

# The International Comparative Legal Guide to: **Real Estate 2007**

**A practical insight to cross-border Real Estate work**



**Published by Global Legal Group, with contributions from:**

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# Poland

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## 1 Real Estate Law

**1.1 Please briefly describe the main laws that govern real estate in your country. Laws relating to leases of business premises should be listed in response to question 10.1. Those relating to zoning and environmental should be listed in response to question 11.1**

- Civil Code of 1964,
- Law of 1982 on Mortgage Books and Mortgages which regulates registration of real estates in mortgage books,
- Law of 1997 on Real Estate Management which regulates aspects of management of real estates owned by the State Treasury and local authorities,
- Law of 2000 on Housing Cooperatives,
- Law of 1994 on Separate Ownership of Condominium Units.

Additionally, there are specific regulations for agricultural and forest land.

**1.2 What is the impact (if any) on real estate of local common law in your country?**

Not applicable.

**1.3 Are international laws relevant to real estate in your country? Please ignore EU legislation enacted locally in EU countries.**

International laws are not relevant to real estate.

## 2 Ownership

**2.1 Are there legal restrictions on ownership of real estate by particular classes of persons (e.g. non-resident persons)?**

All persons (companies and individuals) may acquire different titles to the real estate. Restrictions include acquisition of real estate by foreigners (excluding citizens of European Economic Area) and acquisition of agricultural real estate by all foreigners (with respect to foreigners from European Economic Area restrictions shall be maintained by May 1, 2016). Companies registered in Poland but controlled by foreigners are also subject to such restrictions. Before acquisition of the ownership right or perpetual usufruct right, foreigners are obliged to obtain permit of the Minister of Interior. Transaction executed without such permit is invalid.

## 3 Real Estate Rights

**3.1 What are the types of rights over land recognised in your country. Are any of them purely contractual between the parties?**

Polish Civil Code recognises the following types of rights over real estate:

- ownership right (title);
- perpetual usufruct right; and
- limited property rights i.e. rights of third parties to the real estate such as easements, usufruct, mortgage, rights to residential and non-residential premises in buildings owned by housing cooperatives.

All above mentioned types of rights over real estate are rights *in rem*, i.e. they are effective with respect to third parties.

The concept of the perpetual usufruct right is similar to the ownership right, but it is limited in time (from 40 to 99 years with possibility of extension). The State Treasury or the local municipality remains the owner of the land, whereas perpetual usufructuary has the right to use and dispose of the real estate. Perpetual usufructuary is obliged to pay to the owner annual fee for perpetual usufruct right. Buildings which are developed by perpetual usufructuary on the land are owned by perpetual usufructuary.

“Contractual rights” such as leases or pre-emptive rights become effective with respect to third parties when they are registered in the mortgage books, otherwise they are binding only on the parties thereto.

## 4 System of Registration

**4.1 Is all land in your country required to be registered? What land (or rights) are unregistered?**

Pursuant to the Law on Mortgage Books and Mortgages, all real estates in Poland should be registered in the mortgage book. However, the law provides that for the real estates which do not have yet mortgage books or whose mortgage books have been lost or destroyed, the competent court maintains so called “files of documents” until the mortgage book is established. Basically, all provisions regarding registration procedure in mortgage books are applied accordingly to the files of documents except for the principle of reliability of land and mortgage registry books (see question 4.2). In practice, there are still some lands which do not have mortgage book established (mainly State Treasury’s or local municipalities’ real estates).

#### 4.2 Is there a state guarantee of title? What does it guarantee?

The primary source of information about the legal status of the real estate in Poland is the mortgage book. Person acquiring the real estate may rely on the legal status of the real estate described in the mortgage book, even if there is a discrepancy between such legal status and the actual status of the real estate, unless the purchaser is acting in bad faith i.e. is aware or with due diligence should have been aware of such discrepancy or the acquisition of real estate is made gratuitously (principle of reliability of land and mortgage registry books).

#### 4.3 What rights in land are compulsory registrable? What (if any) is the consequence of non-registration?

Compulsory registrable are: (i) establishment and transfer of the right of perpetual usufruct, (ii) establishment of the ownership right of condominium unit, and (iii) establishment and transfer of mortgage. These rights only become effective (created and/or transferred) upon their registration in the mortgage book.

With respect to point (ii) above, Polish law recognises the concept of separate ownership right of a condominium unit (residential or non-residential) located in the building developed on the land. Owner of the condominium unit has share in the common areas i.e. common areas in the building and in the ownership right or perpetual usufruct right of the land. Separate ownership right is created upon its registration in the mortgage book which is a separate mortgage book from the mortgage book maintained for the land on which building is located.

#### 4.4 What rights in land are not required to be registered?

Other property rights such as ownership right, easements, usufruct, rights to residential and non-residential premises in buildings owned by housing cooperatives do not have to be registered in the mortgage book in order to be effectively created and transferred. However, the owner of the real estate is obliged to apply for its disclosing in the mortgage book as owner of the real estate and is responsible to third parties who suffered damages in result of owner's failure to comply with this obligation.

#### 4.5 Where there are both unregistered and registered land or rights is there a probationary period following first registration or are there perhaps different classes or qualities of title on first registration? Please give details. First registration means the occasion upon which unregistered land or rights are first registered in the registries.

Not applicable.

#### 4.6 On a land sale, when is title (or ownership) transferred to the buyer?

Ownership right is transferred to the buyer upon execution of sale agreement. Transfer of perpetual usufruct right becomes effective upon its registration in the mortgage book.

#### 4.7 Please briefly describe how some rights obtain priority over other rights. Do earlier rights defeat later rights?

In principle, priority of rights is applicable with respect to limited property rights i.e. rights of third parties to the real estate

(easements, usufruct, mortgage). The right which is disclosed in the mortgage book has priority over right which is not disclosed in the mortgage book. Furthermore, the right which has been disclosed earlier has priority over right which has been disclosed in the mortgage book later.

## 5 The Registry / Registries

### 5.1 How many real estate registries operate in your country? If more than one please specify their differing rules and requirements.

The main registry of real estates in Poland is the mortgage book register, which is maintained by district courts, land and mortgage registry divisions. Starting from 2001 the new central computerised mortgage book register is being introduced and gradually traditional "paper" mortgage books are transferred into such central system.

Additionally, real estates in Poland are registered in the land register, register of buildings and register of condominium units which contain technical data regarding real estates, but also provide information regarding owner of the property.

### 5.2 Can information on real estate ownership be accessed from the registry on line (electronically)?

Each person has the right to review the mortgage book. Access to the documents enclosed to the mortgage book is given to the notary and to any person able to prove legal interest. On-line access to the information in the mortgage book is ensured for free in the district courts, which have already introduced the central computerised mortgage book system.

Additionally, one may obtain an excerpt (hardcopy) from the mortgage book, if the mortgage book has been transferred into the central computerised mortgage book register. If not - in order to obtain such an excerpt from the mortgage book, one has to prove legal interest.

### 5.3 Can compensation be claimed from the registry/registries if it/they makes a mistake?

Compensation can be claimed from the State Treasury on the basis of general rules of compensating for damages.

### 5.4 Are there restrictions on public access to the register? Can a buyer obtain all the information he might reasonably need regarding encumbrances and other rights affecting real estate?

Information regarding encumbrances and third parties' rights is contained in the mortgage book (sections III and IV of the mortgage book). See also question 5.2.

## 6 Real Estate Market

### 6.1 Which parties (in addition to the buyer and seller and the buyer's finance provider) would normally be involved in a real estate transaction in your country? Please briefly describe their roles and/or duties.

- Selling and purchasing agents (or realtors)  
Real estate agents may be hired either by seller or by buyer.

They render agency services aiming at execution of the real estate sale agreements. Real estate agents are licensed.

b) Lawyers

Usually lawyers provide legal advice in larger real estate transactions involving foreign and domestic investments (office buildings, retail centers, warehouse), their role involving legal due diligence of the property, negotiating and drafting of legal documents.

c) Notaries

All transfers of ownership and perpetual usufruct, as well as establishment of limited property rights require notarial form. The notary is responsible for the validity of the agreement being executed. The notary is impartial and does not represent parties at negotiations. The notary's obligation is also to explain law provisions and their implications to the parties, especially those not represented by professional attorneys.

d) Sworn translators

Sworn translators must be present at and translate notarial deeds to persons who are parties to the agreements executed in the form of notarial deed and who do not know Polish language.

## 6.2 How and on what basis are these persons remunerated?

a) Selling and purchasing agents (or realtors)

Real estate agents' fee/commission is usually calculated as per cent of the purchase price and is paid by person hiring the real estate agent (seller or buyer).

b) Lawyers

Lawyers are remunerated based on fee agreed with the client.

c) Notaries

Notaries' fees depend on the value of the transaction, however, the maximum fees which may be collected by the notaries have been regulated in the law provisions.

d) Sworn translators

Sworn translators are remunerated based on fee agreed with the client, however, the minimum fees have been regulated in the law provisions.

## 7 Liabilities of Buyers and Sellers in Real Estate Transactions

### 7.1 What (if any) are the minimum formalities for the sale and purchase of real estate?

As for the form - real estate sale agreement requires notarial form.

As for the contents - real estate sale agreement must determine object of the transaction (specify the real estate), purchase price and terms of payment and must contain declaration on transfer of title to the real estate. Other terms and conditions if not contained in the agreement shall be determined pursuant to the provisions of Civil Code.

Basic documents which must be presented to the notary at execution of the notarial deed include excerpts from mortgage book and from the land register and in case of corporations - excerpts from the business register, as well as corporate consents (resolutions of the company's authorities) for sale and purchase of the real estate.

### 7.2 Is the seller under a duty of disclosure? What matters must be disclosed?

There is no specific duty of disclosure imposed by law on the seller, however, at larger transactions "representations and warranties" clause is a standard provision.

### 7.3 Can the seller be liable to the buyer for misrepresentation?

The seller is liable to the buyer under statutory warranty for physical and legal defects. Liability for physical defects arises when the real estate has physical defects which decrease its value or utility taking into account purpose agreed in the agreement or when the real estate does not have features with respect to which the seller made representation. Seller is also liable to the purchaser when the title to the real estate is vested with third party or is encumbered with right of third party e.g. easement, usufruct, mortgage. Liability under statutory warranty is independent on the seller's fault. Liability shall not arise if buyer was aware of the defect at the execution of the sale agreement. In case of defects, the buyer may rescind from the agreement or request that the purchase price is decreased and additionally can claim damages.

### 7.4 Do sellers usually give contractual warranties to the buyer? What would be the scope of these? What is the function of warranties (e.g. to apportion risk, to give information)? Are warranties a substitute for the buyer carrying out his own diligence?

Scope of contractual representations and warranties depends on type and scale of the transaction. At larger real estate transactions "representations and warranties" clause is a standard provision and usually includes warranties regarding legal status of the real estate, possible development of the real estate (zoning plan, zoning decisions, building decisions), leases (either no leases or valid and binding leases), taxes and public charges, contamination etc.

### 7.5 Does the seller warrant its ownership in any way? Please give details.

Under the real estate sale agreement the seller is obliged to transfer to the buyer ownership right and possession of the real estate in exchange for the purchase price. In case of seller's failure to comply with the above obligation, the seller is liable to the buyer both under the sale agreement (damages) and under the statutory warranty (see question 7.3).

### 7.6 What (if any) are the liabilities of the buyer (in addition to paying the sale price)?

Under the sale agreement, additional buyer's obligation is to take over the real estate from the seller.

## 8 Finance and Banking

### 8.1 Please briefly describe any regulations concerning the lending of money to finance real estate. Are the rules different as between resident and non-resident persons and/or between individual persons and corporate entities?

Rules regarding the lending of money are governed by the Civil Code and Banking Law. Collateral instruments securing loans are regulated in different laws (e.g. Registered Pledges Law, Bill of

Exchange Law). Mortgages are governed by the Law on Mortgage Book and Mortgages. Rules for granting loans to residents and non-residents, individual persons and corporations are the same, subject that there is special regulation regarding consumer loans which provides for higher level of consumer protection.

### 8.2 What are the main methods by which a real estate lender seeks to protect itself from default by the borrower?

Apart from typical real estate collateral instrument i.e. mortgage, there are other types of securities such as ordinary, financial or registered pledges, promissory notes, bank account blockades, declaration on voluntary submission to enforcement proceeding, assignment of receivables under lease agreements or insurance agreements. Other instruments applied by lenders shall include supervision of the borrower's financial standing or in case of construction loans - supervision of the progress of the real estate development and its compliance with the budget and schedule.

### 8.3 What minimum formalities are required for real estate lending?

Loan agreement regarding lending of an amount exceeding PLN 500 requires written form. Establishment of mortgage shall require the declaration made by the real estate owner in the form of notarial deed. An exception to this rule is provided in article 95 of the Banking Law with respect to bank financing. Written declaration made by the bank confirming on the basis of entries made in the bank books that the mortgage has been established, constitutes basis for registration of the mortgage in the mortgage book.

### 8.4 How is a real estate lender protected from claims against the borrower or the real estate asset by other creditors?

The real estate lender's interests may be protected through establishment of mortgage over the real estate. Mortgagee has the right to enforce its claims with priority over other creditors whose claims are not secured with mortgage. First the real estate lender needs to obtain enforcement title (court decision adjudicating real estate lender's claims or borrower's declaration on voluntary submission to enforcement proceedings). After so called enforcement clause is attached to the enforcement title by the court, enforcement proceeding may be initiated, where the real estate shall be sold by the bailiff and the proceeds shall be distributed between creditors, taking into account mortgagee's priority over other creditors.

## 9 Tax

### 9.1 Are transfers of real estate subject to a transfer tax? How much? Who is liable?

If not subject to VAT, sale of real estate is subject to transfer tax of 2%, while sale of shares in a company owning real estate is 1%. The buyer is liable for payment of this tax.

### 9.2 When is the transfer tax paid?

In case of sale of shares in the company owning real estate, transfer tax should be paid by the buyer within 14 days of the share purchase agreement. In case of sale of real estate the transfer tax is collected by the notary at the execution of the notarial deed.

### 9.3 Are transfers of real estate subject to VAT? How much? Who is liable? Are there any exemptions?

Sale of real estate by VAT-payers is subject to VAT of 22% in case of non-residential real estate and 7% in case of residential real estate. The sale is exempted from VAT in case of sale of a land developed with the building older than five years, where: (i) the seller had no right to recover input VAT at purchase of this real estate and (ii) expenditures on the building (with input VAT recovered by the seller) did not exceed 30% of the initial value of the building.

### 9.4 What tax or taxes (if any) are payable by the seller on the disposal of a property?

Purchase price from disposal of a property made within seller's business activity constitutes taxable business profit for the seller, subject to income tax and VAT.

### 9.5 Is taxation different if ownership of a company (or other entity) owning real estate is transferred?

When shares are sold in a company owning real estate, purchase price for shares constitutes seller's capital gain. Whether and at what rate such capital gain is taxable depends on the seller's jurisdiction and agreements on avoidance of double-taxation.

## 10 Leases of Business Premises

### 10.1 Please briefly describe the main laws that regulate leases of business premises.

There are no specific provisions regarding lease of business premises. Lease agreement is regulated in the Civil Code.

### 10.2 What types of business lease exist?

Polish law does not distinguish different types of business lease, although in practice there are leases of office premises, retail center premises or warehouse premises and thus particular provisions of such lease agreements may vary.

### 10.3 What are the typical provisions for leases of business premises in your country regarding: a) length of term; b) rent increases; c) tenant's right to sell or sub-lease; d) (i) change of control of the tenant; and (ii) transfer of lease as a result of a corporate restructuring (e.g. merger); and e) repairs?

a) Length of term

Civil Code provides that the lease agreement which is entered into for period longer than 10 years, after this period is deemed an agreement for indefinite period of time. Therefore, usually business leases are entered into for the period of 10 years with extension option for the tenant.

b) Rent increases

Usually annual rent indexation is provided. Depending on the currency in which the rent is expressed, rent indexation is based on indexation rate announced by the Polish Statistical Office or by the Statistical Office of the European Communities.

- c) Tenant's right to sell or sub-lease  
Pursuant to the Civil Code, tenant may sub-lease or give the premises to free-of-charge use by third party, unless the lease agreement specifies otherwise. Usually, lease agreements of business premises exclude or limit tenant's right to sub-lease the premises (sub-lease is permitted to entities within the same capital group).  
The agreement may be assigned by the tenant subject to landlord's consent.
- d) (i) Change of control of the tenant  
Sometimes lease agreements provide that the landlord may terminate the lease in case of change of control of the tenant. In case of no such provisions, the lease relationship remains unchanged.  
(ii) Transfer of lease as a result of a corporate restructuring (e.g. merger)  
In case of merger of companies all rights and obligations, including lease agreements are transferred by operation of law, to the acquiring company or to the new company. Lease agreement remains unchanged with the acquiring company or the new company as a party to the lease agreement.
- e) Repairs  
Scope of tenant's and landlord's obligations regarding repairs depends on the type of premises leased. It is common that the landlord is responsible for repairs of the building (roof, structure), whereas the tenant is obliged to provide all necessary repairs within the leased premises.

#### 10.4 What taxes are payable on rent either by the landlord or tenant of a business lease?

If within business activity, rent under lease agreements constitutes taxable business profit for the landlord, subject to income tax and VAT.

#### 10.5 In what circumstances are business leases usually terminated (e.g. at expiry, on default, by either party etc.). Are there any special provisions allowing a tenant to extend or renew the lease or for either party to be compensated by the other for any reason on termination?

In case of lease agreements entered into for indefinite period of time, the lease may be terminated by either party upon termination notice. Lease agreement for definite period of time may not be terminated upon termination notice. Lease agreement (entered into for definite or indefinite period of time) may also be terminated with immediate effect in situations described therein, usually in case of default by the other party.

Extension clauses allowing tenant to extend the lease are commonly used.

In case of unjustified termination by either party of the lease agreement entered into for definite period, the other party may claim compensation for damages.

#### 10.6 Does the landlord and/or the tenant of a business lease cease to be liable for their respective obligations under the lease once they have sold their interest? Can they be responsible after the sale in respect of pre-sale non compliance?

Pursuant to the Civil Code, if the object of lease is sold, the buyer enters into the lease relationship instead of the seller, which means that the seller ceases to be liable for the obligations under the lease.

Buyer may terminate the lease agreement subject to statutory termination periods (irrespective whether the lease was for definite or indefinite period of time), unless the lease agreement was executed for definite period of time in a written form with the date confirmed by the notary and lease object was delivered to tenant.. In case of such earlier termination of the lease agreement, tenant may claim compensation for damages from the seller.

## 11 Zoning and Environmental Issues

### 11.1 What are the main laws which govern zoning and related matters concerning the use and occupation of land and buildings? Please briefly describe them and include environmental laws.

Planning (zoning) matters are regulated in the Zoning Law of 2003. Construction process and occupancy of buildings are governed by the Construction Law of 1994. Environmental matters are regulated in the Environmental Protection Law of 2001 and Law on Wastes of 2001.

### 11.2 Which bodies control land/building use and/or occupation and environmental regulation? How do buyers obtain reliable information on these matters?

Use of buildings is supervised by the Poviast Construction Supervisory Inspector. Environmental regulations are monitored by different authorities, including among others municipal authorities, poviast authorities, voivodship authorities and Minister of Environmental Protection.

### 11.3 What main permits or licenses are required for building works and/or the use of real estate?

Investor needs to obtain building permit before commencement of construction works and occupancy permit after completion of the construction process. In case of no zoning plan for a given real estate, the investor must also apply for a zoning decision. There are some exceptions provided in the law where instead of building permit and occupancy permit, investor is obliged to notify competent authority upon intended commencement of construction works and occupancy.

### 11.4 Are building/use permits and licenses commonly obtained in your country? Can implied permission be obtained in any way (e.g. by long use)?

Building and occupancy permits are commonly obtained in Poland. There is no concept of implied permission by long use.

### 11.5 What is the appropriate cost of building/use permits and the time involved in obtaining them?

Costs very much depend on type of development and size of the project. Process of obtaining building permit is rather complicated and time-consuming. Before building permit is granted, the investor has to apply for a number of consents, permits and arrangements from other authorities (e.g. in case of projects located on the area protected by conservator of monuments - consent of this authority is required). The entire process may last couple of months.

**11.6 In what circumstances (if any) is environmental clean up ever mandatory?**

Environmental clean up is mandatory any time environmental standards provided by law regulations are exceeded. This obligation is imposed on the real estate owner, unless the owner may prove that third party is responsible for contamination.

**12 General****12.1 Are there any current proposals for significant reform of real estate law in your country - please give details.**

At present there are no proposals of any significant reform of real estate law in Poland.

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**12.2 Date at which law is stated.**

March 2007.

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(through a Polish partnership)

Chadbourne & Parke's Warsaw office has been active since 1990 in all critical processes connected with the transformation of the Polish economy. Chadbourne's lawyers advise on restructurings and privatisations, mergers and acquisitions, joint ventures, financings, energy and real estate projects as well as on tax and customs matters. We also have experience in advising on banking and finance, insurance and intellectual property matters, as well as in representing clients in litigation, mediation and arbitration proceedings.

Chadbourne and Parke's real estate team is experienced in representing international and Polish developers, investment funds, institutional investors and lenders in connection with office, retail, warehouse, residential and hotel projects throughout Poland. Our experience ranges from acquisitions of warehouses and distribution centers for the first foreign investors entering the Polish market, through development, acquisition, sale or lease of office space and residential and commercial buildings, to financing complicated and versatile development and investment project.