Developer's guide to Poland

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1 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 must be clear about before starting 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 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*)
- 10-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 usufructee) 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 (State Treasury, local authorities, other public bodies) are not privileged over private ones. 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

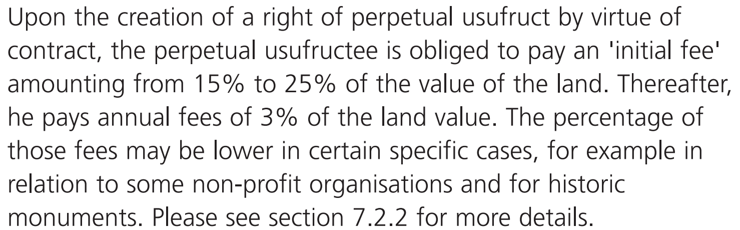
One of the most important property interests in land, specific to Poland, is the right of perpetual usufruct to land (*użytkowanie wieczyste*).

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 usufructee 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 (e.g. the development of a project) as set out in a contract. If the holder of the title breaches these provisions of the contract, it may lead to an increase of the annual fees, or even the termination of the contract.

Another fundamental difference is that perpetual usufruct is created for a specified term (40 to 99 years depending on the purpose of its creation). If the holder demands 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 usufructee may also demand 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.



Upon the creation of a right of perpetual usufruct by virtue of contract, the perpetual usufructee is obliged to pay an 'initial fee' amounting 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 7.2.2 for more details.

Upon termination of a perpetual usufruct contract, the perpetual usufructee 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 usufructee 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 usufructee 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 two types of easements: ground easements and personal easements. The former are established to the benefit of the owner (or perpetual usufructee) of (usually neighbouring) land, and the latter are established to the benefit of an individual. Ground easements are transferred together with the property (whether dominant or servient) and personal easements may not be transferred.

Easements are meant to confer on the holder of the dominant tenement 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 to the boundary). As a rule, any installations necessary to exercise the easement should be

financed, maintained and repaired by the holder of the dominant tenement. Easements expire if they are not exercised for more than 10 years. In general, 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 media network or an access road, for example.

1.1.6 Leases

There are two basic contractual rights allowing the use of a property. Those are 10-year lease (*najem*), granting the right to use the object; and 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 maximum fixed periods for which each of them can be established (10 and 30 years respectively), and in the scope of beneficiary's 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 on notice). Without entering into theoretical nuances, it is fair to say that 30-year lease may be signed with respect to farmland and operating businesses, rather than green-field intended for development.

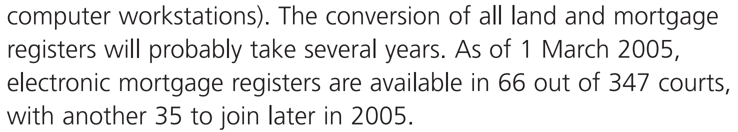
1.2 Registration of real estate

There are two parallel types of land register in Poland: (i) the land and mortgage register or "perpetual book" (*księga wieczysta*), registering titles and encumbrances, 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

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

Traditional "hard copy" mortgage registers are now being converted into electronic ones ("virtual", accessible only through



computer workstations). The conversion of all land and mortgage registers will probably take several years. As of 1 March 2005, electronic mortgage registers are available in 66 out of 347 courts, with another 35 to join later in 2005.

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 usufructee, where appropriate) is specified. Section three contains all encumbrances other than mortgages (easements, usufructs, leases, pre-emption rights etc.). It also includes restrictions in disposals, 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 ones.

According to the "principle of public faith of mortgage registers", everybody may rely on the contents of the 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 registered 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 the Polish civil law i.e. the burden of proof is on the party questioning good faith.

Mortgage registers are publicly available for review by anybody (even with no legal interest).

1.2.2 Land register

Land registers, in comparison to mortgage register, 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 voivodship).

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

1.3 Acquisition of real estate by foreigners

The 1920 Act on the Acquisition of Real Estate by Foreigners restricts on the acquisition of real estate by foreign nationals or companies. Based on this Act, prior to acquiring land in Poland, a foreigner is obliged to obtain a permit issued by the Ministry of Internal Affairs and Administration ("MOI"). A property sale agreement executed without a required MOI permit is null and void. Similar rules apply to the acquisition of shares and compinies holding real estate.

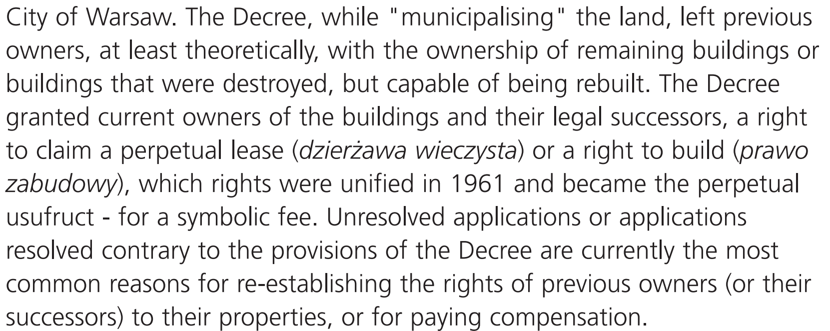
However, due to Poland's accession to the EU, the Act was changed to include wide exemptions to the requirement to obtain an MOI Permit. According to the Accession Treaty (which prevails over national legislation) entrepreneurs from the European Economic Area ("EEA") cannot be prevented from purchasing real estate in Poland, apart from certain protected types of properties mentioned in the Treaty (agricultural land, forests and "second houses"). It should also be noted that the MOI considers Polish-based SPVs as entrepreneurs from the EEA, even if they are fully controlled by entities from outside the EEA.

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).

The current situation of 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 global reconstruction of the destroyed city. On the basis of the "Warsaw Decree" of 1945, all the Warsaw properties were "municipalised" i.e. seized by the



City of Warsaw. The Decree, while "municipalising" the land, left previous owners, at least theoretically, with the ownership of remaining buildings or buildings that were destroyed, but capable of being rebuilt. The Decree granted current owners of the buildings and their legal successors, a right to claim a perpetual lease (*dzierżawa wieczysta*) or a right to build (*prawo zabudowy*), which rights were unified in 1961 and became the perpetual usufruct - for a symbolic fee. 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 paying compensation.

1.5 Title insurance

There are situations where even legal due diligence cannot answer whether the title to the given land can be challenged by third parties or not. This concerns "border line" situations, where the full certainty would only be assured by a final court verdict. In all such cases it is possible to obtain title insurance, offered by specialised firms acting on the Polish market.

1.6 Preliminary agreement

Where the immediate acquisition of a property (or shares in a company holding real estate) is not possible due to certain circumstances, the parties may conclude a preliminary purchase agreement. Commonly, the function of this agreement is to fill the time gap between the letter of intent (which, apart from clauses on exclusivity and confidentiality, is not usually binding on the parties) and the execution of the final purchase agreement.

A preliminary agreement must include the essential content of the final agreement in order to be valid. In the case of the preliminary purchase agreement, these are the subject of the sale and the purchase price.

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

1.7 Purchase from public bodies

The largest Polish land owners are the public bodies, i.e. the State Treasury and local authorities (mainly gminas). The acquisition of real estate from public bodies (or granting perpetual usufruct on their land) is regulated by the same civil law regime as transactions between individuals. However, due to 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 reflected by a general obligation to dispose of land via public tenders. The relevant authority selects the purchaser of the land from the 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 other aspects to take into account 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 were carried out in this more flexible way. Municipalities selected developers in a less formal procedure, set up common SPVs and sold their stake of shares once the development was completed. However, this scheme is no longer popular due to 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 the private shareholder already holding shares in such SPV has no priority in the acquisition).

1.8 Pre-emptive right

In certain cases, public bodies may have a statutory pre-emptive right relating 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 the local authority; (ii) undeveloped land held in perpetual usufruct; (iii) land for which a public use is provided in the local Master Plan (if the pre-emptive right is registered in the mortgage register); and (iv) a historical monument (if the pre-emptive right is registered in the mortgage register). The district in question has two months 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 introduces a pre-emptive right of tenants of agricultural land. If there are no qualifying tenants, the pre-emptive right may be exercised by the Agricultural Properties Agency. Both the tenant and the Agency have one month to exercise their rights. Disposing of agricultural land in violation of the Act or without notifying the entitled tenant or the Agency is invalid.

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2 Zoning and permitting

2.1 Zoning issues

2.1.1 The 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. However, as the new law does not work very well, the government submitted a draft of a completely new regulation at the end of 2004 (with a plan to have it in force on 1 January 2006). If adopted by Parliament, the new law would introduce significant modifications to the current planning system. This edition of the Guide discusses the regulations as in force on 1 March 2005.

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% of the territory of Poland (and about 18% 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 executive ordinances to the Zoning Law, Environmental Protection Law, Protection of Nature Law, Protection of Monuments Law, and various acts concerning the security of the State etc. These are acts of "general" application that should be taken into account while preparing the zoning study and the master plan. 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.

2.1.2 Master plan

The master plan is voted on by the city council and constitutes the most important zoning tool. The "new" procedure (under the 2003 Law) for voting on the master plan is quite complicated and may take more than 12 months. The draft master plan must take into account all general and specific constraints applicable to the given

site. It also has to be fully compliant with the "zoning study" (see section 2.1.3 below).

The draft master plan is subject to a "public review" procedure, during which it is made available for review by any interested party, and a public discussion is organised. Any interested party may file motions to the draft master plan concerning any specific zoning issue in any area, though 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.

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

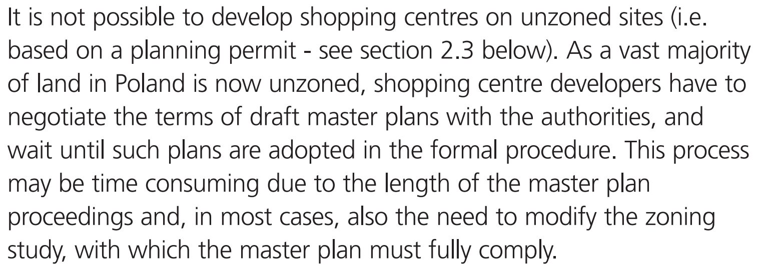
If the adoption of the master plan restricts the use of the property, the owner may require the authorities to compensate the damage or to buy out the land (and the authorities may, in return, propose a land swap). If the new master plan reduces the value of the property and the owner sells it - the vendor may require the city to pay the difference in value.

2.1.3 Zoning study

The zoning study is an internal document of the city. It sets general zoning guidelines for the whole of a local district's (*gmina*'s) territory, and determines the contents of the master plan in this respect. The procedure of adopting the zoning study under the 2003 Zoning Law is quite similar to the procedure of adopting the master plan (public review, motions, external approvals/opinions etc.). This concept is highly criticised because of two main reasons: (i) it means that the city votes more or less the same document twice and (ii) the master plan becomes very rigid (as its modification will, in most cases, require the prior modification of the zoning study, which is a difficult and time-consuming process).

2.1.4 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 not possible to develop shopping centres on unzoned sites (i.e. based on a planning permit - see section 2.3 below). As a vast majority of land in Poland is now unzoned, shopping centre developers have to negotiate the terms of draft master plans with the authorities, and wait until such plans are adopted in the formal procedure. This process may be time consuming due to the length of the master plan proceedings and, in most cases, also the need to modify the zoning study, with which the master plan must fully comply.

2.2 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 perhaps the necessity to establish easements), the phasing of the project (and allocation of various phases to various SPVs), 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. The regulations also allow the subdivision of co-owned land developed with two buildings (to enable termination of the co-ownership), and the subdivision with a view to separating a "construction site". This latter exception seems particularly broad and theoretically enables large-scale subdivisions of unzoned land.

The subdivision process has two stages. In the first stage, the city confirms the compliance of the projected subdivision 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.

Please see section 7.2.4 for information on possible re-zoning and subdivision fees.

2.3 Planning permits

If the site is not covered by a master plan, a planning permit must be obtained before submitting the building permit documentation. 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, which is heavily criticised and will probably lead to changes in the legislation.

Obtaining a "private" planning permit requires a number of conditions to be fulfilled, including: securing media connections (at least signing contracts with grid operators) and ensuring architectural compliance 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 12 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.

Summing up, the current shape of the planning permit makes it possible for the authorities to approve only those developments that they discretionally consider appropriate. Obtaining a planning permit may also turn out to be dangerous to the developer, as it has to satisfy the claims related to the restriction of use or loss of value of neighbouring plots caused by this decision.

Planning permits may be obtained by any interested party, irrespective of whether such party holds a legal title to the site. They are also transferable on third parties.

A planning permit specifies its validity period (usually 2 - 3 years). It expires if another developer obtains a building permit for the site, or if a master plan is adopted that does not comply with the planning permit (unless a 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. In this latter case, the building permit application must be submitted within the validity period of 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 the permission to start the works for the initial phase(s) only. In this case, the building authority must approve the "site development plan" (forming 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 consecutive phases (which may be approved at a later stage, together with granting permission to start the works for such future phases).

In order to obtain a building permit, the developer needs to hold a legal title to the site (not necessarily freehold - it may be even a simple lease).

The 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 marshal etc. A large part of the land in Poland (including in big cities) is considered "agricultural" (the formal criterion is the relevant entry in the land register). In such a case, prior to issuing a building permit, the site should be excluded from agricultural use. This involves payments from the owner, in ten annual instalments, depending on the category of the land (see section 7.2.6 for details).

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

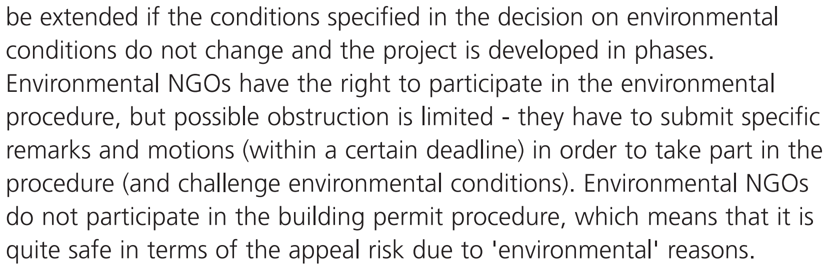
The works concerned include: parking lots with no more than 10 spaces, certain temporary objects, fencing, renovation works (except for structures entered into the register of historical monuments), certain advertising billboards, reconstruction and modernisation of roads etc. The list of construction works that may be commenced via the notification procedure has been extended by the recent amendment to the Building Code. In particular, the general rule requiring the building permit no longer applies to the construction of power, water, sewage, gas, heating and telecommunications connections, irrespectively of whether such works are related to the construction of the building or work performed on an undeveloped land.

2.6 Environmental procedures

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 NGO's have the right to take part in it. An environmental impact assessment must be prepared and approved by sanitary and environmental authorities.

The developments concerned include: most industrial facilities, public roads at least 1 km long, parking lots or garages for more than 100 lorries or 300 cars, shopping centres of more than 10,000 square metres, other service developments of more than 20,000 square metres, out of town hotels with more than 100 beds, and many others.

In case of the developments mentioned above the developer has to obtain a "decision on environmental conditions" prior to filing for a building permit (and without the need to secure the title to the site). The decision on environmental conditions is valid for two years and will be binding on the building authority while granting the building permit. The 2-year term may



be extended if the conditions specified in the decision on environmental conditions do not change and the project is developed in phases. Environmental NGOs have the right to participate in the environmental procedure, but possible obstruction is limited - they have to submit specific remarks and motions (within a certain deadline) in order to take part in the procedure (and challenge environmental conditions). Environmental NGOs do not participate in the building permit procedure, which means that it is quite safe in terms of the appeal risk due to 'environmental' reasons.

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 length 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 (due to the need to prepare the "zoning analysis" - see above).

If an appeal is filed, the matter is sent to the second instance proceedings conducted by the voivode (head of region). Such proceedings usually take 2 months.

2.7.2 Ordinary appeals

Any party to the procedure can submit ordinary appeals. Those include: the developer, the owner of the site (which may not be the developer) and other parties having a "legal interest" in the proceedings. In planning permit procedures, this latter category will cover the owners of adjacent properties. Concerning the building permit procedure, the 2004 amendment to the Building Code 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 the 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 of the Administrative Courts in Poland: the voivod administrative courts and the Supreme Administrative Court.

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

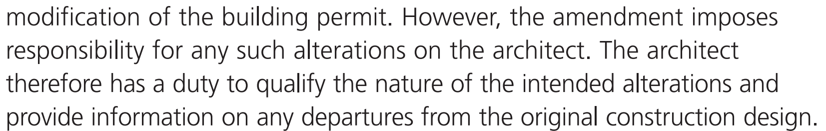
The lawsuit does not automatically suspend the building permit (which means that the works may be commenced) but the court may decide to suspend it. In such a case, the appellant may be obliged to pay a cash deposit to secure potential claims of the developer for suspending the permit. If the court rules that the lawsuit is entirely or even partially justified, the cash deposit shall be repaid. If the lawsuit is dismissed, the developer may satisfy its claims from the cash deposit. The 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 voivod administrative courts may be appealed to the Supreme Administrative Court. If the ruling of the voivod administrative court is cancelled, this court should issue a new ruling taking into account 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 divert 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 made material alterations without a prior amendment of the building permit, such works will be considered illegal. In such a case, the building authority must cancel the building permit and the construction works must be stopped. The developer must obtain a new building permit before it continues the works.

Due to the new amendment to the Building Code, the investor will now have greater flexibility to introduce the alterations without needing a



modification of the building permit. However, the amendment imposes responsibility for any such alterations on the architect. The architect therefore has a duty to qualify the nature of the intended alterations and provide information on any departures from the original construction design.

Any construction works requiring a building permit or a notification (in case of smaller works) carried 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 moment 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 (completed or not) should be demolished, though a legalisation procedure may be initiated if the project complies with the master plan 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" whose amount 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 aim at changing the current use of the building or the premises, a building permit will be required for such alterations. The Building Code provides that a change of use of a building or its part consisting of: such change of use of the building that implies a change of fire safety, labour safety, sanitary or other legal requirements may only be made on the basis of a building permit. If the alterations were made without a 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

The 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 Code. The investor may take the occupancy

if the authority has not reported any objections within 21 days of the delivery of the notification. However, in some cases the notification is not sufficient and a permit for use 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 Code, (ii) where use of the structure is to be commenced prior to the completion of all construction works, (iii) for 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 due to the "material" deviations from the approved design or other conditions as indicated in the building permit.

The issue of the permit for use requires a compulsory inspection by the relevant authorities provided for in the Building Code.

Moreover, if the investor was obliged to obtain a building permit, it should also inform the Environmental Protection Inspection, the Sanitary Inspection, Labour Inspection and Fire Bridge 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, it is to be treated as tacit consent to use the building structures.

The use of the building structures without notifying the relevant authorities or without 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 a permit for use causes fundamental problems concerning leasing the building.

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3. 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 are 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 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 and quasi entity. Those rules apply to such loans that exceed 3 times the share capital of the borrower, and disallow the tax deductibility of interest allocated to the excess. Interest on loans granted by unconnected 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 the transaction: (a) financing the construction of a development; (b) refinancing an existing development (including acquisition) and (c) 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 under Euro or US dollar denominated rents, these are the main lending currencies. Sometimes a building has leases denominated in both currencies. In this case, a solution is to match such incomes with a loan of two tranches in mirroring currencies.

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: (a) debt service cover ratio and (b) 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 envisages a cure period to remedy the level of the ratio.

3.2.5 Default

The facility agreements contain 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 would 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 (a) interest rate swaps ("IRS") and (b) "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 (it is sometimes the lender). The level of the fixed

interest is agreed in the swap agreement. Standard ISDA agreements are often used for that 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. The 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.

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 signing 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 prior to maturity 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 in performing an agreement, in the absence of specific provision 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 on to the borrower.

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

3.5 Security

3.5.1 Mortgages

Mortgages are the most typical security in the case of real property financing, and the lending bank(s) almost never agrees to financing a real property without this type of security. In real estate financing transactions, the following types of mortgage are used: (i) ordinary "contractual" mortgages (used when the exact amount of the loan is already known) and (ii) capped mortgages (*hipoteka kaucyjna*) (used when the facility is made up to a certain amount). Both types may be also used in what is called a joint mortgage (*hipoteka łączna*), which is one mortgage (either ordinary or capped) encumbering several real estate properties.

A mortgage may be established either in the form of a notarial deed or through a written statement of the lender (Polish based bank). So far, it has been the practice on the market that, in real estate transactions, mortgages are established in the form of notarial deeds.

It is a matter of negotiation whether a condition precedent for the draw-down of the facility is filing the motion to register the

mortgage or the actual registration. 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 the event where the court refuses to register the mortgage. The capped mortgage is the most common in the market. It is a cheaper form of security from the investor's point of view as the fees and costs related to it are lower.

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 courts' internal by-laws. If the process is in serious 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 the electronic mortgage register system, which substantially shortens the registration period.

Mortgage is an "accessory" security (its existence depends on the existence of the underlying debt). Polish legal system does not yet know any non-accessory securities (land charge), but a draft law is being elaborated to introduce such a concept.

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 the banks granting property financing secure their claims with a registered 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. Until the registration of the pledge over shares, the banks take an ordinary or financial pledge. 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, due to tax reasons, borrowers began to develop property belonging to limited partnerships, there were attempts to pledge the interests in limited partnerships. This has not yet become standard on the market.

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

The pledge agreement should be entered into with signatures certified by a notary and registered with the National Pledge Register. The registration the motion should be filed within 30 days from the execution of the agreement, otherwise it becomes null and void.

(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 prior written consent of the bank.

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

(c) Ordinary pledge

Upon enforcement of the ordinary pledge, the shares (or the assets) will be sold in an enforcement procedure as provided for by the civil procedure code. Such enforcement is more difficult from the bank's perspective.

(d) Financial pledge

This is a new form of security. It may be established on monies and financial instruments. The pledge may be enforced through a seizure of the object of the pledge.

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 a 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 until 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 accounts 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: (a) suretyships and corporate guarantees, (b) subordination agreements and (c) a power of attorney to the accounts.

3.6 Usury interest

On 20 February 2006 a new law will enter into force, which will introduce a maximum annual interest rate applicable in all contracts including those between entrepreneurs. The law will apply only to loans made on or after this date. The maximum interest rate will amount to four times the lombard rate, as published by the National Bank of Poland (i.e as of 1 September 2005, 24 % 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 24 % p.a.). The provisions of the new law will prevail in case of choice of a foreign law by the parties. 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.

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4. Construction issues

4.1 Standard

Developments in Poland involve the use of construction contracts, which generally operate in the manner one would expect in other jurisdictions in the EU. However, developers and investors need to be aware of the manner in which local law may affect the use of standard international forms. International standard forms, even when available in Polish, do not take account of specific Polish legal issues and are usually purely a linguistic translation.

At present, there is no standard form of construction contracts used in Poland, however major construction projects in Poland are often based on international standards from the FIDIC (red and orange book).

4.2 Warranties in construction contracts

When negotiating construction contracts, the parties often need to be clear about the period of time after completion that the contractor will be liable for the quality of the works. This period of time is either agreed specifically in the contract or implied by the law.

Warranty (*rękojmia*) is the contractor's liability for defects revealed after the building has been delivered and accepted at handover, and entails strict liability. The statutory warranty period is 3 years for buildings and one year for the fittings of a building. The parties may vary this 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 building works up to 10-12 years in certain circumstances.

A standard building contract, like FIDIC, will also contain a defects liability clause. The defects liability period essentially confers a right on the owner to call for the physical return of the contractor to the site to rectify defects for an agreed period of time after taking over of the works. Such corrective work is almost always carried out more cost effectively by the original contractor, than by a new one being appointed. This means that a defects liability clause often confers a benefit to both parties to the

contract. The defects liability period needs to be properly described in the contract. Depending on the agreement, the defects liability period is typically treated either as warranty (*rękojmia*) adjusted by the parties, or as a separate type of guarantee (*gwarancja*).

Additionally, a clause concerning the obligation of the contractor to deliver guarantees for material and installations in the building should be included in the contract. This guarantee (*gwarancja*) is subject to agreement, but is usually for a period of 12 months.

4.3 Employer's liability to sub-contractors

The legal relationship between employers, general contractors and sub-contractors on construction projects was significantly affected by legislation introduced in 2003 (amendments to the Civil Code). This was designed to create joint and several liability of both employer and general contractor towards sub-contractors on construction projects. Employer’s are responsible for the payments of fees to subcontractors, provided that they have approved the relevant sub-contracts (giving no answer within 14 days is treated as approval). It is notable that, despite the responsibility for the fees, the employer does not have any right to claim the performance directly from subcontractors, and does not directly benefit from the warranties issued by them (this can be modified by the agreement).

In the event that an employer on a project does not consent (either expressed or deemed) to sub-contracts entered into by a general contractor, then such sub-contracts between the general contractor and sub-contractors are unenforceable. Clearly, this creates a difficulty for a sub-contractor in pressing claims against general contractors for money owing for work performed on the project.

The non-enforceability of the sub-contract could equally create problems for a general contractor. In the event that the sub-contractors' works are incomplete, defective or not in accordance with the plans and specifications (intended to form part of the sub-contract), a general contractor will not be able to simply rely upon the provisions of the sub-contract to demonstrate the sub-contractor's failure of performance. Further, any warranties required of a sub-contractor by the general contractor pursuant to the terms of the sub-contract, which are in excess

of those otherwise implied by the Civil Code would be equally unenforceable. It could even be questionable whether the statutory warranties would apply to work carried out pursuant to a contract that is unenforceable.

4.4 Employer's payment guarantees

The 2003 Law on Payment Guarantee for Construction Works 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 contract term 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 guarantee is insufficient, the contractor may, at his own discretion, indicate a grace period for the employer to deliver a sufficient guarantee. If the employer fails to deliver a sufficient guarantee, the contractor may cease work. If the contractor indicates an additional grace period, he may terminate the contract for the employer's default. The contractor's rights may not be limited or excluded contractually. The employer may not terminate the contract due to a claim on the payment guarantee. The employer may claim reimbursement of the costs of the payment guarantee from the contractor, but only up to 2% of the amount guaranteed.

To avoid excessive risk, employers may 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. In the absence of a statutory restriction, the payment under the guarantees may be conditional, e.g. upon acceptance of the works by the employer or even a court order against the employer. Moreover, in some cases it is possible to exclude the application of the law by choice of a foreign law and a foreign jurisdiction.

4.5 Terms of payment to small businesses

Developers and investors should also be aware of the implications of the Act on Terms of Payment in Commercial Trade. According to that regulation, payments to "small businesses" not made within 31 days from

the date on which any service is provided or goods are delivered from the small business, attract statutory interest from the 32nd day, regardless of the contractual term of payment.

Small businesses are defined as a person or entity that a) on average employs less than 50 employees, or b) where the operating income in the previous year did not exceed 7,000,000 Euro, or c) the balance sheet value of assets as of the end of the last financial year did not exceed 5,000,000 Euro. However, a business is not considered to be small, if it is a subsidiary of a "large" business.

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

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

4.6 Use of FIDIC in Poland

The Polish Association of Engineers, Advisors and Surveyors (SIDIR) arranged the translation and publication of a new Polish/English version of the 1999 FIDIC Conditions of Contract for Construction, for Building and Engineering Works designed by the employer (the 'new Red Book') as well as some others forms prepared by FIDIC. The previous Red Book available was a translation of the 1987 FIDIC Red Book (reprinted in 1988 and 1992 with additional amendments).

It is important to note that the translation of the English version of the contract into Polish does not take account of Polish legal issues in any way. Therefore, in order for the contract to be used on construction projects in Poland a series of amendments will need to be made in order to avoid conflict and confusion in relation to the application of Polish law.

The areas that require most changes are: the procedure for establishing of the contract, payment to the contractor, time for payment, defects notification period and dispute resolution.

4.7 Dispute resolution mechanism

Arbitration is gradually becoming a standard method of dispute resolution under the construction contracts in Poland. Although the parties to small construction contracts often leave the dispute resolution to the public courts, it is difficult to find a large construction contract without an arbitration clause.

For those using FIDIC and other forms of contract, the use of a dispute adjudication board is a concept that may be foreign to developers and contractors operating in Poland, where alternative dispute resolution is yet to take roots, and therefore consideration will need to be given to amending this part of the contract.

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5. 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 a small number of mandatory provisions on lease (apart from residential leases) mean much can be accomplished.

5.2 Standard Forms

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 Leasing agents

It is quite common for retail developers and managers to use leasing agents, although some of them have their own in-house leasing 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-90s.

5.4 Lease term and extension options

As mentioned in section 1.1.6, there are two types of lease agreements under Polish law, one with a maximum fixed term of 10 years (*najem*), and one where the maximum fixed term is 30 years (*dzierżawa*). The common opinion of lawyers is, however, that one cannot sign a 30-year lease for premises. If a lease is concluded for a longer period of time then, after the lapse of 10 years, it is considered to have been concluded for an unspecified period of time (and thus may be freely terminated by either party upon notice).

In practice, the average terms of leases vary from 3 to 10 years, and in most cases the minimum required by the banks financing the development is at least 5 years. It is very rare to sign a lease for less than 3 years.

Extension options have become more and more popular on the market. It should be noted that, unlike in other jurisdictions, 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 10 years, and (ii) the essential terms of the extended lease are already specified (e.g. the rent).

In certain cases it is vital for the landlord (or for the tenant) to secure a lease for longer than 10 years (especially in the case of anchor tenants or when it is required as security for a bank). One solution would be to create the right of usufruct (instead of concluding a lease) that has no limits of duration. Another way to avoid the maximum 10-year lease period consists in signing a series of two or three consecutive lease contracts, each with a separate entity of the same group.

5.5 Rent and service charge

Euro denominated and CPI indexed rent have become the rule in Poland although references to US dollars are also common. 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. In any case, the rent should be paid in PLN, unless a special forex permit is granted.

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 one 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 frequent for landlords to make a concession on the rent, rather than on the service charge. Usually, service charges include repair, maintenance and upkeep costs of the common areas, management costs, insurance, security, consumption of media in the common areas and land tax. Where the building is developed on land held in perpetual usufruct - it might also include the 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, due to changes in the level of common costs month by month. Each tenant's participation in the service charge budget usually depends on the surface of its premises. However, weighting rates are applied to the surfaces occupied by bigger tenants. It also happens 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 22% applies to both the rent and the service charge advances. Common costs should be re-invoiced at their face net value with only the landlord's VAT added (unless the landlord is expressly authorized to margins on such costs). The tenant should seek the possibility of carrying out service charge audits.

There are three basic types of security of 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 3 months' rent and 3 months' service charge plus VAT). Larger tenants deliver bank guarantees in the same amount. Anchors may get away with a parent company's 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 and service charge payments. Any permits required for fit-out works are the responsibility of the tenant, but the landlord has a co-operation obligation in this respect. The design should be approved in advance by the landlord, so it may be advisable to attach them 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.

As the market is now becoming more and more tenant-driven, fitting out premises is often offered as a part of the tenant's incentive package.

5.7 Upkeep, renovations and repair

Upkeep, renovations and repair of common parts is always the obligation of the landlord. This also concerns essential parts of the premises, like 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 an upfront tenant's consent for 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 obligation of the tenant.

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 inter-relation between various policies such that the scopes of insurance do not overlap. Otherwise there may be problems with the payment of an indemnity, as there may be a dispute between the insurers as to which of them is actually bound to do it, and in what proportion.

Tenants are also required to insure their civil liability 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 financed 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 on signing, or identified during the term of the lease) making them unfit for the purpose of the lease. The tenant must, however, grant a grace period to the landlord to cure such defects and will not have the right to terminate if it knew about 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 while 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 it does not pay the arrears, despite being granted an additional one month's 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 provisions 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 provisions.

The most typical contractual termination clauses include the following breaches by the tenant: unauthorized subletting, changing the scope of activities in the premises, stocking hazardous materials, not disclosing financial information (in the case of turnover rent), breaking competition clauses, executing unauthorised works, etc.

Lease contracts usually provide for contractual penalties to be paid by the tenant in case the lease is terminated due to their breach. 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, it may not work if the lease is terminated due to the lack of payment (which is by far the most common reason for terminating by the landlord).

5.10 Non-competition clauses in shopping centre lease agreements

In the '90s, when first modern shopping schemes were appearing, it was quite popular to include in the lease a non-competition clause which prohibited the tenant from opening a shop in the radius of x kilometres of the centre concerned. With many new developments coming on the market, those clauses are now becoming a real problem, as they may significantly reduce the number of brands in such new schemes.

Although there have been no cases so far, it is fair to say that such clauses are invalid if the "relevant market" share of the landlord concerned exceeds 10%. The reason for this is that they 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.

What the "relevant market" actually is will be assessed on a case-by-case basis. Two approaches will have to be made: geographic (which may correspond to the potential catchment zone) and "product-based" (lettable space).

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 submitted 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 by every landlord. It enables the landlord to leapfrog judicial proceedings and start enforcement much faster than usual. Submission to execution is effected by the tenant's signature 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 the 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 disconnecting the media. It should be noted that it is possible only if the lease authorises the landlord to do it on "reasonable" terms (e.g. a delay in payment justifying early termination, prior notice etc.). Otherwise, the landlord would be liable for all damages incurred by the tenant due to disconnecting the media.

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 within statutory notice periods, unless three conditions are met cumulatively: (i) the lease has a fixed term, (ii) the premises have been already handed over to the tenant and (iii) the lease has a certain date. The "certain date" 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 the 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 certain date 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 such 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 any of them, unless 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 3 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. Terminating the lease by the receiver would, therefore, be a rare case. However, if the tenant has paid the rent in advance for more than three months, he will have to pay again the amount due for the period above three months - 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 it until the full execution of the settlement (which may take several years). The settlement may reduce and arrange instalments for rent and service charge arrears as of the date of the court's decision, but not for future ones (if the lease is to be continued).

5.13 Residential leases

Residential leases are governed by the Tenants' Protection Act.

Rules of the lease of private apartments are less severe than these applying to municipal ones. However, in both cases the Tenants' Protection Act provides for very detailed regulations regarding increase of rent and termination by the landlord, which are extremely favourable for the tenants.

One of the most important deficiencies of the system is that it is almost impossible to expel a tenant, because he must be provided with alternative/temporary premises.

As a rule, in case of lease agreements for unspecified period, the tenant may terminate the lease agreement by serving a 3-month notice. On the other hand, in case of the landlord, the term of notice varies from 6 months to 3 years, depending on the situation.

Rent may be increased every 6 months, upon 3 months notice. Any increase of rent exceeding 10% annually gives the tenant the right to question it in court. There are also detailed rules on how the process of rent increase should be carried out.

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6. Selling the scheme

6.1 What to sell

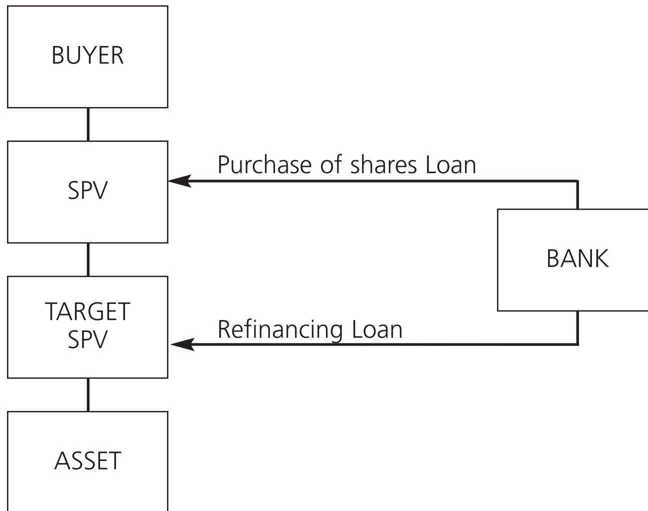
6.1.1 Choice

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

6.1.2 Shares or asset

One of the specifics of the Polish property market is that the majority of the property transactions were structured and conducted as share deals. For various reasons (mostly taxes and accessibility of the proceeds) developers prefer to sell shares in the companies (mainly in single purpose vehicles established in order to conduct 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 the buyer's interest to establish the highest possible initial value of an asset, which is important for the 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 the share acquisition. As external debt is used to finance part of a 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 also borrowed some external debt arranged by the buyer to repay its prior existing loans, the structure upon acquisition would look like this:



The above means that all the income from leases, and some tax deductible costs (depreciation of the asset, interests on refinancing loan), are left with the Target SPV. The SPV (holder of the Target SPV) has tax deductible costs (interest on the purchase of shares loan), 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. This of course takes time and costs money.

A share deal results in the additional risk of 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.

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

The costs of the 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 22% VAT (except for buildings older than 5 years which were not subject to VAT at the moment of their acquisition, or unless other criteria are not satisfied). This VAT is imposed both on land price and building price and is fully recoverable. It is a common practice to take a separate loan in Polish zlotys to finance VAT. The recovery takes (depending on circumstances) from 28 days to 180 days.

There is another difficulty with share transactions which applies to German open-ended funds. By their own laws, they are prohibited from owning shares in holding companies. It means that they cannot lever purchases by using external debt, and the temporary liability structure is excluded. As a result, financing share purchases is more complicated in such cases. In addition, the fact that shares in companies holding real estate are held by fund managers as trustees creates some tax questions related to withholding taxes on dividends paid from their Polish SPVs.

Due to the above reasons, the last couple of years have seen a tendency for property transactions to be structured as asset deals.

6.1.3 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 logistic 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 number of issues. Are the individual buildings and plots on which these buildings are located properly divided? Is the access to the building being sold, and to all other buildings which remain with a developer, properly secured, for example, through cross easements over the "common areas", transferring the roads to a separate company or creating the co-ownership structure under which all the individuals co-own the "common areas"? Do all the buildings have their separate media 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 moment of planning of the

development. The lack of consideration at that stage will certainly cause additional costs and problems at the moment of selling an asset. Any defect in this respect may be priced by the purchaser or makes the disposal of individual asset impossible or in the best case retagged.

6.1.4 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 galleries forming part of large shopping mall schemes.

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

The ownership of separate premises carries 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, faćade, installations etc.). The share is calculated as the proportion of the 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, the share in the "common areas" and the 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 7 or fewer premises within a building then 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 7 premises separated, the rules set out in the Law on Ownership of Premises are applicable, although the owners can modify these rules by agreement.

6.2 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 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, the mechanism of the price adjustment is agreed to reflect the progress in leasing the scheme and the additional income stream.

Another approach to this issue is the situation when the seller enters into a "master lease" under which it is paying the buyer an agreed guaranteed rent, and further sub-leases the asset to final users or arrange 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.

6.3 How to sell

6.3.1 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 obtaining antimonopoly clearance or an MOI permit for the acquisition of the shares or asset. Antimonopoly clearance for the acquisition of shares will not be required if the total turnover of the parties to the transaction and their groups of companies did not exceed 50,000,000 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 group in Poland did

not exceed 10,000,000 Euro in either of the last two financial years. In *asset deals*, it is worth noting that the 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 does not require 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 due to some practical reasons (difficulty to establish whether all the conditions were 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 as to the rights and obligations of the seller in respect of operating the asset/target company during the interim period between the execution of the preliminary sale agreement and the transfer agreement. The preliminary agreement, as with a transfer agreement, should be executed as the notarial deed (for the sale of real estate) or with the signatures of the parties certified by a notary (for the sale of shares).

6.3.2 Warranties

The most heavily negotiated provisions of the preliminary sale and final agreements are usually the warranties of a seller. 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 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 differ the period during which the buyer is entitled to make a claim due to a breach of different categories of warranties and to limit the scope of the damages that can be claimed by the buyer. There are no standard warranties in the market and they vary depending on the selling/buying powers of the parties, or even nationalities of parties involved and their expectations.

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

6.3.3 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 the 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 balance sheet of the company as of 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.

6.3.4 Financing

Almost every property investment is financed by external debt. Before selling the scheme (no matter if the asset deal or the share deal is agreed) the parties should agree whether a 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 the arrangement between an old and a new lender in respect of establishing security (usually only mortgages) over an asset prior to the repayment of an existing debt. Various mechanisms are put in place, including escrow accounts, undertakings of the existing lender allowing the establishment of a second rank security to the benefit of a new lender and undertakings of a new lender to release its second rank security if refinancing fails.

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7. Costs

7.1 Transactional costs

7.1.1 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 tariffs and are calculated based on degressive rates with caps. In general, the notary collects all payments mentioned in section 7.1.

7.1.2 Notary fees

These are the fees for preparing the notarial deed. They are two different types of rates:

(a) depending on the agreement with notary, they are capped at a level equal to six times the average salary (13,200 PLN), which are applicable to most documents signed by the notary, and
(b) fixed fees (at very low levels 20-50 PLN) for certain simple acts VAT is added to notarial fees at a rate of 22%.

7.1.3 Registration fees

The registration fees depend primarily on the value (price) of the property. There are two types of the fees: "percentage fees" and "fixed fees". Generally, the percentage fees are relevant to registering the title and various property rights. There is an Ordinance of the Minister of Justice that sets the mechanism of calculating the percentage fees, which is the point of reference for calculation of all registration fees. The "percentage fee" is a certain percentage of the property value plus a certain fixed amount. The amount of the percentage and the fixed amount depend on the thresholds set by the Ordinance. The highest threshold applicable to most of the properties, is 6,600 PLN for the first 100,000 PLN and 5% of the excess above 100,000 PLN. The maximum amount of the "percentage fee" may not exceed 20,000 PLN. Depending on the

right to be registered and the type of the property the registration fee is a fraction of the percentage fee.

The above fees will be decreased dramatically following the coming into force of a new law on the court fees. As of March 2006, the percentage fee will no longer be applicable for registering title and various property rights. In its place a fixed fee of 200 PLN will be introduced and in certain cases an even lower fee may be charged.

7.1.4 Transfer taxes

The transfer of real estate may be subject to either VAT or stamp duty (tax on civil transactions). VAT will apply if a business entity makes the sale, unless the property fulfils certain conditions (the building is considered "used", or the land is not developed or zoned for development). Sales made by individuals not conducting business activities are not subject to VAT. The base rate of Polish VAT is 22%, but a 7% 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 stamp duty at the 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 the collection of stamp duty and registration fees. VAT is paid directly by the seller to the buyer who then settles it with the tax office.

7.2 Costs of holding real estate

7.2.1 Land tax

Polish governments have been working on a new common property tax based on the value of the property since 1994. The introduction of the tax requires the valuation of all real properties. According to the Ministry of Finance, the valuation may be completed about 2010. Before this happens, land, buildings and building structures related to commercial activity, will be subject to land tax. The tax is payable by owners, perpetual usufructees, and lessees of public properties. The tax is based on surface area in the case of land, and on the useable area in the case of buildings. The rate of the tax is defined by a city council but there is a statutory cap. The tax on land related to commercial activity may amount up to 0.66 PLN per

1 sqm, and for buildings related to such activity up to 17.98 PLN per 1 sqm of the useable area.

7.2.2 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. 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 re-evaluating the land. The re-evaluation may take place only once a year. A holder of the 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 a fee in the old amount and no interest accrues. In practice, many disputes are solved by a settlement.

7.2.3 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 due 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 city council within 3 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 the perpetual usufruct right do not participate in these costs. It is deemed that the perpetual usufruct fee covers the costs of public infrastructure.

7.2.4 Re-zoning and subdivision fees

It usually happens that 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 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 master plan), then the owner (or holder of the perpetual usufruct) may demand that the local authority (the city) pay compensation equal to 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 the land, but not later then 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 the local authority to buy the affected land.

More frequently, the value of land increases as a result of adoption or modification of a master plan, e.g. a green-field is re-zoned to a land on which a shopping centre may be built. In such a case, if the owner sells or otherwise transfer 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.

If, as a result of the subdivision of land made at the request of the owner of the land, the value of the land increases, the city may charge a subdivision fee within three years from the subdivision. The amount of the fee may not exceed 50% of the increase of the value. The increase of the value is calculated as at the date of the city's decision charging a subdivision fee. At the request of the owner of the land, the subdivision fee may be divided in up to ten annual instalments. The instalments are indexed and subject to interest.

7.2.5 Road infrastructure

Under the Act on Public Roads, owners (perpetual usufructees) of real estate must participate in the cost of construction and

modernisation of public roads that serve their properties - in proportion to the traffic they generate. The construction or modernisation of the road is usually regulated in the agreement with the public manager of the road.

7.2.6 Exclusion from agricultural use

Properties legally recognised as farmland and forest can only be turned into non-agricultural (or non-forest) use if special conditions are met. First of all, the local master plan should provide for such a possibility. If this is not the case then no investment falling outside of the scope of their current use is allowed. Secondly, provided that the master plan allows such new investments, 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 land (forest), the surface of the site and the current price of corn (wood). 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 due at all. If the property is sold, the obligation to pay the annual fees passes onto the purchaser.

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