessity to protect the interests of the employer in the future, so it is vital for the employer to carefully review the subcontracts before approving them.) Given that the employer and general contractor are jointly and severally liable towards a subcontractor, the subcontractor is allowed to raise any claims concerning remuneration with the employer and the general contractor at the same time. As a result, if there is no proper exchange of information between employer and general contractor, the subcontractor could be paid twice for the same works. Some employers insure themselves against such risk. As a rule, the costs of the above insurance are passed on to the subcontractor.

If an employer on a project does not expressly consent to a subcontract entered into by a general contractor, then such subcontract between the general contractor and subcontractor is unenforceable against the employer.

4.4 Employer's payment guarantees

The Civil Code grants a contractor the right to demand a payment guarantee for construction works from the employer. The guarantee may be issued in the form of a bank guarantee, an insurance guarantee, a letter of credit or a bank's suretyship.

The contractor may demand the payment guarantee at any time during the construction contract term and in an amount up to the value of the contract. He may also demand an extension of the guarantee for additional works agreed during the term of the contract. If the employer fails to deliver a guarantee, the contractor – because of the fault of the employer – may terminate the contract. Failure to provide the contractor with the payment guarantee constitutes an obstacle to carrying out building works for which the employer is responsible. The contractor's rights may not be limited or excluded contractually. The employer may not terminate the contract because of a claim on the payment guarantee. Both parties of the contract bear in equal parts the costs of obtaining the payment guarantee.

To protect their financial interests, employers seek to structure payment terms so that the contract is "back loaded" with proportionately higher amounts due to be paid later in the contract period. Moreover, in the absence of a clear statutory restriction, employers link the starting point of their payment obligation towards the contractors with the final acceptance by the employers of all works of the contractor executed under a given phase of the development.

4.5 Terms of payment

Employers and developers should also be aware of the implications of the 2003 Act on Terms of Payment in Commerce. According to that Act, payments not made within 30 days from the date on which any service is provided or goods delivered attracts statutory interest from the 31st day, regardless of the contractual term of payment.

From the construction industry perspective, the above Act does not apply to agreements financed by international organisations of which Poland is a member or with which it has signed agreements on co-operation, and to agreements financed from non-refundable aid funds of the European Union, structural funds or the Cohesion Fund.

The Act increases the risk resulting from the employer's liability for subcontractors' fees. (See above.) It may turn out that, even if a sub-contractor is paid in full by a general contractor, the subcontractor will be entitled to claim interest directly from the employer if the payments were late.

4.6 Dispute Resolution Mechanism

Arbitration has become a standard method of dispute resolution under construction contracts in Poland. This is mainly because public courts in Poland are slow and, as a rule, trial judges do not have the required sector-related expertise. Currently, it is difficult to find a large construction contract without an arbitration clause. However, the parties to small construction contracts still prefer to leave dispute resolution to the public courts. (Court fees in public courts are significantly lower.)

For those using FIDIC and other international forms of contract, the use of a dispute adjudication board is a concept that developers and contractors operating in Poland are not familiar with. Alternative dispute resolution is yet to take root in Poland, and therefore consideration will need to be given to amending the part of the standard contract dealing with the above issues.

Pylon of Holy Cross Bridge in Warsaw
Photo by Paulina Matuszewska

letting

5.1 Introduction

Polish regulations on leases are in some ways old fashioned, with modern provisions on institutional or commercial leases still lacking. However, this does not mean that a decent institutional lease agreement cannot be signed. On the contrary, freedom of contract and the small number of mandatory provisions on leases (apart from residential leases) mean much can be accomplished.

5.2 Standard Forms

Up until now, no common model of a standard commercial lease has been adopted in Poland. However, core provisions of standard leases seem to be generally accepted. As a rule, every shopping centre, office building or warehouse owner has its own standards, and only certain terms and conditions are negotiable (and not the structure itself). Needless to say, the final outcome of such negotiations depends on the market position of the given scheme and the attractiveness of the potential tenant.

5.3 Letting agents

It is quite common for retail developers and managers to use letting agents, although some of them have their own in-house letting teams. It might be advisable for tenants (especially new entrants) to use agents as well. Many of the big international property consultants have been present on the Polish market since the mid-1990s.

5.4 Lease term and extension options

As mentioned in section 1.1.6, there are two types of lease agreements under Polish law, now both with a maximum fixed term of 30 years *(najem)* and *(dzierżawa)*. The 30 year maximum term of the lease *(najem)* applies only if the parties to the contract are business entities; if one of the parties is an individual or a legal entity not carrying out business activity, then the lease can be entered into for a maximum of 10 years.

In practice, the average terms of leases vary from three to 10 years, and in most cases the minimum required by the banks financing the development is five years. It is very rare to sign a lease for less than three years.

Extension options have become more and more popular on the market. It should be noted that, unlike other jurisdictions, in Poland the tenant does not have a statutory priority (or extension) right to conclude a new lease in the same premises. This matter is purely contractual. Extension options are legally binding provided that two conditions are met: (i) the total term does not go beyond 30 years and (ii) the essential terms of the extended lease are already specified (e.g. the rent).

5.5 Rent and service charge

Euro-denominated and CPI-indexed rent have become the rule in Poland although references to US dollars also happen. Certain retailers (basically supermarkets and hypermarkets) or big tenants are strong enough to negotiate a PLN-denominated rent, so that they do not incur any currency risk in Poland. The rent can be paid in foreign currency now. Because of the fact that VAT has to be paid by the landlord to the tax office in PLN, net rent is usually paid in foreign currency and the VAT component in PLN.

Apart from a monthly base rent, optional turnover rents are becoming more and more common (at least as a contractual provision, not necessarily put into practice) in the case of shopping centres and warehouses. This requires a relatively high degree of financial transparency of the tenant towards the landlord, and involves submission of official financial statements (monthly, quarterly or yearly). In shopping centres, in many cases the retailer's tills are connected to the landlord's computer system.

Base rent is usually payable monthly, whereas turnover rent is payable for various periods agreed in the contract. Two months' delay in the payment of rent (or service charge) authorises the landlord to terminate the lease if this default is not cured within an additional grace period of 1 month.

Leases need to make a very clear distinction between the rent and the service charge. Landlords tend to include as many items as possible in the service charge, but each individual case will depend on the market position of the landlord and the tenant. However, it is now more common for landlords to make a concession on the rent, rather than on the service charge. Usually, service charges include repairs, maintenance and upkeep costs of the common areas, management costs, insurance, security, consumption of utilities in the common areas and land tax. Where the building is developed on land held in perpetual usufruct, it might also include the annual perpetual usufruct fee. Building owners may also create sinking funds (in order to finance future major repairs) or marketing funds.

The service charge is usually paid in 12 monthly instalments (advances) calculated on the basis of a budget prepared by the manager. The actual amount of such monthly advances may vary during the year because of changes in the level of common costs month by month. Each tenant's share of the service charge budget usually depends on the area of its premises. However, weighting rates are applied to areas occupied by bigger tenants. It is also the case that certain tenants have caps on their service charge contributions, and others do not participate in certain categories of costs (e.g. marketing costs).

VAT at the rate of 23% applies to both the rent and advances towards the service charge. Common costs should be re-invoiced at their face net value with only the landlord's VAT added (unless the landlord is expressly authorised to margins on such costs). The tenant should seek the possibility of carrying out service charge audits.

There are three basic types of security in relation to rent and service charge payments. The most widely used and preferred by landlords with respect to smaller and medium-sized tenants is a cash deposit (usually three months' rent and three months' service charge plus VAT). Larger tenants deliver bank guarantees in the same amount. Anchors may get away with a parent guarantee, or even a letter of comfort.

5.6 Fit-out

Tenants are granted fit-out periods during which they have to prepare their premises for operation. Such periods are usually excluded from the lease period, at least for the purposes of rent payment. Any permits required for fit-out works are the responsibility of the tenant, but the landlord is obliged to co-operate in this respect. The design should be approved in advance by the landlord, so it may be advisable to attach it to the lease. The works are supervised by the landlord's site manager and the tenant has to take out an insurance policy covering construction risks.

In the "tenant market", fitting out premises is often offered as part of the incentive package for tenants.

Mermaid, symbol of Warsaw
Photo by Paulina Matuszewska

5.7 Upkeep, renovations and repair

Upkeep, renovations and repair of common parts is always the landlord's responsibility. This also applies to material parts of the premises, such as structural elements and common infrastructure.

"Fully repairing" leases have now become a standard, which means that the relevant costs are included in the service charge. Sinking funds are also created in order to finance capital repairs.

Any renovation in the building that affects the amenity of the tenant (e.g. access to the premises, visibility etc.) should be subject to consent. Many leases contain the tenant's upfront consent to such works, but they are only valid if they are specific enough (e.g. they define what kind of impact is allowed).

The upkeep and renovation of the premises are the tenant's responsibility.

5.8 Insurance

The rule is that the landlord insures the common areas and the tenant insures its premises. The premium paid by the landlord is usually recovered in the service charge. It is important to structure the relationships between various policies such that the scopes of insurance do not overlap. Otherwise there may be problems with the payment of indemnity as there may be a dispute between the insurers as to which of them is actually bound to pay, and in what proportion.

Tenants are also required to take out third party liability insurance for any possible damage to individuals or assets they (their employees, agents etc.) may cause in their operations. Sometimes they also take out "business interruption" insurance or "lost rent" insurance.

Landlords' policies are often assigned (at least conditionally) to the banks that finance the development. Tenants' policies may sometimes be assigned to the landlord and then further to the banks.

5.9 Early termination and indemnities

Fixed term leases may only be terminated in cases specified by law and by the contract itself.

The law authorises the tenant to terminate a fixed term lease if the premises have defects (whether existing at the time of signing or identified during the term of the lease) making them unfit for the purpose of the lease. The tenant must, however, grant the landlord a grace period to cure such defects and will not have the right to terminate if it knew about the defects when signing the lease. The tenant may also terminate the lease if the state of the premises (as delivered by the landlord) is dangerous to the health of its occupiers, even if it knew about this state when signing the lease.

The landlord is authorised by law to terminate a fixed term lease in four cases. Firstly, if the tenant breaches the provisions of lease concerning the use of the premises and fails to cure this default despite being granted a grace period; secondly, if the use of the premises by the tenant may result in their devastation; thirdly, if the activities of the tenant disturb neighbours (other tenants), make the use of other premises difficult, or if the tenant continually breaches internal regulations; and finally, if the tenant is in delay with rent (the law does not recognise service charges) payments for at least two settlement periods, and does not pay the arrears despite being granted an additional one-month grace period.

Lease contracts often provide for many more reasons for the landlord to terminate the lease, and usually make it difficult for the tenant to do so (save for his statutory termination rights described above). It should be noted that, in order for those contractual termination terms to be effective, they should be quite specific. It is not enough to say that the landlord will have the right to terminate the lease if the tenant is in breach of its terms.

The most typical contractual termination clauses include the following breaches by the tenant: unauthorised subletting, changing the scope of activities in the premises, stocking hazardous materials, failing to disclose financial information (in the case of turnover rent), carrying out unauthorised works etc.

A lease contract usually provides for contractual penalties to be paid by the tenant if the lease is terminated because of a breach of its terms. It should be noted that Polish courts have the right to lower the amount of such "liquidated" damages if they consider them excessive. Moreover, as a contractual penalty may not be stipulated for a breach of pecuniary obligations, such penalty cannot be imposed if the lease is terminated because of a lack of payment (which is by far the most common reason for a landlord to terminate).

5.10 Non-competition clauses in shopping centre lease agreements

In the 1990s, when the first modern shopping centres began appearing, it was quite popular to include a non-competition clause (a so-called "radius clause") in the lease which prohibited the tenant from opening a shop within a radius of x kilometres from the centre concerned.

Although there have been no recent major Polish cases concerning radius clauses, it is fair to say that such clauses run a risk of being found invalid because of a potential antitrust law infringement. The reason for this is that they may foreclose the market to other shopping centre operators and limit the choice of options to customers. With EU accession, the protection of competition and customers has become a very important issue for the authorities.

On the other hand, such clauses may often serve a legitimate business purpose, in particular by protecting the landlord from "free riding" by the tenant[1].

In practice, the assessment of a radius clause will normally be conducted on a case-by-case basis, attempting to determine whether the restriction imposed on the tenant is reasonable, justified, proportional and not excessively onerous. The landlord's market power in the relevant market[2] will also play a role, with dominant landlords or those enjoying substantial market power being allowed less freedom in imposing such clauses.

5.11 Enforcement by landlord

The landlord has a statutory pledge on all the tenant's assets (goods, equipment, other moveable property) within the premises. If the tenant is late with payment, the landlord may seize the assets and foreclose on them. The pledge does not release the landlord from foreclosure proceedings, which may be simplified if the tenant voluntarily submits to execution – see below. The pledge may only concern assets owned by the tenant, and secures debts due for less than 12 months.

The tenant's voluntary submission to execution (also discussed in section 3.5.3) is a common requirement of the landlord in retail leases. It enables the latter to leapfrog judicial proceedings and start enforcement much faster than usual. Submission to execution is signed by the tenant before a notary, and the entry into force of the lease is sometimes made dependent on the delivery of this notarial deed to the landlord. Submission to execution concerns two things: payments and the vacation of premises. However, the enforceability of submission to execution with respect to the vacation of premises may be questionable. (Standard submission deeds do not take account of certain statutory requirements.)

One of the common ways to "discipline" a tenant in delay with payments is to disconnect utilities. It should be noted that this is possible only if the lease authorises the landlord to do this on "reasonable" terms (e.g. a delay in payment justifying early termination, prior notice etc.). Otherwise the landlord would be liable for all damage incurred by the tenant owing to the disconnection of the utilities.

5.12 Change of ownership, enforcement by the landlord's creditors and bankruptcy

In certain cases, external circumstances may have an impact on the lease. Those include, in particular, a change of ownership of the building, enforcement by the landlord's creditors and bankruptcy of either party.

If the building (the asset, not the company) is sold to a third party, the new owner may terminate each lease subject upon statutory notice periods, unless three conditions are met cumulatively: (i) the lease has a fixed term, (ii) the premises have already been handed over to the tenant and (iii) the lease has a date certain. The "date certain" requirement is met if the lease has been executed as a notarial deed, or with signatures notarised, or if a public authority (e.g. a notary) made a dated mention on the copy. If a public document (e.g. a notarial deed containing the tenant's submission to execution) refers to a signed lease, it has the same effect. If none of those apply, it is advisable for the tenant to have a copy of the lease seen by a notary (who will affix a "date certain" to it).

If the landlord's creditor forecloses on the building and it is sold to a third party, the lease will not expire and the buyer will take it over. The lease must not be modified or terminated, either by the parties or automatically, in the case of bankruptcy of either of them, unless this is in compliance with the rules of the bankruptcy law, which are briefly described below.

If the landlord goes bankrupt, the receiver may terminate the lease with three months' notice. This may happen only if keeping the lease would make the sale of the asset (e.g. building) difficult, or if the rent is not at market rates.

1 The tenant's rent may often be a function of its turnover from the outlet in the shopping centre. Consequently, in the absence of a radius clause, the tenant may be incentivised to treat the shopping centre mainly as its advertising outlet, and channel a large bulk of its sales through a nearby outlet, located on more cheaply rented premises.

2 The relevant market is defined both in terms of the product and the geographic aspect. From a product side, the usual approach would be to define the market as lettable retail space in shopping centres (although even narrower definitions, limiting the market, e.g. to lettable retail space to upscale shopping centres, may be possible). From a geographic side, the market is usually defined by a given catchment zone surrounding a shopping centre – which may be limited to a part of a city in the case of bigger cities.

Termination of the lease by the receiver would, therefore, be a rare case. Any advance rent payment the tenant has made before declaration of the insolvency of the landlord – not including payment for the three-month period immediately following the date of declaration of insolvency – will have to be paid again – this time to the bankruptcy estate.

If the tenant goes bankrupt but the court's bankruptcy decision allows settlement with creditors, the landlord must not terminate the lease. The settlement may even prohibit the landlord from terminating the lease until the full execution of the settlement (which may take several years). The settlement may contain provisions to reduce and arrange instalments for rent and service charge arrears as at the date of the court decision, but not for future ones (if the lease is to be continued).

5.13 Residential leases

Residential lease agreements are governed by the Tenants' Protection Act.

The rules governing the leasing of private apartments are less stringent than those applicable to municipal apartments. However, in both cases the Tenants' Protection Act sets out very detailed regulations regarding increase of rent and termination by the landlord, which are extremely favourable for tenants.

One of the most significant deficiencies of the system is that it is almost impossible to evict a tenant because he or she must be provided with alternative/temporary premises; however, this restriction has been mitigated by a recent amendment, described below.

As a rule, in the case of lease agreements for an unspecified period, the tenant may terminate the lease agreement by serving three months' notice. On the other hand, in the case of the landlord, the term of notice varies from six months to three years, depending on the situation.

Rent may be increased every six months, upon three months' notice. Any increase of rent exceeding 10% annually gives the tenant the right to question it in court. There are also detailed rules covering how the rent increase process should be carried out.

Since January 2010 residential premises can be leased out under a special type of contract – an "occasional" lease agreement, which can be concluded for a specified period of time, no longer than 10 years. However, an occasional lease is available only for those who do not carry out a business activity in respect to leasing premises and concern only those premises which are used to meet housing needs and are not intended for the short-term housing of people.

An occasional lease agreement has to be concluded in writing and be submitted to the relevant tax office of the landlord within 14 days from lease commencement day. A tenant has to indicate in writing other premises which can be inhabited by him in case the landlord forces the tenant to vacate the premises. If the above conditions are met and the tenant voluntarily submits to enforcement proceedings executed in the form of a notarial deed, then the landlord in the case of earlier termination of the lease agreement can evict the tenant from the premises without going through court proceedings.

6. INSURANCE

During the development phase and after completion of a development project, the developer will normally carry a comprehensive "all risks" insurance policy consisting of casualty, liability and, sometimes, loss of rent or business interruption risks. The Polish insurance market is well served and comparable with that in other EU member states.

Lending banks will require casualty insurance to indemnify based on full replacement value, including demolition, site clearance, professional fees and re-permitting costs. If the project is rented, loss of rent cover for up to three years is available (though 2-year indemnity periods are more common). Lending banks typically require cover against acts of terrorism only if the building is a landmark or trophy building.

Indemnity limits for third party liability are generally lower in Poland than in Western Europe and significantly lower than in the United States, reflecting the fact that awards of damages for tortious and other civil claims are lower. Developers and lending banks normally rely on insurance brokers to advise on the appropriate indemnity limits.

It is quite common for insurers to agree to include loss payee, notices and non-cancellation clauses in policies where required by lending banks.

In transactions concerning real properties, there are two specific types of insurance (in Poland offered by two companies):

(i) "title insurance", i.e. insurance against legal defects that allows compensation to be obtained, usually amounting to 100% of the price paid in the event the risks identified during due diligence materialise. This insurance provides an alternative to an indemnity clause; and

(ii) "gap insurance", i.e. insurance against failure to enter certain rights in the mortgage register, is often required by banks providing financing for projects. Thanks to this instrument, the beneficiary's rights are insured until they are entered in the mortgage register.

It is common practice to take out insurance intended to cover the entire construction process. "Construction All Risks Insurance" (CAR) makes the insurer liable for any losses of the insured regarding unforeseen events during construction.

Third party liability (TPL) insurance provides cover for the developer when it is required to redress damage caused to anyone in consequence of a tort or to a contractor as a result of a default on a contract.

selling the scheme

7.1 What to sell

7.1.1 Choice

The two happiest moments in the life of a developer and an investor are when they acquire a property and when they sell it. The choice of method of sale lies, as in many other jurisdictions, between the sale of shares or the sale of assets.

7.1.2 Shares or asset

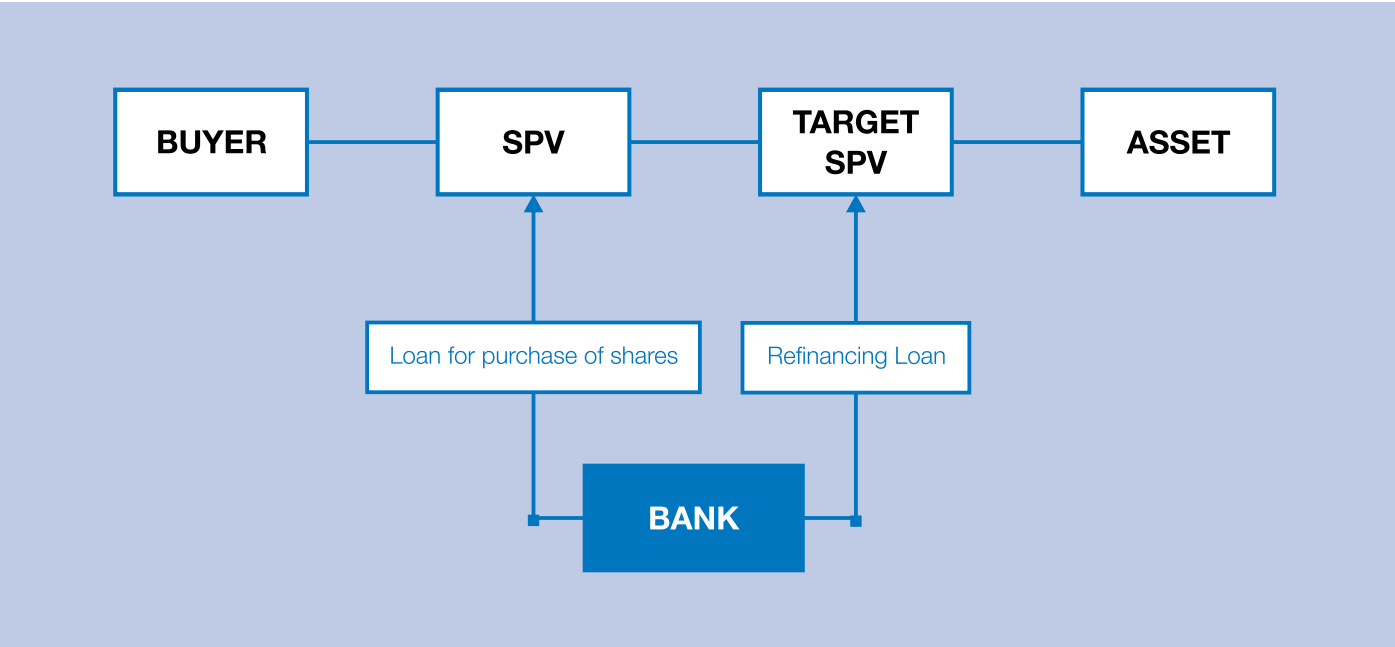
One of the specifics of the Polish property market is that the majority of property transactions are structured and conducted as share deals. For various reasons (mostly involving taxes and accessibility of proceeds), developers prefer to sell shares in the companies (mainly in special purpose vehicles established in order to carry out a particular development) holding assets rather than the assets themselves.

However, the best structure for a seller may not necessarily be beneficial for a potential buyer. It would be in his interests to establish the highest possible initial value of an asset, which is important for depreciation purposes of such assets and for future corporate income tax purposes (if the exit is considered to be through an asset deal). It is also more burdensome to efficiently structure the financing for a share acquisition. As external debt is used to finance part of the price payable for shares in a target SPV holding an asset, a buyer usually establishes a new SPV in Poland to borrow the funds, pay the price and acquire shares in the target SPV. Assuming that the target SPV has also borrowed some external debt arranged by the buyer to repay its prior existing loans, the structure upon acquisition would look like in the chart 2.

The above means that all the income from leases, and some tax-deductible costs (depreciation of the asset, interest on the refinancing loan), are left with the target SPV. The SPV (holder of the target SPV) has tax-deductible costs (interest on loan to purchase shares), while it has no current constant income to off set such costs. Therefore it requires a merger with its subsidiary (target SPV) to combine all tax-deductible costs and income generated by the asset. It also makes the flow of profits generated by the asset to the ultimate buyer much easier. Of course, this takes time and costs money.

A share deal results in the additional risk of there being undisclosed liabilities of the company holding the assets. This risk can be decreased, but not entirely eliminated, through a proper legal and tax due diligence of the asset-holding company.

Chart 2



Finally, only asset deals benefit from the "public warranty of land and mortgage registers" (discussed in section 1.2.1), which provides additional security as to the existence of the title to the property itself and the encumbrances.

The cost of a share deal is 1% stamp duty and relatively low notarial and registration fees. Stamp duty on asset deals is 2%, and notarial and court fees are also higher. However, the sale of an asset is usually subject to 23% VAT (unless the sale is exempt from VAT). This VAT is imposed both on the land price and the building price and is fully recoverable. It is common practice to take out a separate loan in Polish zlotys to finance VAT. The recovery takes (depending on circumstances) from 25 days to 180 days.

7.1.3 Preparing the legal structure of the project

The situation is quite straightforward if a developer/investor sells its stand-alone asset or an entire scheme (like a multiphase logistics park). It becomes more complicated when it decides to sell only part of it (for example one building from the entire scheme). In this case, the developer has to consider a number of issues. Are the individual buildings and plots on which these buildings are located properly divided? Is access to the building being sold, and to all other buildings which remain with the developer, properly secured through, for example, cross easements over the "common areas", transferring the roads to a separate company or creating a co-ownership structure under which all the individuals co-own the "common areas"? Do all the buildings have separate utility connections allowing them to function separately? How is the cost of maintenance and repair of the common areas split among the owners of individual buildings? All these questions should be considered much earlier – at the time the development is being planned. Lack of consideration at that stage will certainly cause additional costs and problems at the time an asset is sold. Any defect in this respect may be priced by the purchaser or can make the disposal of individual assets impossible or in a best case scenario, more difficult.

7.1.4 Selling the premises

In certain situations the subject of the sale is limited to a part of the building only. This situation is typical for sales of shopping malls forming part of large shopping centre schemes.

Two criteria should be met in order for premises to constitute separate properties, and therefore to be sellable. They must be “independent” (which must be confirmed by a certificate of a local architecture department) and legally separate. (A notarial deed must be signed creating the premises and a separate mortgage register should be established.) Legal separation may take place upon sale.

The ownership of separate premises carries with it a relevant share in the ownership (or perpetual usufruct) of the land on which the building is located and in the ownership of "common areas" of the building (i.e. entrances, staircases, lifts, structural elements, roof, façade, installations etc.). The share is calculated as the proportion of usable area of given premises to the usable area of all premises within a building. Therefore the subject of the sale is the ownership title to the premises, a share in the "common areas" and a share in the ownership (or perpetual usufruct) of the land on which the building is located.

The owners of separate premises establish by law a condominium. If there are seven or fewer premises within a building, the general provisions of the Civil Code applicable to co-ownership will govern the management of the common areas and land on which the building is constructed. If there are more than seven premises (both separated and not separated) in the building, the rules set out in the Act on the Ownership of Premises of 1994 are applicable; although the owners can modify these rules by agreement.

7.2 When to sell

Usually, developments are sold once they have been completed and let. However, it is becoming more common on the Polish market to precontract the sale of the investment before it is completed and/or fully leased. In such a situation, a developer is often obliged to complete the construction, obtain necessary permits allowing the occupation and operation of the asset, and sometimes to continue the leasing process during the agreed lease-up period. The completion of sale, transfer of title and payment of the price are often triggered by achieving the agreed percentage of leased premises in the building. As a result, a price adjustment mechanism is agreed on to reflect the progress in leasing the scheme and the additional income stream.

Another approach to this issue is demonstrated in the situation where the seller enters into a "master lease" under which it pays the buyer an agreed guaranteed rent, and further sub-leases the asset to final users or arranges for the release of the area leased under the master lease to new tenants who will enter into direct leases with the landlord. This mechanism allows the income stream from the investment to be secured for the buyer and for the price to be established at a higher level than would be possible if the scheme was not fully leased.

7.3 How to sell

7.3.1 Preliminary sale agreement and final agreement

The majority of property transactions on the Polish market are completed in two stages. During the first stage, the parties enter into a preliminary sale agreement pursuant to which they are obliged to transfer the shares or asset upon meeting certain conditions. (See section 1.6 for details.) These may be business or regulatory conditions, such as the purchaser's obtaining antimonopoly clearance for the acquisition of the shares or asset. Antimonopoly clearance for the acquisition of shares will be required if the total turnover of the parties to the transaction and their groups of companies exceeded 50,000,000 euro in Poland or 1,000,000,000 euro worldwide in the previous financial year.

If this turnover threshold was exceeded, then antimonopoly clearance will still not be necessary if the turnover of the target and its (direct or indirect) subsidiaries in Poland did not exceed 10,000,000 euro in either of the previous two financial years. In asset deals, it is worth noting that this turnover is calculated on the basis of the turnover related to the asset constituting the subject of the transaction (and not the total turnover of the company holding the asset), provided that the assets to be purchased constitute part of the business of the holding company and not the whole business. On the other hand, with respect to the need to obtain antimonopoly clearance, the turnovers of "groups of companies" (i.e. all companies directly or indirectly controlled by one and the same ultimate parent company) is treated by the Antimonopoly Office very broadly, and should be calculated very carefully. Purchasers should verify whether, according to their own jurisdiction, the acquisition of shares or assets in Poland requires antimonopoly clearance.

The need to enter into a preliminary agreement is sometimes caused by the fact that Polish law does not allow for the conditional sale of real estate. This limitation does not apply to share deals, but for some practical reasons (difficulty in establishing whether all the conditions have been fulfilled and when the title to the shares finally passes to the purchaser) two-stage transactions are also recommended in this case. The preliminary agreement should also establish clear criteria concerning the rights and obligations of the seller in respect of the operation of the asset/target company in the interim period between the execution of the preliminary sale agreement and the transfer agreement. A preliminary agreement, like a transfer agreement, should be executed as a notarial deed (for the sale of real estate) or with the signatures of the parties certified by a notary (for the sale of shares).

7.3.2 Warranties

The most heavily negotiated provisions of preliminary sale and final agreements are usually the seller's warranties. The scope of such warranties is much broader in the case of a share deal as they have to cover corporate, financial, tax, litigation and other issues. If an asset deal is being considered, the scope of the warranties will usually be limited to the particular asset and its legal and physical state, leases, construction and environmental issues. The parties often try to change the period during which the buyer is entitled to make a claim owing to a breach of different categories of warranties and to limit the scope of the damages that can be claimed by the buyer. There is no standard warranty in the market, and warranties vary depending on the selling/buying powers of the parties, or even nationalities of the parties involved and their expectations.

It should be noted that the nature of warranties and consequences of a breach of warranties should be specified in the relevant agreement very carefully because Polish law does not address this issue sufficiently.

7.3.3 Price

Polish law requires that the price, or at least a price-fixing mechanism, be agreed in the preliminary agreement. When the price for the shares is considered, apart from the value of the asset, the parties should agree to an adjustment of the price to reflect the receivables and liabilities of the target company. Such an adjustment is often made on the basis of the company's balance sheet as at the date of executing the final agreement. The price established in the transfer agreement may also be adjusted to reflect, for example, progress in leasing the scheme after transferring shares or an asset. Such post-closing adjustments create certain tax and bookkeeping consequences that should be considered beforehand.

7.3.4 Financing

Almost every property investment is financed by external debt. Before selling the scheme (regardless of whether an asset deal or share deal has been agreed), the parties should agree on whether the purchaser would like to retain the existing debt, repay it or refinance it and replace the existing debt with a new one. The last approach requires an arrangement between the old and new lender in respect of establishing security (usually only mortgages) over the asset before repayment of the existing debt. Various mechanisms are put in place, including: escrow; undertakings of the existing lender allowing the establishment of a second ranking security for the benefit of a new lender; and releasing undertakings of the new lender to release its second ranking security if refinancing fails.

costs

8.1 Transactional costs

8.1.1 Introduction
The level of notary and registration fees depends on various factors: in particular, on the value (price) of the property, but also on the parties (e.g. private or public bodies) and the category of the property (e.g. agricultural or commercial). They are subject to statutory rates and are calculated based on degressive rates with caps. In general, if the agreement is signed in the form of a notarial deed, the notary collects all payments.

8.1.2 Notary fees
Fees are payable for the preparation of a notarial deed. In general, the maximum notarial fees are reasonable and usually negotiable.

In share deals, the notary fee is charged per certified signature and is capped at PLN 300.

23% VAT is added to notarial fees.

8.1.3 Registration fees
The fees for registration of title and various property rights amount to PLN 200. There are also fixed fees for other actions relating to registration of other property rights, and to mortgage register books, that are generally set between PLN 60 and PLN 150.

8.1.4 Transfer taxes
In general, sales made by business entities will be subject to VAT while sales made by individuals not conducting business activities (who are not considered taxpayers within the meaning of the VAT Act) are not subject to VAT. The basic rate of Polish VAT is 23%, but an 8% rate applies in certain cases (e.g. sale of apartments).

If the sale of real property is not subject to VAT, it is subject to transfer tax at a rate of 2% (asset deal) or 1% (share deal). The sale of agricultural properties is not subject to any transfer taxes.
The notary is responsible for collecting transfer tax (the tax burden is levied on the buyer) and registration fees. VAT is paid directly by the buyer to the seller, who then settles it with the tax office.

8.2 Costs of holding real estate

8.2.1 Real estate tax
At present, land, buildings and building structures related to commercial activity will be subject to real estate tax. The tax is payable by owners, co-owners, perpetual usufructuaries, possessors, co-possessors and in several cases lessees of public properties. The tax is based on area in the case of land, and on useable area in the case of buildings. The rate of tax is defined by the City council, but there is a statutory cap. Currently, the tax on land related to commercial activity may amount to up to PLN 0.80 per sq.m in 2011, while for buildings related to such activity up to PLN 21.05 per sq.m in 2011.

Property tax returns should be filed by 15 January each year, and any tax due should be settled in 12 equal monthly instalments by the 15th day of each month.

8.2.2 Perpetual usufruct fee
Holders of a perpetual usufruct right are obliged to pay the annual perpetual usufruct fee by 31 March of each year. The annual fee is calculated on the basis of a rate applicable to the land and the value thereof. The rate is 3% if the land is designed for commercial purposes, and 1% if it is designed for residential purposes. The City council may increase the fee by revaluing the land. The revaluation may take place only once a year. A holder of a perpetual usufruct right may appeal against the increase of the annual fee to the appeal committee *(Samorządowe Kolegium Odwoławcze)* and then to civil courts (two instances). During the appeal proceedings, the user pays the old amount of the fee and no interest accrues. In practice, many disputes are resolved by settlement.

8.2.3 Public infrastructure fee
Owners should participate in the costs of public infrastructure developed by local authorities. The public infrastructure fee is calculated on the basis of the increase in the value of a property owing to the development of infrastructure and a percentage rate adopted by the City council (not to exceed 50%). The payment of the fee may be imposed by the mayor of a municipality within three years following the development of the infrastructure. The decision imposing the fee may be appealed against to the appeal committee and further to the administrative courts.

It is worth noting that the holders of perpetual usufruct rights do not participate in these costs. It is deemed that the perpetual usufruct fee covers the costs of public infrastructure.

8.2.4 Re-zoning fee
Usually, the market value of land increases or decreases as a result of the adoption or modification of a master plan, or as result of subdivision of land. This is because the master plan determines how the land may be developed. Similarly, the configuration of land may have an impact on its value.

If the market value of land decreases (but the owner may still use the land in the same manner as before the modification or adoption of a master plan), then the owner (or holder of the perpetual usufruct) may demand that the local authority (the City) pay compensation equal to the decrease of the value of the land calculated as at the date of sale. Such a claim may be raised only if the owner sells or otherwise transfers the title to the land, but not later than five years from the adoption or modification of the master plan. In extreme cases, when the current use of the property is not possible following the adoption or modification of a master plan, the owner of the land may demand that the local authority buy the affected land.

More frequently, the value of land increases as a result of the adoption or modification of a master plan, e.g. a green-field is re-zoned as land on which a shopping centre may be built. In such a case, if the owner sells or otherwise transfers the title to the land (e.g. by means of an in-kind contribution to a company) within five years from the adoption or modification of the master plan, the City will charge a re-zoning fee. The re-zoning fee may not exceed 30% of the increase of the value of the land calculated as at the date of sale. The percentage for calculation of the re-zoning fee must be provided for in the master plan.

Establishing a proper holding structure upfront may help to avoid payment of the above fee.

8.2.5 Exclusion from agricultural use

Since January 2009, under the Amendment to the Act on Protection of Agricultural and Forested Land of 1995, agricultural land *(użytki rolne)* within municipal borders will no longer be restricted to agricultural use by operation of law.

As a consequence of that Amendment, the investment process carried out within municipal borders changed with respect to real estate comprising agricultural land – it is no longer necessary to "de-farm" a piece of real estate.

In connection with the abolishment of the obligation to go through the de-farming procedure within municipal borders, the investor is no longer obliged to incur charges or annual fees provided in abovementioned Act.

Properties legally recognised as farmland and forest, located outside towns or cities, can only become non-agricultural (or non-forest) if special conditions are met. First of all, the Act on Protection of Agricultural and Forested Land may require the local master plan to be in force and provide for such area to be used for non-agricultural (non-forest) purposes. If the local master plan is required but is not in force, then no investment falling outside of the scope of the current use is allowed.

Secondly, the investor must obtain a special decision excluding a given site from agricultural (or forest) use. Following the issue of the decision and the actual change in use of the site, the investor will be obliged to pay an initial fee, and then 10 consecutive annual fees (equal to 10% of the initial fee). The actual amount of these charges depends on the class of the agricultural land or forest. The fee as provided in the Act on Protection of Agricultural and Forested Land varies from PLN 87,435 up to PLN 437,175 per hectare of farmland. The fee for exclusion of forestry land is calculated per cubic metre and it ranges from PLN 250 up to PLN 2,000. It should be noted that the initial fee is decreased by the market value of the property, which in most of cases means that it is not payable at all. If the property is sold, the obligation to pay the annual fees passes to the purchaser.

National Stadium in Warsaw
Photo by Michał Matera

environmental law

9.1 Introduction

Regardless of whether the project involves development of a power plant, hotel, highway or school building, certain environmental law issues must be taken into account by the developer before it launches the works. As already indicated in point 2.6, the development of land in many cases requires an environmental impact assessment. Also before acquiring land for development, most developers undertake some due diligence as to soil and ground water contamination as liability for contamination in some cases transfers with the transfer of title to the land. The environmental law aspects can play a crucial role in the development and investment process.

9.2 Overview

9.2.1 Poland in the EU

A significant part of Polish environmental law originates from European law. From 1 May 2004, the date of Poland's accession, EU environmental law applies to Poland, subject to certain temporary derogations. The process of fine-tuning the new legislation will still continue for few years.

9.2.2 Transitional periods

Envisaged in Chapter XII of the Accession Treaty were certain transitional periods for Poland in respect of a number of sectors. Some of the transitional periods have already passed, but Poland still benefits from some of the temporary derogations including:

- waste landfills until 31 July 2012;
- treatment of urban wastewater; four different derogation periods were agreed on depending on the size of the agglomeration.

Poland has also obtained the following derogations from the EU Large Combustion Plant Directive 2001/80/EC (LCP), but only for certain power plants and combined heat and power plants (CHPs) that are on lists attached to the Accession Treaty:

- from 1 January 2008 to 31 December 2015 – for SO_2 emissions;
- from 1 January 2008 to 31 December 2017 – for dust emissions;
- from 1 January 2016 to 31 December 2017 – for NO_2 emissions.

9.3 Environmental Protection Act

The Environmental Protection Act 2001 (the "EPA") was originally intended as a framework environmental statute. Although, in practice, this has not been fully implemented, it does contain certain basic legal concepts, such as general rules on the granting of environmental permits as well as the rules of determining the costs of exploiting the environment. The EPA contains specific provisions on civil and regulatory environmental liability, including provisions on environmental fees and fines.

The EPA details the specific structure of environmental standards, all of which must generally be observed. These are environmental quality standards that relate to the quality of the environment (for example: ambient air quality standards for sulphur dioxide) and maximum admissible emission/discharge standards (for example: maximum sulphur dioxide emission from a power plant boiler of a specific rated capacity). Additionally, the EPA provides that specific emission limit values are to be determined individually for each installation that requires an integrated permit (the IPPC regime).

9.4 Integrated Pollution Prevention and Control (IPPC Regime)

The EPA includes framework provisions for the transposition of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control ("IPPC Directive"). Annex I to the IPPC Directive has been transposed in its entirety in the form of the Minister of the Environment Regulation of 26 July 2002 on Installations Causing Significant Pollution to Specific Elements of the Environment or to the Environment as a Whole (the "IPPC Regulations"). The IPPC Regulations list the industrial activities falling under the IPPC regime. The IPPC Regulations specify which installations fall under the integrated permit requirement. Non-IPPC installations are covered by a different permitting system within which sectoral environmental permits are required. (See 9.5 below.)

If a company is covered by the IPPC regime, it can apply for a single environmental permit (integrated permit) for all activities on a site. An integrated permit replaces an air emission permit, a wastewater discharge permit, a waste permit and a water permit. An integrated permit also covers non-IPPC installations situated on an industrial site if the operator of the IPPC installation applies for this.

9.5 Permits

The operation of the non-IPPC installations requires separate environmental permits for particular activities on the site. The general rules on the granting of permits, or other related relevant issues in this regard, are contained in the EPA. In accordance with EPA provisions, the relevant environmental protection authority may issue the following types of permits (in addition to the integrated permit discussed above):

(i) air emission permit,
(ii) wastewater discharge permit,
(iii) waste permit.

However, specific obligations can also appear on the grounds of the Water Act (e.g. the obligation to obtain a water permit) or the Waste Act.

Moreover, as far as waste permits are concerned, depending on the type of waste and the volume generated, the operator can be required to obtain the approval of the hazardous waste management programme.

Another type of permit is one that needs to be obtained by entities engaging in any activity associated with the shipment, recovery or recycling of waste. Pursuant to the Waste Act the regulatory liability for waste transferred to a third party, i.e. the potential liability to pay fines and to clean up the place where the waste is illegally deposited, would only be transferred to a waste disposal contractor in a case where such contractor had obtained a permit for its operations.

The environmental rights and duties resulting from permits under the EPA (i.e. permits associated with emissions from an installation) are transferable subject to the prior consent of the environmental authority (Article 190 of the EPA). Moreover, before acquiring an installation an interested party may apply to an environmental authority for a permit that would become effective once the transaction was effected. This mechanism enables a potential purchaser to confirm the environmental conditions imposed on the future operator before the acquisition. The permit expires if the legal title is not transferred or established within 1 year from the date the permit is issued.

All permits are issued by the *starosta*, marshal of voivodship or the Regional Environmental Protection Directors, depending on the type of activity involved.

9.6 Liability

9.6.1 Types

Operators of industrial facilities may suffer liability from the application of the administrative, criminal or the civil law regime. In practice civil liability has been less frequent to date, despite a very liberal approach by Polish courts to the establishment of the causal link in environmental cases. Administrative sanctions are the most common method of enforcing environmental requirements. Environmental enforcement officers impose fiscal measures rather than criminal penalties on companies.

9.6.2 Administrative liability

Regulatory liability is enforced by public authorities vis-à-vis private parties, i.e. operators of installations and other polluters. Consequently, the position of the parties to the proceedings is not equal. Any decision of a public authority can be appealed against to a higher authority and ultimately, to the Administrative Court, which reviews the decision on points of law only.

Regulatory orders to cease the activity in question can be issued by environmental authorities if specific legal conditions are fulfilled. These include a significant deterioration of the condition of the environment or a threat to human health. If an installation is operating either without an integrated permit where one is required or in contravention of an integrated permit for more than 6 months, then the environmental enforcement authority is required to issue a regulatory order to require the cessation of the activity.

Fees constitute an economic instrument for environmental protection, therefore they bear more similarities to taxes than to compensation for environmental damage. Under the EPA the similarities between environmental fees and fines and taxes have been further enhanced, as Chapter III of the Tax Ordinance Act was made applicable to fees. Fees are payable for air emissions, for the discharge of wastewater, for the abstraction of underground and surface water and for the storage of waste. The rates per unit of emission/discharge and the methods of calculating the amounts payable are provided for in the EPA and in secondary legislation.

Increased fees are payable for operating without a permit for the emission of gases or dust into air and for the intake of waters or the discharge or sewage into waters or into the ground. From a functional perspective they are equivalent to a fine for not obtaining a permit in time. They amount to 500% of the fees that would have been payable if the permit had been obtained. Increased fees are payable in addition to regular fees for emissions. Increased fees are also paid for illegal storage of waste.

Fines are payable for an infringement of the conditions of a permit. Even though they are referred to under the EPA as an economic instrument and are imposed in administrative proceedings, in fact they have a penal function. However, fines are often subject to a specific "debt-to-environment swap" under the EPA. This mechanism enables the operator to apply to the environmental authority for the suspension of a fine and the subsequent investment into an abatement technology aimed at terminating the reason for the fine. If an amount equivalent to the fine is spent, the fine will be cancelled. Similar rules apply to increased fees. The mechanism is criticised as promoting "end-of-the-pipe" solutions and resulting in a lack of any responsibility for infringements of permit conditions on the part of operators.

9.6.3 Criminal liability

The Polish Criminal Code of 1997 contains a number of criminal offences in relation to the environment. At present penal sanctions under the Polish Criminal Code can only be applied to natural persons. However, Polish law does recognise the concept of criminal liability of corporations, therefore in some cases penal sanctions can be imposed on corporations. Criminal liability of corporations is a consequence of a conviction of natural persons, as envisaged under the Act on Liability of Corporate Entities for Acts Subject to Criminal Sanction of 28 October 2002. Once a natural person is convicted, e.g. managers responsible for the act or omission constituting a criminal act, penal sanctions could also be imposed on a corporation in a situation where the corporation benefited from the criminal act of such natural person acting in its name. These sanctions could consist of fines, prohibitions to participate in public tenders or benefit from state aid schemes. However, the practice of the Polish courts to date shows that that this Act has very limited significance.

National Stadium in Warsaw
Photo by Michał Matera

9.6.4 Civil liability

Pursuant to Article 435 of the Polish Civil Code, strict liability rather than fault-based liability applies to damage caused by the operation of an industrial facility that is put into motion by so-called natural forces, i.e. steam, gas, electricity, etc. The EPA extends the operation of Article 435 to all facilities that, due to the presence of hazardous substances, would be defined as causing an increased risk or high risk, irrespective of whether or not the said facilities are put into motion by natural forces. This classification of substances is meant to reflect the Seveso II Directive (96/082).

Civil liability for damage resulting from impact on the environment can occur irrespective of the terms and conditions of regulatory permits obtained by the defendant. Hence, it is not an effective defence for the operator to prove that the terms and conditions of such permits have been observed. The only available defences would be *force majeure*, an act of a third party or the fault of the party who suffered damage.

The EPA includes a number of provisions which constitute departures from traditional civil law concepts. These include Article 326, which provides that the polluter is obliged to reimburse any party who restores environmental damage caused by the polluter, to the extent that the costs incurred are justified.

Any party can demand that an unlawful impact on the environment be discontinued even if such party has not yet suffered damage because of the action, but may suffer damage due to it (precautionary action). The claimant can demand that the defendant uses appropriate abatement techniques and it is only where this proves impossible or particularly difficult that the court can order the activity to be discontinued. Moreover, the EPA authorises the State Treasury, local government authorities and NGOs to bring claims on behalf of the general public in cases where the damage is likely to affect the environment as a common good, i.e. when damage can be attributed to the general public.

"Impact on the environment" as defined under the EPA includes impact on human health. Therefore, all civil law rules on exemplary damages and pensions awarded to persons whose health has been impaired would be applicable to cases where environmental damage under the EPA had impaired the health of a person.

9.7 Contaminated Land Liability Regime

9.7.1 Overview

The contaminated land liability regime introduced in EPA and the Transitional Act finally became effective on 19 October 2002 (when the Ordinance of the Minister of the Environment on Soil Quality Standards came into force – see below). Almost 5 years later, in April 2007, a new Act on Prevention and Remedying of Environmental Damage 2007 (the "PREDA") came into force implementing into the Polish legal system the provisions of Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage ("Environmental Liability Directive"). The PREDA introduced new rules regarding contaminated land liability, but did not repeal the former regime: while the EPA contaminated land regime only applies to "damage to the environment" (soil and subsoil) which occurred before 30 April 2007, the PREDA is applicable to an "imminent threat of damage" or "damage to the environment" occurring after 30 April 2007. The relationship between the two Acts is complicated and not easily reconciled.

Land which does not comply with the soil quality standards set out in the Ordinance of the Minister of the Environment on Soil Quality Standards can be considered contaminated land. This definition does not cover groundwater, although there has been a controversial interpretation by the Ministry of the Environment that in certain cases groundwater is also covered.

Under the EPA contaminated land regime, the *starosta* was the enforcement authority and later, under the PREDA, the competences of the starosta with this respect have been taken over by the voivode. Currently the Regional Environmental Protection Directors are enforcement authorities with respect to damage to the environment.

9.7.2 Obligation to clean up

The entity using the environment which causes the "imminent threat of damage" or "damage to the environment" (or – in case of damages that occurred before April 2007 – the holder of the land) is legally obliged to clean it up. It should apply to the Regional Environmental Protection Director for a clean-up decision. The clean-up decision states the method, scope and the date of completion of the clean-up. If the owner of contaminated land has not applied for a clean-up decision, the regulator can order clean-up. The order will require such remediation as is necessary to bring the environment back to a condition where soil quality standards are met.

9.7.3 Parties liable

The EPA contaminated land regime introduced a new principle: that the holder of contaminated land is liable for cleaning up the contamination. However, if the registered title-holder is a different entity than the actual holder of the land, the title-holder is liable (for example, when land is subject to perpetual usufruct). The old principle of "polluter must pay" has not, however, been removed from the EPA. Under this principle, the liability for clean-up rests with the person who caused the contamination. The principle applies, for example, to accidental pollution. It also applies to liability for ongoing damage to the environment under the PREDA.

In consequence, generally, the land contamination that occurred before 30 April 2007 is, as a rule, governed by the provisions of the EPA and is based on the principle of the "holder of land" liability. The environmental administrative liability for contamination caused after that date is governed by the PREDA and is based, as a rule, on the "polluter pays" principle.

In case the "holder of land" liability applies, the holder of land cannot be released from liability by claiming that the damage was caused by a third party before the holder obtained legal title to the land. This results from the basic legal rule that liability is transferred together with the legal title to land. However, if a third party caused pollution after the holder acquired the property and after the entry into force of the EPA and the holder is able to prove this fact, the holder will be released from liability. If the owner is released from liability, the regulator cleans up the land and seeks reimbursement of costs (as a tax liability) from the actual polluter. Both the holder and the polluter would be jointly and severally liable for clean-up if the holder knowingly permitted contamination to occur, even though it was caused by a third party.

9.7.4 Liability of former owners

Contamination of purchased land can be considered a defect and can result in the former owner's liability pursuant to the Civil Code warranty provision (Article 556 of the Polish Civil Code). Under this provision, the seller is liable to the buyer if the asset sold has defects or lacks other relevant properties which reduce its value or use with respect to the purpose stipulated in the contract or to other relevant circumstances. However, if the seller successfully proves that the buyer knew about the defect when the contract was being concluded, the warranty is excluded.

9.8 EIA Act

Due to the fact that the European Commission has found the Polish regulations on environmental impact assessment as not being fully compliant with the respective EU regulations, a new act has been passed in order to ensure compliance, namely the Act on access to environmental information, public participation in environmental protection and environmental impact assessment of 3 October 2008, which came into force on 15 November 2008 (the "EIA Act"). The EIA Act repealed the relevant regulations of the EPA with respect to EIA procedure, access to information and public participation in environmental protection.

9.9 Environmental Impact Assessment of Projects ("EIA")

A number of public as well as private projects are subject to an environmental impact assessment. According to the EIA Act, an EIA is or can be required for:

- projects for which an EIA report is mandatory (List I) i.e. projects likely to always significantly impact the environment;
- projects for which a screening process is applied to determine whether an EIA report is required (List II) i.e. projects likely to potentially significantly impact the environment; and

- projects other than the projects on List I and II that are likely to significantly impact Natura 2000 sites (a European network of protected sites).

The threshold for requiring an EIA for projects likely to significantly impact the environment (both List I and List II projects) is defined on the basis of the Council of Ministers Ordinance of 9 November 2010 on undertakings which may significantly affect the environment ("EIA Regulations") (previously it was set in the Council of Ministers Ordinance of 9 November 2004 on projects that require an environmental impact assessment to be drawn up and on criteria for the determination of projects that require an EIA report).

The EIA Regulations are generally based on the Environmental Impact Assessment Directive (85/337).

In case of List I and List II projects, the investor is required to obtain decision on environmental conditions of the consent to implement the project ("environmental decision"). Only then can the planned project be implemented. In such case the EIA procedure is undertaken within the procedure for issuing the environmental permit. Before issuing the environmental decision, the issuing authority consults with certain environmental and sanitation authorities on the conditions of the EIA permit.

In case of projects likely to significantly impact Natura 2000 sites, the EIA is undergone within the procedure for issuing a project permit (in particular, building permit).

Public participation is automatic in cases where an EIA report is drawn up.

9.10 Access to Information

Public authorities are obliged, subject to certain limitations, to make available to the public any information concerning the environment. Any interested party can take advantage of this obligation without being required to prove direct and individual interest. The obligation to reveal information is very broad and practically all applications for permits, environmental impact assessment reports, post-completion reports, mandatory environmental audit reports, monitoring data and fees and fines payable by an operator must be revealed. Document registers are to be drawn up for the purpose of facilitating access to environmental information by the public.

The definition of "public authority" covers any entity engaged in performing any public duty related to the environment. An operator may request that certain information be excluded from public access in particular by reason of its potential impact on the competitive position of the operator.

9.11 Public participation

The public has the right to participate in proceedings for the granting of an integrated permit and those in which it is required that an environmental impact assessment report be drawn up. Public participation has limited scope as it amounts to the right to file motions and complaints. Since the public does not enjoy the right of a party to the proceedings, the public authority is under an obligation to review the motions and complaints and to refer to them in the justification of its final decision. The scope of public participation and the access of the public to justice on environmental matters is very limited despite the fact that Poland ratified the Aarhus Convention.

The procedure consists of letting the public know about the proceedings by way of making a public announcement giving 21 days for public review and for submitting motions and complaints. A public hearing may be scheduled but is not mandatory.

When the statute requires participation of the public in the regulatory proceedings (integrated permits and environmental impact assessment proceedings), environmental NGOs are authorised to participate in them "acting as a party" (Article 44.1 of the EIA Act). They have the right, among others, to appeal to administrative courts without requiring consent from any other party to the process.

NGOs in Poland often co-operate with local pressure and interest groups. The established national network of environmental movements has proved to be very effective.

9.12 Emissions Trading

Since 1 January 2005, EU Member States have participated in the EU Emissions Trading Act on Emissions Trading (transposing to the Polish legal system the provisions of the Scheme (the "ETS"). In Poland the existing emissions trading scheme is based on the 2004 activities, e.g. operation of professional power plants, cement or glass industries. Companies Emissions Trading Directive 2003/87/EC). Generally, it applies to specified heavy industrial participating in the emission trading scheme in Poland are required to obtain permits allowing them to participate in the ETS.

appendix

Investing In Infrastructure - A New Option For Developers In Poland

The availability of the EU funds and the EIB financing is shrinking so the financial means that Poland has in order to develop infrastructure in 2011 are even more insufficient to meet the demand than a year earlier. There is also a growing concern about the increasing public debt, which results in a number of investments in infrastructure (a number of road projects, most recently) being put on hold.

Investment in key transport, sports and telecommunications infrastructure is still boosted in preparation for the UEFA EURO 2012 football championships, co-hosted by Poland and Ukraine. But in parallel, almost all of the large Polish municipalities have invested considerable funds in the development of social infrastructure and urban regeneration projects. The scale of investment needs encourages the public sector to look for new ways of funding projects under various finance schemes with the participation of private investors.

A comprehensive legal framework enabling the implementation of PPP schemes is already in place with the new Act on PPP and the new Concessions Law. The new laws provide for flexibility in building contractual and financing arrangements with private partners. In addition to standard PPP, a number of projects may still be implemented under various special-purpose-vehicle schemes, allowing the private partner to exit the project relatively quickly without engaging in long-term operation and maintenance, thus increasing the bankability of the project. Interestingly, municipalities are now ready to engage in PPP projects whereby as consideration for expenses incurred by the private investor in developing public infrastructure or constructing buildings important to the municipalities, local authorities are willing to transfer attractive properties to the private partner or engage in the implementation of joint property development projects.

Poland's famously under-developed road system has finally started to improve, and the Polish Motorway Agency has become the largest employer in Poland for several domestic and foreign construction companies.

Approximately 95 per cent of the railway stations owned by PKP, the state-owned railway company, are crying out for immediate investment. Many municipalities have realised that without their active involvement, even commercially well-located railway stations may remain undeveloped and become a symbol of "indolence". A €240 million re-development project for Katowice's main railway station is, however, the only big project under way, where a private investor is involved. Many other PPP-like railway station re-developments (most notably in Warszawa, Poznań, Szczecin and Łódź) are still in their preparatory stages. In addition, the Ministry of Infrastructure is currently pursuing its legislative initiative to introduce the concept of "flying freehold" into Polish law. This is expected to facilitate projects where the ownership of the underground infrastructure (e.g. a railway line) should not interfere with the ownership of the buildings (e.g. shopping centres).

There are also a number of other urban regeneration initiatives. Several of these projects have the potential to become commercial developments, especially for retail units, offices and hotels. It is believed that underground car park projects (for example in Warszawa, Kraków and Katowice) have an unprecedented potential for success (for financing reasons).

Almost all large Polish cities are interested in the construction of incinerating plants. Białystok, Koszalin, Szczecin, Bydgoszcz, Łódź, Katowice, Kraków, Poznań and Warszawa have expressed their desire to implement such projects. In Poland, only 4.5 percent of waste is recycled and composted. Therefore there is a chance that this will become an area of PPP development on a large scale. The Ministry of Regional Development is very active in these fields, most notably, developing concepts of marrying private funds with the EU funds under a so-called hybrid financing scheme.

All Polish international airports have already started large-scale redevelopment investments concerning their airside facilities. In addition, a large number of them plan to invest in the development of so-called airport cities and intend to initiate co-operation with private Investors interested in investing in retail units, offices, hotels and car parks to be built next to the airport terminals.

The availability of external financing for long-term PPP projects is growing, yet commercial banks are still not willing to provide long-term financing (above 10 years) and expect equity of at least 20 percent of the project's value. Nevertheless, projects based on a scheme where the availability risk lies on the public side and where banks are more likely to be interested because of various security instruments provided by the public side (e.g. keepwell agreements) are likely to be financed by commercial lenders (especially if they provide financing along with non-commercial lenders, such as the EIB or the EBRD).

One of the biggest factors encouraging investment in infrastructure in Poland is the notable change in the mentality of the Polish authorities. The biggest Polish cities seem to understand PPP better, and - even more comfortingly to private investors - they are willing to retain external advisers (financial, technical and legal) to help them to structure the project, select the private partner and conclude the PPP agreements.

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