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OF SHOPPING CENTRES

# Retailer's Guide 2015/2016 Poland





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# Introduction

Retail is a highly competitive industry in any market and when an investor considers whether to expand into other countries, it can be very complex and can often hold significant financial risk, as well as all the legal aspects of set-up and start-up in the desired country, which an investor must be aware of before taking the first step.

This Retailer's Guide aims to help Investors make that first step, to aide in the set-up and implementation process of opening a retail business in Poland. It presents many of the legal issues and restrictions any Investor should be aware of before opening their doors to the public.

In particular this guide presents the different forms of companies available to investors, property leasing, Retail Management companies List, Intellectual Property matters, Employment Law, Commercial and Third Party contracts, as well as the claims procedures and e-commerce related issues.

Once an Investor better understands the legal aspects, one is then more confidently able to make a financial and economic commitment in Poland. This process can be assisted by a highly trained

legal team from TaylorWessing e|n|w|c, who are also well positioned to offer a wide range of legal services not only in Poland, across CEE and even on a global basis.

To further support our position in Poland, we have invited our business partner TPA Horwath, which is a dynamically developing consulting group offering tax and business advisory services, financial audit, accounting and payroll services, which can add essential input related to tax issues, which retailers in Poland often face.

We also thank the Polish Council of Shopping Centres (PRCH) for its excellent business input. PRCH represents the interests of the retail real estate industry in Poland and follows its challenging mission to support the development and relationships between all parties involved in the Polish retail industry and to promote a positive image of shopping centres and shopping streets in Poland.

By publishing this guide we hope to help and support new retail Investors to open and develop a successful business in Poland, which is currently one of the fastest growing and strongest markets in the CEE region.

*Ewelina Stobiecka, PhD*



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# Poland - General Background

*To run a retail business in Poland...*

Overall the retail real estate market is stable in terms of supply – Year on year the Polish market has consistently expanded by ca. 0.5 million sq. m of GLA. According to our research, the vacancy rate is low and amounts to a mere 2%. However, the average modern retail space density index for Poland was 268 sq. m per 1,000 inhabitants, which meets the European average. The macro-economic performance remains strong, in contrary to many other countries in Europe – Poland has a outstanding and stable positive GDP growth and inflation is running below the level of 41%. On the other hand, purchasing power and GDP per capita are below European average. To quote from individual segments, we may refer to the PRCH Turnover Index, which compiles data from 83 shopping centres in Poland which states that the average turnover index for the analysed group increased by 1.83% between 2008 and 2014. Annual turnover per sq. m in 2014 was 2,317 Euro. The PRCH Turnover Index seems to be stable for the comparable group of shopping centres, but one must bear in mind that during this period the number of shopping centres in Poland increased by 0.5 mln sq. m each year. Analysing individual categories, outstanding rates of growth has been noticed in recent years in categories such as Services, Entertainment, Specialty Goods, and Homeware, which might be considered as a trend of changing functions of shopping centres into more lifestyle- and leisure-oriented schemes.

As regards the outlook for the coming years, the market's performance may be significantly affected by macro-economic conditions and a stable rate of GDP growth above 3%, as expected by the *European Bank for Reconstruction and Development*, which may also be reflected in retail sales, including shopping centres. Thus Poland remains a particularly attractive investment opportunity for new retailers which are opening up in our market.

## Poland - General background

Area	31268 thousand. hectares
Population	38.5 million (as of 31 March 2014)
Capital	Warsaw with a population of 1.777 million
Currency	Zloty (PLN) = 100 groszy (gr)
GDP per capita (current prices)	43 153 PLN (13,653 \$) (as of end 2013)

# Establishing a Company

*One should choose on the form of conducting a retail activity in Poland. There are two general forms of running a business – as a natural person or in the form of a company. The first form is applicable rather to small businesses. Forming a company provides a wider range of legal and economic opportunities...*

According to the Polish Commercial Companies Code, the pursuit of an economic activity by entrepreneurs can be performed in the form of a company, which can be identified into one of the following categories:

- **A Registered partnership** (*spółka jawna*)
- **A Limited partnership** (*spółka komandytowa*)
- **A Limited joint-stock partnership** (*spółka komandytowo-akcyjna*)
- **A Limited liability company** (*spółka z ograniczoną odpowiedzialnością*)
- **A Joint-stock company** (*spółka akcyjna*)

A company must register on the Polish commercial register (*Krajowy Rejestr Sądowy*) to incorporate itself.

It is also possible for a business to exist in Poland as a branch or subsidiary of another company. A sole business on behalf of a company in the form of a representation is also possible, but the representation must be entered into the appropriate register.

## Registered partnership

- must consist of at least 2 legal or natural persons
- the partners bear unlimited liability

## Limited partnership

- must consist of at least 2 natural or legal persons
- a general partner (*komplementariusz*) bears unlimited liability, while a limited partner (*komandytariusz*) bears limited liability.

## Limited joint-stock partnership

- allows an influx of fresh capital through the issue of shares, without the loss of control by the general partners
- the minimum share capital is PLN 50,000 (ca. € 12,000).

From a tax perspective limited partnerships are transparent vehicles, so taxable profit is taxed in the hands of their partners. However, starting from 1 January 2014, limited joint-stock partnerships have become a separate corporate income tax payer and lost their tax transparency.



## Did You know...

Statistically the most popular legal form of retail investor business activity constitutes a limited liability company (*spółka z ograniczoną odpowiedzialnością*), not only because of the tax issues, but also because of the general regulations of shareholders liability provided in Article 151 § 4 of the Polish Commercial Companies Code – ***The shareholders will not be liable for the obligations of the company.***

### Limited liability company

- A wholly-owned company is possible, but it is not allowed to create a "chain" whereby one wholly-owned company is the sole founder of another wholly-owned company.
- The minimum share capital is PLN 5,000 (ca. € 1,200).
- Since 1<sup>st</sup> January 2012, the company can be registered through the Internet with the use of a template submitted in electronic format by the Ministry of Justice. (A notarial deed is then not required)

### Joint Stock company

- The minimum share capital is PLN 100,000 (ca. € 24,000).
- The company is liable for its entire capital whereas the shareholders are only liable up to the value of their shares.

Company managers may also consist of foreigners not resident in Poland and knowledge of the Polish language is not essential.

The management of a limited liability company is appointed and dismissed by a resolution of the Shareholders' Meeting, unless the Articles of Association state otherwise. The members of the management board of a joint-stock company are appointed and dismissed by the supervisory board, unless the company's statute states otherwise. Members of the management board may also be dismissed or suspended by the Shareholder's Meeting.

The members of a company's governing body are liable for their actions under both civil and criminal law.

For instance, they may face criminal liability if they act in a manner which is detrimental to the company, fail to declare insolvency, buy out their own shares, or issue shares in contravention of Polish law.

The effective registration of a company into the Polish commercial register (*Krajowy Rejestr Sądowy*) also requires the formation of its registered office. For these purposes it is recommended, depending on the needs, to lease specific office premises.

## Ownership structure vs. liability for tax obligations

The principles of tax liability of various types of entities participating in business processes are regulated by the provisions of the Tax Ordinance. According to the general principles, a taxpayer has unlimited liability for payable taxes. This liability is personal and it has no limitations, which means that the revenue office may demand securing receivables against all assets of the taxpayer.

Before 1<sup>st</sup> January 2014 one of the most popular forms of running a business by a natural person was a limited liability hybrid, which had such advantages as limited business liability due to the engagement of an LLC as a general partner, reduction of the tax burden on the investors' profits and the opportunity to involve many investors. According to recently introduced tax law changes, limited joint stock partnership ceased to be transparent for corporate income tax purposes, thus the advantages of a limited liability hybrid have been significantly reduced. Some optimisation options may, however, still be available when using limited liability partnership in the structure.

Another popular investment vehicle is a limited liability company. Apart from limiting the investor's liability for the obligations of the company up to the amount of the share capital (currently at the minimal level of 5.000 PLN), some key unquestionable benefits of using this type of investment vehicle are as follows:

- The opportunity to exit an investment by disposal of shares which in turn creates the opportunity to use international holding companies to reduce tax burdens incurred when exiting an investment;
- Avoiding doubts and risks related to determining the type and amount of sales tax on the transaction of disposing of an investment;
- Immediate availability (so called Special Purpose Vehicle) in the offer of advisory companies.

### Business activity of natural persons

A natural person engaged in a business activity has an unlimited liability

### Partnerships / civil law partnerships

Unlimited liability, jointly with the company and other partners, the following are liable for tax arrears:

- a partner in a civil law partnership, in a general partnership, in a professional partnership
- a general partner in a limited partnership
- a general partner in a limited joint stock partnership

### Corporate entities

- A shareholder/ stockholder is not held responsible for liabilities of the company (exceptions)
- Responsibility of the management board member (under certain conditions)



# The Lease of Premises

*One should provide for appropriate space. The premises in which the business is to be run may become a crucial factor of its success. The lease of premises provides space, but also bears tax and financial advantages...*



## The Legal Perspective

With the lease contract, the landlord (lessor) assumes the obligation to give the tenant (lessee) a premises for use for a specified or unspecified time and the tenant assumes the obligation to pay the landlord the agreed rent. Usually the rent is determined in money, however the Parties shall agree on contributions in kind.

A lease contract for an immovable property or premises for a period longer than one year shall be concluded in writing.

If the lease period is indefinite and the rent is due monthly, the lease contract may be terminated with at least three months notice before the end of a calendar month.

If a leased premises is sold during the term of the lease, the purchaser assumes responsibility of the lease relationship. However, the lease may be terminated with suitable notice, unless the lease contract was executed for a fixed term in writing with an authenticated date and the premises was handed over to the tenant. If, following the termination of a lease by the purchaser, the tenant is obliged to return the leased premises prior to the normal notice period, compensation may be demanded from the purchaser.

If the lease period is not fixed, both the landlord and the tenant may terminate the lease observing contractual notice periods and in their absence, statutory notice periods. Statutory notice periods for the termination of a lease are as follows: if the rent is payable at intervals greater than one month, the lease may be terminated with three months notice no later than at the end of a calendar quarter; if the rent is payable on a monthly basis - with one months notice at the end of a calendar month; if the rent is payable at shorter intervals - with three days notice; if the rent is daily- with one days notice. If the lease period is fixed, both the landlord and the tenant may terminate the tenancy in the instances specified in the contract.

By renegotiating the conditions of the lease it is recommended to include the Best Practice Manual prepared by Polish Council of Shopping Centres (**PL: Kodeks Dobrych Praktyk Polskiej Rady Centrów Handlowych**).  
<http://prch.org.pl/sites/default/files/testd/Kodeks%20dobrych%20praktyk-ang.pdf>.



## Retail real estate market in Poland in figures

	2009	2010	2011	2012	2013	2014
Number of shopping centres	318	339	363	392	416	448
Shopping centres by type (number of centres):						
Traditional	297	313	333	355	370	385
• Very large (80,000 sq. m and above)	4	5	5	5	6	6
• Large (40,000 to 79,999 sq. m)	39	41	45	46	53	55
• Medium (20,000 to 39,999 sq. m)	101	105	111	117	117	122
• Small (5,000 to 19,999 sq. m)	153	162	172	187	194	202
Retail park	12	15	18	23	30	45
Factory outlet centre (5,000 sq. m and above)	6	6	7	9	10	12
Theme-oriented centre	3	5	5	5	6	6
Shopping centre GLA in sq. m	7 694 410	8 145 660	8 674 360	9 211 480	9 835 495	10 311 155

Source: Polish Council of Shopping Centres. Minimum Size of Shopping Centres Counted: 5000 sqm GLA



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## Tax perspective

### On-going taxation of the lease

For rental services the tax obligation on VAT generally arises at the point when an invoice is issued. Due to the amendments, VAT obligation no longer arises on the payment deadline. The same rule applies to tax obligation on VAT arising from additional costs of media (such as electric energy, water supply or mains gas), as the rent and service charges are usually treated as one composite service. Thus, the rental payments and service charges are taxed by a single VAT rate, unfortunately specified for rent, i.e. 23%.

On the other hand, in some cases it is possible to interpret media costs as being separate to rent and thus taxed independently. In such a case the costs of water supply may be taxed with the reduced VAT rate of 8%.

From a CIT perspective, lease rent is tax-deductible according to the general rules.

### Rent free periods

Within a rent free period a tenant is entitled to use the premises without incurring rental costs, often solely paying service charges. Theoretically, from a tax perspective, this situation is a form of “free of charge” benefit received by a tenant and is subject to income tax. However, in practice, taking into consideration the business rationale behind a rent free period, no “free of charge” benefit is recognised and very often an invoice documenting a rent free period plus first regular settlement period is issued. This technical solution allows strengthening the argument that a rent free period is in fact settled within a long term effective rent and a simple reduction of a headline rent for a given period is not equal to a “free of charge” benefit. Such approach is broadly accepted by the tax authorities.

### Fit-out contributions and lease incentives

Incentives granted to tenants while entering the premises often comprise either of a one-off cash incentive or a form of contribution to the fit-out expenses. Dependent on the shape of the lease agreement, different tax consequences may arise. For instance, an entry fee is commonly considered as a service payment. This one-off income is taxed, based on the general rules and is usually

treated as providing immaterial services, advertising or marketing, in particular when the wording of the agreement refers to such additional aspects. An entry fee may also be seen as remuneration for services (in particular VAT is due when related with an entry fee payable to anchor tenants). In the past it was deemed that no VAT should be applicable if the entry fee is paid solely for becoming a tenant (signing the rent agreement), however recently the courts represent the opposite interpretational line.

From a tenants’ perspective contributions to fit-out expenses usually do not create taxable income, however they decrease the value of tax depreciation write-offs of constructed fixed assets (part of the value of asset refunded to tenants cannot be treated as tax-deductible). The tenant may simply reimburse part of the fit-out costs onto the landlord. If so, the tenant will recognise taxable revenues and tax-deductible costs resulting from such re-invoicing.

### Exit from the leased premises

One of the key issues when exiting lease premises is the settlement of the non depreciated value of fixed assets. Based on tax provisions the period of depreciation of fit-outs is generally 10 years. Thus, when the agreement is terminated before the lapse of this period, the tax authorities often challenge the right of a taxpayer for a one-off inclusion of non-amortised expenses in the tax deductible costs, underlining the fact of a lack of relation between such costs and taxable revenues or protecting their sources. This statement completely ignores business aspects of early exit, which have more and more often been underlined by the administrative courts. It is also worth noting that the positive approach of the administrative courts results slowly, however noticeably in a shift in the approach of the tax authorities i.e. some of them begin to see and accept the business rationale for early exit and thus, also accept the right to recognise the non depreciated value of fixed assets as tax deductible costs.

Another case is an obligation to liquidate the fit-outs. As the costs of liquidation may be significant, in practice landlords and tenants elaborate solutions, under which a tenant may leave the fit-outs in the premises, however waives the right to lay any claims towards the landlord. This business-wise agreement creates a VAT risk, as from the tenant’s perspective leaving fit-outs in the premises may constitute a gratuitous supply of goods, subject to VAT. Therefore, sometimes it is better to sell the fit-outs to the landlord for a token price, justifying that it complies with the arm’s length principle, as for the landlord such fit-outs only have a symbolic value.



## Compensation for an early exit

Early termination of a lease agreement is usually related to a contractual penalty. In the case when the said penalty is purely of compensatory nature, then it remains outside VAT taxation. However, in the situation when the tenant physically refuses to vacate the premises, although the lease agreement was terminated, and as a result is charged by the landlord with additional payment, such payment should be subject to VAT, as in fact is economically similar to the rent. Therefore, when determining the VAT treatment of a compensation/contractual penalty, it is important to see not only the term specified in an agreement but also the actual circumstances, in particular whether it is a pure compensation/penalty or if the payment is related to an equivalent service received for it (e.g. money paid by a tenant to a landlord for consent to an early exit/early termination of a rent agreement).

From an income tax perspective, the tax authority often refuse to allow tenants to deduct paid compensation as a tax deductible cost. This may, however, be dependent on the reasoning behind an early exit. When the purpose of an early exit is to cost-cut, improvement of conditions to run sales activity etc., in our opinion this is a sufficient argument to allow the deduction of costs for tax purposes.

## Definitions used in this publication are in compliance with ICSC standards:

**Shopping Centre** (esp. Conventional or Traditional SC) – a retail property which is planned developed and managed as a single entity, comprising of units and common areas with a minimum gross leasable area (GLA) of 5,000 sq. m., and a minimum of 10 retail units.

**Retail Park** – a specifically designed, planned and managed scheme which mainly comprises of medium to large scale specialist retailers ("big boxes" or "power stores"), which typically share an open-air passage or a parking lot.

**Outlet Centre** – a specifically designed, planned and managed scheme with separate store units, where manufacturers and retailers sell merchandise at discounted prices which may be surplus stock, off-season collections or slow selling lines.

## Did You know that...

- The average number of new retail space in Poland amounts to between 550,000 sq. m GLA per annum
- There is more than 450 shopping centres in Poland which equates to almost 10.5 million sq. m GLA
- Warsaw is the largest retail market of the eight major urban areas in Poland with over 1.4 million sq. m of GLA
- At the end of 2014 there was 800,000 sq. m of GLA under construction in shopping centres, of which 45% are in the large urban areas and 30% in small towns with a population less than 100,000 inhabitants
- At the end of 2014, the average modern retail space density for Poland rose by 12 sq. m to 268 sq. m per 1,000 inhabitants compared with the end of 2013.
- Strong development activity is focused on smaller cities with a population below 100,000, though still 66% of new shopping centres GLA to be opened till 2017 is located in big cities (above 400,000 inhabitants).
- The overall vacancy ratio for 237 shopping centres offering in total 6.927 million sq. m of modern shopping in 15 largest Polish cities amounts to a mere 2.7%.
- The Warsaw area boasts the largest number of tenants in Poland and has around 3,500 stores operating in its 43 shopping centres, retail parks and outlets, which continues to add to Warsaw's strong competitive edge over other cities



## Shopping centres in the eight biggest agglomerations in Poland

Agglomeration	Population	Open GLA (sq. m)	The number of open shopping centres	Open GLA per 1,000 inhabitants	Major shopping centres
<b>Warsaw</b>	2 539 714	1 405 915	43	553,6	<i>Arkadia, Galeria Mokotów, Złote Tarasy</i>
<b>Katowice (Silesia conurbation)</b>	2 173 441	1 106 660	46	509,2	<i>Silesia City Centre, Galeria Katowicka, Europa Centralna</i>
<b>Cracow</b>	1 029 045	549 400	15	533,9	<i>Bonarka City Centre, Galeria Krakowska</i>
<b>Tri-city (Gdańsk, Gdynia &amp; Sopot)</b>	1 027 480	685 630	25	667,3	<i>Galeria Bałtycka, Klif Gdynia, Centrum Riviera</i>
<b>Łódź</b>	978 163	510 350	15	521,7	<i>Manufaktura, Port Łódź</i>
<b>Poznań</b>	820 342	627 610	19	765,1	<i>Galeria Malta, Stary Browar</i>
<b>Wrocław</b>	783 780	598 760	19	763,9	<i>Magnolia Park, Pasaż Grunwaldzki</i>
<b>Szczecin</b>	557 443	275 320	11	493,9	<i>Galeria Kaskada, Galaxy</i>

Source: PRCH Retail Research Forum, March 2015



# The law governing trademarks and industrial patterns, patent law

*...secure your brand and logo...*



With the registration of a company into the Polish commercial register (*Krajowy Rejestr Sądowy*) we also recommend, where necessary to register the trademarks of the company's goods and services in the Polish Patent Office. Once registered, a trademark is protected for 10 years from the point of registration. Protection may be extended for a further 10 years at the expiry of the previous term. The regulations governing trademarks, industrial patterns and patents are set forth in the Industrial Property Law, which lays down the legal basis for invents, user patterns, Industrial patterns, trademarks and graphical symbols.

To obtain a patent, it is essential to register it at the appropriate National Patent Office. An international patent registration may also be performed at these offices, in compliance with the Patent Cooperation Treaty (PCT). When such a PCT registration is made, at present the patent assumes validity in 130 countries. The maximum period of validity of a patent is 20 years from the point of registration.

The period of protection for user patterns is 10 years from the point of registration, but may be extended for a further 10 years on application.

## Tenant mix in Polish shopping centres

In 2012 the structure of tenants across the entire market has remained unchanged. An analysis of tenants in shopping centres located in the eight largest urban areas and seven regional capitals shows that the following categories represent the largest groups of tenants: fashion (29% of all tenants), services (14,5%), shoes and leather accessories (10%) and catering services (10%). The representatives of other sector categories account for less than 10% of all tenants. A typical shopping centre also features a large super- or hyper-market and several anchor tenants, which usually sell radio and television equipment, domestic appliances or sports equipment. It is also worth noting that the largest high-quality shopping centres offer a wide range of entertainment and recreational pursuits. Approximately 30% of the analysed shopping centres also feature a DIY store, usually located in a separate building.



# Labour Relations

*... employ professional staff...*



An employment contract is concluded in written form and must specify the following: the parties in the contract, the type of contract, the date of its conclusion, as well as the work and remuneration conditions. If an employment contract is not concluded in written form, the employer must confirm in writing the type of employment and the terms and conditions thereof no later than the day on which the employment commences.

**Pursuant to Article 25 of the Polish Labour Code, the following types of employment contract may be concluded:**

- An employment contract for a fixed term,
- An employment contract for an indefinite term,
- A contract limited to the performance of a specific task,
- A contract to replace a person who is absent.

Before each of these contracts is signed, a contract for a probationary period may be concluded. The probation may last up to a maximum of 3 months.

The conclusion of a third successive employment contract for a fixed term will be treated as the conclusion of a contract for an indefinite term.

An annex to an employment contract for a fixed term, extending its validity, is considered a “new” contract. This does not apply to contracts to replace other individuals, or contracts for seasonal or part-time work.

## Periods of notice

**The notice period for terminating a probationary employment contract is:**

- for contracts valid up to two weeks – 3 days,
- for contracts valid more than two weeks – one week,
- for contracts valid more than 3 months – two weeks.

For employment contracts concluded for a fixed term, a notice period of 2 weeks is allowed, pursuant to Article 33 of the Labour Code, employment contracts for a fixed term may be terminated only if they are valid for at least 6 months and the opportunity to terminate is explicitly stated in them.

**The notice period for an employment contract for an indefinite term is regulated by law, and varies according to the employee’s length of service.**



The notice period for terminating an employment contract concluded for an indefinite term is:

- 2 weeks, if the length of service is less than 6 months,
- 1 month, if the length of service is more than 6 months,
- 3 months, if the length of service is at least 3 years.

If an employee is 4 years or less prior to retirement, there is a statutory ban on terminating such an employment contract.

Whether longer periods of notice than those above may be agreed upon in an employment contract is open to question. According to the latest jurisdiction on this subject, longer periods of notice are permissible if they improve the employee's situation on account of the condition of the labour market.

Termination notice from an employer must be in writing. Moreover, if an employment contract concluded for an indefinite term is terminated, reasons for the termination must be given. In certain cases, the dismissal of a larger number of employees requires approval from the trade unions and an adherence to a special procedure.

Working hours may not exceed 8 hours in a 24-hour period and an average of 40 hours in an average five-day working week in an applicable calculation period not exceeding 4 months.

For employment overtime, employees are entitled to bonuses as follows:

- 100% of their salary for work at night, on Sundays and public holidays that are not working days for an employee, in accordance with the schedule of working hours
- 50% of their salary for work at other times.

An employee is entitled to annual leave as follows:

- 20 business days per year, if employed for less than 10 years,
- 26 business days per year, if employed for at least 10 years.

The minimum salary is fixed by law and, at present, amounts to about 1,750 PLN gross (ca. € 420) per month (as of February 2015). The average monthly salary is currently about PLN 3,959 (ca. € 951) (as of February 2015).

Additional employment costs in Poland comprise of pension and disability allowance, accident insurance and contributions to the social security and guaranteed employee benefits fund.

# Commercial Contracts

*...be aware while concluding contracts...*



As far as commercial relationships with other contractors and third parties are concerned, there are several different legal methods to arrange this. According to Polish Civil Law, there can be two types of differentiated contracts:

- nominate contract,
- innominate contract,

Nominate contracts represent such a contract, where essentials are directly stipulated in the Polish Civil Code. The most common among the nominated contracts are: sale, lease, tenancy, contract of specific work, mandate.

The content of an innominate contract is not associated with any of the stipulated types of nominated contracts. These types of contracts are legally admissible on the basis of the rule of freedom of contract stipulated in Article 353<sup>1</sup> of Polish Civil Code. **The parties to a contract may arrange the legal relationship as they deem proper on condition that the contents or the purpose of that contract are not contrary to the nature of the relationship, with the statutory law and with the principles of community life.** The main advantage of such type of contract is the opportunity for the entrepreneurs to adapt their economic activity and legal formation in a manner most suitable and efficient for their purposes.



# Pursuit of Claims

*... use appropriate legal remedies...*

Polish Law constitutes the following methods of claims pursuit:

- mediation,
- arbitration,
- civil proceedings

Mediation or any other conciliatory procedure does not constitute an ordinary proceeding, where neither party shall be forced to conclude a solution. Each party shall express an agreement to participate in mediation and it is popular, especially in mediation agreements, concluded by parties before they enter into a legal relationship. A Party is allowed to renounce the participation in conciliatory procedure, without any negative legal consequences. During civil proceedings, the judge is entitled to persuade the parties to mediate, however the parties are not obliged to enter mediation. **TaylorWessing e|n|w|c is a coordinator of the first International Mediation Centre for commercial cases established at the international chambers of commerce in Poland. The objective of the Mediation Centre is to solve commercial disputes by means of private mediation conducted by an independent and professional mediator. Depending on the needs of entrepreneurs, mediation may be conducted in foreign languages.**

Arbitration is also possible for contentious issues in connection with a company's Articles of Association or caused by an industrial dispute. Arbitration is often chosen because of the lengthy court proceedings. An arbitration clause must be in writing, whereby the agreement to such a clause expressed in mutual written correspondence is sufficient. Poland has ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

In certain cases, arbitration rulings can be appealed against (on the grounds of the invalidity of the list of arbitration clauses, the lack of competence of the arbitration court, or a breach of procedures, etc.)

A Civil proceeding is governed by the Polish Code of Civil Procedure as a major way of dispute resolution led by the Polish Common Court in accordance with the territorial competence.



Other than one of many methods of reaching consumers, the internet today has become an essential tool in the competitive consumer goods market. Becoming an internet trader poses many key obstacles which need to be addressed. Attempting to solve them through traditional know-how, which may have been successful in an off-line activity, may not be beneficial to an e-commerce operation and may, in fact, create a source of additional obstacles and complications.

## Domain Name

It is apparent that the commercial success of a business is dependent on its geographical location. The equivalent "location" on the internet is the internet domain name (so called an internet address), which is used to obtain a searched web site. One of the important aspects in this context is so called cyber-squatting, i.e. registration of another person's or organisation's trademark as an internet domain for speculative purposes. Therefore internet trading will very often be proceeded by an internet domain dispute with a cyber-squatter, who may be a dishonest competitor or a previous business partner.

It is strongly advisable to monitor the popularity of an internet domain name. It is therefore essential, as a part of diligent preparation of a commercial internet website, to invest in so called positioning (SEO, search engine optimisation), as well as to consider the use of sponsored links. The appearance of the latter in regular (i.e. natural) search results is determined by purchasing keywords from the search engine operator. It is essential to bear in mind that the use of another company's trademarks may result in the infringement of rights. For the same reason, it is also advisable, from time to time, to check whether competitors' web addresses are displayed amongst the search results having entered one's own business name or brand into a search field,.

# eCommerce

*...Internet zone...*





## Consumer protection on the Internet

Recently Poland has implemented the Directive 2011/83/EU on consumer rights, which has introduced several crucial changes to consumer protection law. The new law has come into force on 25<sup>th</sup> December 2015. The extent of changes introduced through the new Act is impressive, starting with the new comprehensive regulation on consumer information requirements, through the organisation of the issue of settlement of distance transactions and finishing with a modification of the institution of withdrawal from the contract. Currently consumer may generally withdraw from the distance contract within 14 days from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires physical possession of the goods or from the conclusion of the contract when the contract refers to the provision of services. The new term for withdrawal from the contract is now uniform in all EU member states.

Moreover, the new Act introduces changes not only in the functioning of the general e-commerce sector, but also in traditional consumer sales. With the new Act coming into force, Directive 1999/44/EC of the European Parliament and the Council on certain aspects of the sale of consumer goods and associated guarantees was re-implemented through transferring the regulations concerning liability for the quality of goods sold to consumers from a separate Act of law to the Civil Code. Since then, there has been a single regime in place for liability for defects of goods, based on the institution of defects liability warranty.





## Unfair contract terms with consumers

Selling goods on-line includes the provision of internet services regarding the conclusion and performance of sales contracts for goods which are offered by an entrepreneur. As a provider of internet services, each entrepreneur is obliged to issue and apply for the general terms and conditions which govern the legal relationship with the users. As the Directive 93/13/EEC on unfair terms in consumer contracts has been implemented into Polish law, the T&Cs which are used in the B2C relationship must not include the provisions which have not been individually agreed with the consumer, if the rights and obligations are set forth in a form which is contrary to good practice, or grossly violates one's interests (unlawful contractual provisions).

The impact of unlawful contractual provisions under Polish law is twofold:

- I. firstly an unlawful contractual provision is not binding for consumers, thus the clause in question is not effective however the parties are bound by the other provisions of the agreement (provided that the other provisions are not unlawful contractual provisions).

An entrepreneur, who uses unlawful contractual provisions, may be sued by a consumer in a common civil court. When the court confirms the unfair character of the given contractual term, the clause will be entered into an official register of unfair contractual terms maintained by the President of the Polish Office for Protection of Competition and Consumers. The register is freely accessible by the public and the entries include, among other details, the wording of the clause and the name of entrepreneur who used it as part of T&Cs.

- II. On the other hand, the practice of using unfair contractual terms which are already in the aforementioned register may be regarded as an infringement of the collective consumer interests by the President of the Polish Office for Protection of Competition and Consumers.

In such a case the Office may impose financial penalties on the company, theoretically up to the 10% of the revenue from the previous financial year.

## Data Protection

The fundamental legal framework regarding the data protection is included in the Act of 29<sup>th</sup> August 1997 on Personal Data Protection. There are, however, a number of special regulations which apply to specific industries (e.g. insurance sector, telecoms or banks). As a rule Polish data protection law reflects the principles as set out in European law, in particular including Directive 95/46/EC on data protection. However there are notable discrepancies which for example refer to law enforcement.

As a rule, specific to the Polish system, the data protection authority may not impose a financial penalty. However, the Polish authority may issue certain instructions/recommendations, which, if not adhered to, may result in fines, yet their level is not significant (up to around € 12,000 or a ceiling of around € 48,000 in total for multiple fines). Yet, these fines are issued as a result of the failure to execute the Polish authority's instructions/recommendations and, as such, do not serve as penalties for an infringement of the relevant data protection provisions.

Failure to observe any of the significant obligations of the data administrator results in criminal liability of the relevant individuals responsible for the failure to register the database, failure to obtain authorisation to carry out data processing, to prevent unauthorised data access, to ensure technical data security, or to notify the individual of which the data refers to of his/her rights. The Polish data protection authority is obliged to notify the public prosecutor of any infringement which may give rise to criminal proceedings. However in practice the risk is also limited as, statistically, less than 10% of such notifications results in an indictment being lodged with the court by the public prosecutor and the number of court judgments confirming such an infringement is negligible.



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Ewelina is the initiator and coordinator of the International Mediation Center at the international Chambers of Commerce in Poland, which is a platform for out-of court commercial dispute resolution dedicated to the entrepreneurs interested in mediation.

Ewelina is an author of numerous publications. Her recent work includes: practical aspects of mediation and litigation, corporate and real estate issues, as well as contract law. She focuses on practical issues regarding doing business in Poland and has worked with the World Bank on "Doing Business Report" (Poland) since 2004.

Sources say: "The lawyers have good commercial understanding and are very hard-working." Ewelina Stobiecka "takes personal care of your business interests", a client commented.

Chambers & Partners Europe 2011



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Przemysław regularly gives lectures on IP law, e-commerce and new technologies at legal conferences. Przemysław has been an author of many articles for various specialist and economic media titles.





## TPA Horwath in Poland

**TPA Horwath** is one of the largest consulting companies in Europe, a member of the Crowe Horwath International global structure. It offers business solutions for international and national enterprises in tax consulting, transaction advisory services, financial audit, accounting and payroll administration outsourcing, as well as corporate finance and human resources advisory.

TPA Horwath also provides specialised advisory services for separate industries, particularly for the Real Estate and Construction sectors, as well as for the Energy industry. Our activity focuses not only on the commercial real estate sector (retail, office, industrial), but also is extended to construction and residential activities. Horwath HTL, a separate brand but a member of the same group, also offers specialised advisory services for the hotel and tourism sector.

Apart from Poland, the TPA Horwath Group includes partner companies from Albania, Austria, Croatia (an exclusive partner), the Czech Republic, Slovakia, Slovenia, Romania, Bulgaria, Hungary and Serbia, providing employment to over 1,000 consultants in total. Crowe Horwath International is an international association of independent advisory and auditing companies. With over 29,000 experts in 118 countries around the world it is the ninth largest global consulting group.

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**Krzysztof Kaczmarek** is a partner at TPA Horwath – he specializes in tax advisory for commercial real estate sector – among others he provides tax due diligence, transaction advisory projects as well as restructuring and reorganisation processes. Krzysztof is an expert in tax proceeding and his professional experiences include also representing clients before tax authorities and Provincial Administrative Courts and the Supreme Administrative Court as well as consulting during transactions involving restructuring and reorganization of Polish and international companies. Since October 2012 he has been a member of the four-person Steering Committee, in which he develops the strategic directions of TPA Horwath International Group and oversees implementation of strategic solutions in different countries.

**Małgorzata Dankowska** became a member of TPA Horwath in 2006. She has been involved in numerous tax projects, including tax reviews, due diligence analysis for real estate companies, retailers, public utilities and accommodation industries, as well as in transactional advisory and tax structuring. Her field of experience is mainly in Corporate Income and Value Added Tax. As a partner she is responsible for the Real Estate Team. Małgorzata is a well-known expert in transactional advisory regarding Mergers & Acquisitions. She is a co-author of *Restructuring of corporations. Tax aspects* (*Restrukturyzacje spółek kapitałowych. Aspekty podatkowe.*) published in, as well as *Taxation of the hotel business* (*Podatki w hotelarstwie*) published in 2013, both by Wolters Kluwer. In 2013 she was awarded second best M&A tax advisor in Poland by "Dziennik Gazeta Prawna".



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## The Polish Council of Shopping Centres (PRCH) in Poland

The Polish Council of Shopping Centres (PRCH) is a non-profit association of over 200 companies operating on the retail real estate market. It is a Polish partner of the International Council of Shopping Centers (ICSC) and has been active in Poland since 2003.

PRCH's mission is to support the development of companies and professionals operating on the retail real estate market in Poland and to promote the positive image of shopping centres and high streets.

The Council issues market reports, offers comprehensive educational programmes, organises training courses, conferences and networking meetings and the ReDI Fair. By joining us, you will receive professional support for your business endeavours: effective tools, current information concerning the retail real estate market, the opportunity to attend our events, conferences and join discussion clubs.

### OUR OBJECTIVES

1. To promote the best practices in the retail real estate sector
2. To promote the positive image of shopping centres and high streets in opinion-forming circles
3. To conduct an active dialogue with organisations which can influence the future and the dynamics of the retail real estate market development in Poland
4. To overcome/break down legal obstacles to develop the retail market in Poland
5. To issue and update key information on the retail real estate sector
6. To provide a broad forum for networking, research and knowledge sharing

### Contact details:



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