

Poland

Piotr Szafarz

1. Real Property Law – Introduction

1.1 General Features and Short History

After over 120 years of lacking or limited sovereignty, Poland regained independence in 1918. At that time four civil law systems were in force on its territory. The central part of the country was subject to the Napoleonic Code, eastern districts were governed by Russian law, western and northern districts were governed by German law, and southern districts – by Austrian law. Poland did not manage to unify its real estate law before WWII (other branches of civil law, e.g. obligations, were unified).

Real estate law was unified only after WWII – by the adoption of the Real Estate Act¹, the Mortgage Register Act² and Introductory Regulations³ in 1946. Although these acts treated ownership as a uniform right, the introduction of communism was reflected in the Polish Constitution of 1952, which granted special protection to “social ownership” (e.g. state ownership, co-operative ownership, etc.), and in particular to the state ownership of production means (in conformity with the Marxist economy). The protection of private ownership was limited to the satisfaction of the individual’s basic needs.

The provisions of the 1952 Constitution were implemented and developed in the Civil Code, adopted on 23 April 1964 (and in force as of 1 January 1965). The code abolished the Real Estate Act, while the Mortgage Register Act remained in force. The Civil Code differentiated between the reach of various kinds of ownership and gave the farthest ranging protection to social ownership (impossible to acquire by usurpation, everyone obliged to protect, etc.).

Social ownership dramatically increased with the introduction, in 1944-46, of various nationalisation decrees (concerning agricultural properties, forests, certain urban properties, factories, etc.).⁴ In addition, farmers were forced to become members of agricultural cooperatives, handing over their farms to the common good (although the idea of “collectivisation” was then abandoned).

Satisfying residential needs was one of the biggest problems in the 50s and 60s. One of the remedies proposed was perpetual usufruct – a new *in rem* right introduced by the law of 14 July 1961 over the management of land in cities and districts⁵ (this right is described under 1.3 below). This could be considered a continuation of Roman emphyteusis, or of the feudal concept of shared ownership. However, the right has now become a very strong right in real property, much closer to full ownership, and relatively remote from its socialist origins.

With the fall of communism in 1989, huge reforms were undertaken with a view to introducing free market economy rules in the Polish legal system, one of the most

¹ dated 11 October 1946 (Dz. U. 1946, no. 57, item 319)

² dated 11 October 1946 (Dz. U. 1946, no. 57, item 320)

³ dated 11 October 1946 (Dz. u. 1946, no. 57, item 321)

⁴ see 8.1.1 (bibliography)

⁵ see 8.1.2 (bibliography)

basic of which was the full protection of now widespread private ownership. This was reflected in the “Temporary” Constitution of 1989 and the Constitution of 1997, currently in force, which treated ownership as a uniform right and guaranteed its full protection (irrespective of whether “social” or “private”). The 1997 Constitution states that private ownership is the basis of the free market economy and the economic regime of Poland. Expropriation and any other limitation of ownership may only result from law and should be appropriately indemnified. The European Convention on Human Rights (in force in Poland since 19 January 1993) and the *acquis communautaire* (especially since the signing of the Association Treaty on 16 December 1991) also played an important role in these developments. The Civil Code was thoroughly amended in a series of reforms.

Together with the necessary changes in the legal regime of ownership and other property rights (including perpetual usufruct), a significant part of state-owned (or “social”) property was passed on to other bodies. These included state-owned enterprises (now almost all of them privatised), newly created districts (*gmina*), and finally other local self-government units like *powiat* and *województwo*, cooperatives and, in certain cases, individuals⁶. These changes, together with the National Investment Funds programme (nation-wide privatisation), meant that a very significant part of real property ended up in private hands.

However, one problem remained: the restitution of properties unlawfully taken under the communist regime following WWII. Poland has still not entirely remedied this problem. So far, there has been a lack of political support for a re-privatisation law, despite there being no issue of cancelling good faith acquisitions. (Each draft law provided for compensation in cash or shares in state-owned companies, restitution in nature being limited to cases where properties were still held by the State or local authorities). Therefore, the only possible means of restitution today is questioning individual nationalisation decisions. In fact, a large proportion of the decisions were illegal as the communist authorities did not much care about complying with nationalisation laws. The aim was to nationalise everything they could, even if a given property did not fall within the scope of a particular nationalisation act or a beach of procedural rules was required.

At present, the basic source of real property law is still the 1964 Civil Code (heavily amended since it was first adopted). However, the code does not regulate this branch of law exhaustively. There are many more acts that apply, in particular: the law of 6 July 1982 on mortgages and mortgage registers⁷, the law of 24 June 1994 on the ownership of apartments⁸, the law of 21 August 1997 on real estate management⁹, and the law of 11 April 2003 on the agricultural system¹⁰.

1.2 Property and Estates

⁶ see 8.1.3

⁷ dated 6 July 1982 (Dz. U. 1982, no. 19, item 94, as amended)

⁸ dated 24 June 1994 (Dz. U. 2000, no. 80, item 903, as amended)

⁹ dated 21 August 1997 (Dz. U. 2000, no. 46, item 543, as amended)

¹⁰ dated 11 April 2003 (Dz. U. 2003, no. 64, item 592)

Under Polish law, it is not possible for several persons to be owners of the same real property other than in the form of joint ownership. The concept of perpetual usufruct probably comes closest to this idea. This equates to the State or local authority granting the beneficiary a restricted right in property whose scope is very close to that of full ownership. Perpetual usufruct is discussed in more detail below (see point 1.3).

Apart from having a remote resemblance to perpetual usufruct, feudal rights do not play any role in the Polish legal system.

It is a general rule that buildings, other structures and installations are “integral parts” of the land, provided that they are both objectively and subjectively “permanent”. Such integral parts share the legal regime of the land. A temporary structure does not qualify as an integral part and belongs to its owner, independently of his title to the land.

There are few exceptions to this rule. The most common one is that in the case of land subject to perpetual usufruct, the ownership of the buildings belongs to the perpetual usufruct and not to the owner (the State or local administrative unit). Second, apartments are not considered as integral parts of the building (and the land), but constitute independent real estate if they were formally separated. Third, utility infrastructure materials (pipes, cables, transformers, etc.) belong to the relevant grid operator – usually up to the wall of the recipient’s building – depending on individual technical solutions and the contract with the operator. Other exceptions are less common. Until 1983, farmers were able to pass their land over to the State in return for rent – in so doing, they were allowed to keep ownership of the houses erected on their land. Lastly, agricultural cooperatives (a certain number still exist but very few, if any, are being created nowadays) hold usufruct title to the land contributed by the State, local authorities or their members. However, they acquire ownership of any buildings they erect on this land and may acquire ownership of the buildings existing at the time they obtained the usufruct.

The total separation of the ownership of buildings from ownership of the land is very rare and concerns only two of the cases mentioned above: farmers’ houses and utility infrastructure (to the extent that such infrastructure may be considered a building). In all other cases, one must hold a title to the land in order to be the owner of the building. As a rule, this title should be ownership, but in the cases mentioned above perpetual usufructors and agricultural cooperatives (holding usufruct title to the land) also become owners of buildings. Owners of independent apartments hold a relevant share in the title to the land (either full ownership or perpetual usufruct – see point 1.4).

The independent ownership of farmers’ houses may, in practice, be ignored. Utility infrastructure ownership is a specific case and very rarely concerns buildings as such. Perpetual usufruct is very common (for historic reasons, especially in Warsaw and with respect to properties held by state-owned enterprises – see below), but it would not be correct to say that the ownership title to buildings is independent of the title to land (it is strictly related to perpetual usufruct on the land).

1.3 Interests in Land

Numerus clausus is the basic principle of Polish real estate law. All *in rem* interests in land are defined by law and no new interests may be created. Obviously, the exact

scope of a given interest (servitude, usufruct, etc.) is specified in the contract or in the deed of establishment.

The Polish legal system recognises only the following *in rem* interests in land (or, more broadly, in real property):

- (a) full ownership (*własność*);
- (b) perpetual usufruct (*użytkowanie wieczyste*);
- (c) usufruct (*użytkowanie*);
- (d) servitude (*służebność*);
- (e) cooperative right to residential premises (*własnościowe spółdzielcze prawo do lokalu mieszkalnego*);
- (f) cooperative right to business premises (*spółdzielcze prawo do lokalu użytkowego*);
- (g) cooperative right to a house (*prawo do domu jednorodzinnego w spółdzielni mieszkaniowej*);
- (h) mortgage (*hipoteka*);
- (i) timesharing.

The rights mentioned in points (c) – (i) are restricted rights in property.

The pre-emption right is an *in personam* and not an *in rem* right under Polish law. However, it comes very close to an *in rem* right in the following cases: (i) the statutory pre-emption right belonging to the State or local authorities, (ii) the statutory pre-emption right belonging to the tenant of an agricultural property, and (iii) pre-emption rights registered on the mortgage register. In the first two situations, a violation of the pre-emption right results in the invalidation of a transfer to a third party. In the third case, the pre-emption right becomes *ius in rem scripta* and is enforceable against any third party purchaser.

If we ignore cooperative rights (whose main purpose is to serve residential needs and which are in any case now in decline), the Polish legal system recognizes two *in rem* rights to use real property: usufruct (extensive use) and easements (restricted use).

Usufruct grants its holder a right to use and collect income (“fruits”) from the property in compliance with the usufruct contract (to be executed before a notary). It is supposed to grant the usufruct full economic use of the property. The owner is not obliged to make any improvements or repairs to the property; all such responsibilities belong to the usufruct. Usufruct cannot be transferred to a third party. This is the major inconvenience of the right. There is no maximum time limit for usufruct.

Polish law distinguishes between two types of easements (whose scope may be identical): ground easements (easements in appurtenance) and personal easements (easements in gross). The former are established to the benefit of the owner (or perpetual usufruct) of (usually neighbouring) land, and the latter are established to the benefit of an individual physical person. Ground easements are transferred together with the property (whether dominant or servient). Personal easements are only transferred with the servient property. (The personal easement right itself may not be transferred). Depending on the easement deed, the holder of the dominant tenement

may exercise the following rights: use the servient property to a defined extent (e.g. road easement); require the holder of the servient property not to exercise some of his rights over his own property (e.g. not to build closer than x meters to the boundary), or require the holder of the servient property not to exercise some of his rights over the dominant property (e.g. cutting overhanging tree branches). 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.

At present, the mortgage is the only type of security interest in real property under the Polish legal system. As a rule, a mortgage is accessory, subject to a few small exceptions (e.g. it secures a prescribed debt, a capped mortgage secures a debt whose amount is not yet known, etc.). There are different kinds of mortgages (contractual and forced, ordinary and capped, of a single property or joint, etc. See section 7 below for more details).

A draft law is now (September 2004) being drawn up, in order to introduce a non-accessory security in land in the form of a ground debt (land charge). However, it is difficult to say when and in what form this law will be adopted.

The Polish legal system does not have any *in rem* rights to acquire real property. However, certain *in personam* rights to acquire property (e.g. pre-emption rights, rights resulting from conditional or preliminary sale agreements or from an offer to sell) may be registered with the mortgage register and thus become *iuris in rem scripta*. This makes them enforceable against a third party purchaser. Besides this, certain pre-emption rights (vested in the State, local authorities and tenants of agricultural properties) are stronger than “ordinary” ones and their violation results in the invalidation of the contract of sale.

One of the most important *in rem* interests in land is perpetual usufruct (*użytkowanie wieczyste*).

The concept of perpetual usufruct arises from the historical reluctance of the State to hand over control of properties to full private ownership. It was intended to give the holder a relatively broad set of rights and responsibilities, whilst allowing the full title to remain with the State. Moreover, the State had instruments to control the development of land which might have been undermined if it had lost the full title to a large amount of well-located property.

Perpetual usufruct has now become a strong and stable right in property, far removed from its origins and, of all *in rem* rights, the closest relation to full ownership.

The Supreme Court has stated that, “... perpetual usufruct has been shaped as an intermediate institution between ownership and limited property rights. In cases not regulated by ... the Civil Code and in the perpetual usufruct contract, interpretation problems should be resolved by referring to the provisions of... the Civil Code on ownership as an analogy”¹¹.

¹¹ Supreme Court judgement of 17 January 1974, III CRN 316/73.

Perpetual usufruct may only be created on land belonging to the State Treasury or local authorities. Once created it can be subject to inheritance, transfer to third parties and encumbrances (mortgage, easements, usufruct). The perpetual usufruct holder 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 local authority) is substantially constrained in its powers: it cannot encumber the property or sell it to an entity other than the holder of perpetual usufruct, the State Treasury or local authority. The holder of the perpetual usufruct is solely entitled to use and collect income from the land.

There are two basic ways to create perpetual usufruct: by contract or by operation of law. Creating a right of perpetual usufruct by contract requires, with very few exceptions, putting the land up for tender. The bidder who wins the tender signs a notarial deed with the owner (the State Treasury or local authority) establishing a right of perpetual usufruct. The right of perpetual usufruct comes into existence only after its registration in the mortgage register. The same applies to any transfers of this right: they too only become effective on registration.

The creation of perpetual usufruct by operation of law was introduced as part of the reforms in the late 1980s and early 1990s. On 5 December 1989, state-owned enterprises became holders of perpetual usufruct rights over the state-owned land, which they had previously been using. They also became the owners of all buildings and constructions located thereon. This represented an enormous de-nationalisation of real estate given the large number of state-owned enterprises then in existence. Additionally, special laws gave other entities (such as co-operatives and some individuals) the right to claim the creation of perpetual usufruct in their favour. Technically speaking, in these cases the right of perpetual usufruct was created by contract, and not by operation of law, but it took special laws to make this possible.

The most fundamental difference between perpetual usufruct and full ownership rights is that a perpetual usufruct right is said to be created for a defined purpose (the development of a project or the conduct of some sort of activity) as set out in the contract. If the holder of the title breaches these provisions, it may lead to an increase in the annual fees, or even termination of the contract.

The second fundamental difference is that perpetual usufruct is created for a specified term (40 to 99 years depending on the purpose of its creation). If, within five years of the scheduled termination date, the holder demands an extension, then the owner must extend the term unless there are serious social reasons for not doing so. The perpetual usufruct holder may also demand an extension earlier if he plans developments whose completion is likely to/likely fruition will go beyond the initial term of his right.

Upon the creation of a right of perpetual usufruct by contract, the perpetual usufruct holder is obliged to pay an 'initial fee' amounting to 25% of the value of the land. Thereafter, he pays annual fees of 3% of this value. The percentage of these fees may be lower in some specific cases, for example in relation to certain non-profit organisations and historic monuments. The value of the land as established for the purposes of calculating the annual fee is subject to indexation (not more often than once a year). The perpetual usufruct holder has the right to question a new valuation before the local appeal committee and, if unsuccessful, before a common court.

On 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 reimburse the perpetual usufructee for the current market value of the buildings and other improvements legally implemented by the perpetual usufructee.

A further interest in land (or, more broadly, in real property) is that of cooperative rights mentioned under point 1.3. They played a very important role until the 1990s, and significant numbers of flats are held under this cooperative regime. However, these rights are gradually being replaced with full ownership (of either apartments or houses with plots of land). Cooperative members have a claim to convert their cooperative rights into full ownership.

Timesharing, introduced into the Polish legal system in 2000, does not play an important role as a property right.

1.4 Apartment Ownership (Condominiums)

The ownership of independent apartments in its current form was introduced in 1994. Before that date, the concept had been limited to apartments in small residential houses and was definitely insufficient. Two criteria should be met in order for apartments to constitute separate property: they must be “independent” (which is confirmed by a certificate from the local architecture department) and legally separated (a notarial deed must be signed creating the apartment and a separate mortgage register entry should be created).

Ownership of separate apartments is strictly linked to a relevant share in the ownership (or perpetual usufruct) of the land and in the ownership of “common parts” (entrances, staircases, lifts, structural elements, etc.). The share is computed as the proportion of the usable area of a given apartment to the usable area of all the apartments within the property.

Owners of separate apartments form a condominium. If there are fewer than 7 apartments within a property then the general provisions of the Civil Code on co-ownership apply. If there are more than 7 apartments then more detailed rules apply, in particular holding meetings, voting on resolutions (with less severe majority rules than under the “ordinary” co-ownership regime), etc. Certain condominium resolutions must be adopted before a notary. The condominium manages the property, either through its board, or through an appointed professional manager. In principle, all costs are allocated to the owners proportionately to their shares in the land and common parts.

The apartment owners may decide on the principles of use and management of the common property. Those rules may be registered with the mortgage register, but even rules not registered are binding on future owners. However, such regulations may not reach too far. In particular, it seems it is not possible for owners to forbid the keeping of pets (in reasonable numbers) on the premises, as it would violate the more general freedom of individuals. On the other hand, it does seem possible to change the method of cost allocation and the common costs, or to convert residential premises into commercial premises (subject to the necessary administrative approval).

Apartments may be freely mortgaged by the owner, in which case the mortgage also covers the share in the land and in the common parts. No consent is necessary to create the mortgage as it does not affect the situation of other owners.

If the building is destroyed, separate ownership of apartments expires (the object of the right ceasing to exist), but their apartment owners nevertheless remain co-owners of the land in the relevant shares. Likewise, the mortgage established over the apartment would only cover the share in the land.

1.5 Building Lease (emphytéose – bail à construction/ Erbbaurecht)

Building leases as such do not exist in Polish law. The closest concept is probably that of perpetual usufruct discussed in more detail under point 1.3, as it also serves zoning purposes and may be terminated if the property is not developed according to the terms of the contract.

1.6 The Public Law Context of Real Property Transactions

In certain cases, public bodies may have a statutory pre-emption 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 is the case where a district holds a pre-emption right (almost always waived) over 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-emption right is registered in the mortgage register); and (iv) a historical monument (if the pre-emption right is registered in the mortgage register). The district in question has two months following notification of the conditional sale agreement by the notary to exercise its right, failing which the parties may enter into the final sale agreement. Another example is the pre-emption right belonging to the Agricultural Properties Agency in the case of sale (or any other transfer) of an agricultural property.

The acquisition of real estate from public bodies (and the granting of perpetual usufruct over their land) is also regulated. In most cases a prior call for tenders is required.

The acquisition of real estate by foreigners may be subject to authorization by the Minister of Internal Affairs. This is discussed in more detail under point 6.3.

Certain kinds of transactions benefit from various financial privileges (with regard to transfer taxes, notary fees, registration fees), such as exemptions or discounts. This is the case with transfers of agricultural property (VAT and stamp duty exemptions, discounted notary and registration fees), apartments (preferential 7% VAT, discounted notary and registration fees), and various transactions involving public bodies. Likewise, the registration of mortgages securing financing for agricultural and residential investments may benefit from lower notary and registration fees.

As far as public subsidies are concerned, the National Residential Fund (*Krajowy Fundusz Mieszkaniowy*) was created with the aim of financing low cost apartments in order to cover the needs of families below a certain income level. The funds originate mainly from the central budget.

1.7 Brief Summary on "Real Property Law in Action"

The situation on the Polish property market has been changing quite rapidly. Throughout the 1990s, developers were filling the gap inherited from the previous system. The demand for modern space (office, retail, residential, warehouse) was very high and so were the returns on property investments (well over 12%). The situation stabilised around 2000, with falling rents (probably stabilising now) and a reasonably large proportion of vacant space on the market. Today's yields are much more reasonable, but are still above the European average (from 8% in big cities to 10.5% in smaller ones). Overall, Poland is perceived as having a decent Central European property market, with a relatively high volume of property available.

The residential sector is very vulnerable to market turns, and demand reacts very swiftly to changes in the unemployment rate, average salary, changes in the price of construction materials, etc. It is also spoiled by an overbearing tenant protection system, which makes it almost impossible to consider residential "built-to-let" property as a serious investment. As it stands today, most residential apartments are probably still held under the cooperative regime, but this is likely to change soon towards more full ownership.

Since the opening of the market economy in the beginning of the 1990s, mortgages have become a very popular security, commonly used to secure bank loans and other debts. Mortgage regulation has gradually been liberalised. At present, the financing of most new developments is secured by mortgage.

Ground easements have also gained in importance and use. While used mainly in rural relationships until the beginning of the 1990s, they are now very common in urban commercial and residential schemes. Personal easements and usufruct, on the other hand, are now much less popular, mainly because it is impossible to transfer these rights.

As mentioned above, cooperative rights to premises are now in decline and are gradually being replaced with full ownership of premises.

Notaries play a very important role in the Polish real estate system. Most real property related deeds (sale, other transfers, usufruct, easement, mortgage, etc.) must be executed before a notary. Until 1992, mortgage registers were kept by notaries, but since then they have been taken over by district courts. Notaries form a regulated professional corporation, with special rules for admittance both to the apprenticeship and to the profession itself. This corporation has its own internal bodies, including a disciplinary court. The notary tariffs (maximum fees) are regulated by an ordinance of the Minister for Justice.

Estate agents also play a relatively important role, but their involvement in transactions is not obligatory. The regulation of their profession is still evolving, but basically individuals need a special licence granted by the Ministry of Infrastructure in order to join this profession. Estate agencies must employ licensed individuals.

A number of mortgage banks are registered in Poland and are subject to special regulations. Mortgage bankers (individuals) do not form a regulated profession.

Property disputes (in particular between neighbours or heirs) are a Polish tradition, so the jurisdiction is quite rich. Therefore, one can be relatively sure of the application

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of real estate law, even more so given that there is a significant amount of high quality literature. In cases not referred to in decisions of the Supreme Court or legal doctrine, it is probably possible to use analogies with other similar legal systems (e.g. German law).

Unfortunately, the courts are still rather slow. Theoretically, property disputes may be referred to arbitration, but this is mainly used in business relations. Most common cases involve the questioning of transfer deeds, usucaption, forced easements, co-ownership disputes and, more recently, restitution claims.

Court fees are reasonable and are calculated as a percentage of the value of the case, with degressive rates and a general cap of 100,000 PLN (22,000 euro). The maximum 100,000 PLN fee applies if the value of the dispute exceeds 450,000 euro. In certain cases (especially title or mortgage registration), the cap may be set lower or a flat fee may be used (see further point 3.7).

2. Land Registration

2.1 Organisation

There are two parallel types of land register in Poland: (i) the mortgage register or “perpetual books” (*księga wieczysta*), whose main purpose is to register titles and encumbrances and (ii) the land and buildings register (*ewidencja gruntów i budynków*), whose main purpose is to describe the physical features and the use of the land and buildings. The land and buildings 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.

English translations of the Polish title register vary (“land register”, “land and mortgage register”, “perpetual register”, “perpetual books” or “mortgage register”). In this report, the term “mortgage register” will be used as (i) it cannot be confused with the “land and buildings register” which serves other (geodetic) purposes, (ii) it is simple and (iii) it is quite widespread. Unless expressly stated otherwise, the text below only applies to mortgage registers (title registers).

The statutory basis for land registration is the law dated 6 July 1982¹² on mortgages and mortgage registers and the law dated 17 May 1989¹³ on land surveying. As traditional “physical” mortgage registers are now being converted into electronic ones, there are a number of acts and ordinances that regulate this process.

The mortgage register system in Poland is uniform. This means that (in principle) only one kind of title register (mortgage register) is regulated by law and benefits from various statutory privileges (legal presumptions, public faith, etc.). However, “old” mortgage registers (originating from before WWII) are also kept by district courts. Although the function of most of them is merely informative, with no statutory guarantee attaching to such information, some of them are still “living” (i.e. new entries can be made in them and they benefit from the statutory guarantees of contemporary mortgage registers).

At present, the traditional “physical” mortgage registers are being converted into electronic ones. A central computer database is also being created for all electronic mortgage registers and is already operational in certain courts. The contents of the electronic register are the same as the contents of the traditional register (with a few discountable exceptions). The conversion is done on a court-by-court basis and is coordinated by the Minister for Justice. As a rule, no entries are made in the physical registers kept by courts covered by the conversion. The conversion of all mortgage registers will probably take several years.

Mortgage registers are kept by special divisions of the district courts competent for the relevant territory (up until 1992, they were kept by the State Notarial Office). They register titles and all encumbrances.

¹² see 8.1.4

¹³ see 8.1.5.

Land registers are kept by *powiats* (local-government units at a level between *gmina* – district and *województwo* – region or voivodship). 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.

The mortgage register divisions of district courts are the first instance authority. Entries are made in the form of decisions that may be appealed against to appeal courts. First and second instance courts apply non-contentious civil procedure.

In the first instance, registrations may be made by either regular judges or court clerks (*referendarz*). The latter need to have a university education in law and must undergo a special six month apprenticeship. Court clerks also make certain registrations in the commercial register.

The long term target of the mortgage register system is to have all properties registered. There are several tools used to achieve this. First, each owner is obliged to register his property (and the competent court may theoretically force him to do so by imposing fines). Second, each transfer of property must be registered. Also, certain property rights (perpetual usufruct, mortgage, separate ownership of apartments) can only be created if there is an entry in the mortgage register (their creation is effective upon registration). In these cases, the notary executing the deed is obliged to file the registration motion (accompanied, where necessary, by a motion to create a mortgage register entry). The notary also deals with all the taxes and court fees, so that the court cannot reject the motion due to the court fee not being paid. Public bodies are also obliged to inform the court about any changes in ownership that they may have triggered (e.g. through court decisions, expropriation, etc.). Lastly, one cannot withdraw a motion to register an ownership right if it is clear that one did in fact acquire this right.

It is difficult to assess what percentage of properties are registered, as no official statistics exist. Urban properties are usually registered, but it is far less frequent amongst agricultural properties and forests. Overall, registration levels are realistically at about 50-75%.

2.2 Contents of Registration

The mortgage register is broken down into four sections (the first one being composed of two subsections). The “description” subsection of section one contains a physical description of the property, which is always based on the data and documents contained in the land register. The “list of rights attached” subsection of section one lists the rights attached to the property as dominant tenement (e.g. easements granted). In section two, the owner (and, where appropriate, the perpetual usufruct) is specified. Section three contains all encumbrances other than mortgages, both *in rem* (easements, usufructs) and *in personam* (leases, pre-emption rights, etc.). Section three also includes restrictions on disposal, such as warning notices (e.g. enforcement proceedings, or status of the register not being in conformity with the actual legal status). Section four contains mortgages.

Mortgage register files (maps and other land register documents, deeds, court decisions etc.) are kept together with the mortgage register itself, but are only accessible to parties with a legal interest.

See attachment no 1A for a sample of a “traditional” mortgage register entry and attachment 1B for a sample of an electronic entry.

2.3 Registration Procedure

Registrations takes place at the demand of the interested party (save for certain exceptions allowing registration *ex officio*). If a property right is created or transferred by a notarial deed, the registration motion is included in such deed (usually in one of the last paragraphs), which is then sent by the notary to the relevant court (within 3 days of execution). There is no common form for this “notarial” motion, but in general they are quite similar and relatively simple.

In other cases (the acquisition of a right other than by a notarial deed, or where no mortgage register entry exists), interested parties file registration motions themselves, on official forms.

The mortgage register court has limited control. It can only check the form and the contents of the motion, the form and the contents of the documents attached and the contents of the register itself. In particular, the mortgage register court is not competent to judge on any property related disputes, which should be referred to a common court. If the court has any doubts as to title, it may only enter an *ex officio* warning notice.

Entries and refusals to make an entry are court decisions and are notified to the interested parties by registered mail (unless a party waives the right to be notified). Although such decisions become final only after the lapse of the appeal period (14 days from receipt) or on rejection of the appeal, their execution is immediate (the entry is made before the decision is final).

2.4 Access to information

In those courts covered by the conversion from traditional mortgage registers to the electronic variety, all new registrations are made electronically. If there is no electronic mortgage register entry for a given property, the traditional register entry must be converted into an electronic one before the entry is made.

Mortgage registers are publicly available for consultation by anybody (even those with no legal interest). The technical means of access depends on whether the mortgage register has already been converted to the electronic version or not. Traditional mortgage registers are in the form of a book, which is available for consultation at the relevant court’s premises (such books must not however leave the premises). Electronic registers are virtual (data stored in computer memory) and may be viewed at computer workstations available at the courts. It is important to note that if the mortgage register has been converted, it may be consulted from any location where workstations are available – and not just on the premises of the court holding the register. Electronic registers are not yet accessible online, but there are plans to allow this in future.

As far as mortgage register files (maps, deeds, court decisions) are concerned, only parties with a legal interest may inspect them. Legal interest is usually interpreted quite narrowly and comes down to those parties whose rights are registered in the given register.

2.5 Substantive Effects of the Registration

There are a number of substantive effects of registration:

First, registration has a constitutive effect in certain cases, including: creation and transfer of perpetual usufruct, creation of separate premises, creation and transfer of a mortgage.

Second, important legal presumptions are associated with the registered data, namely: presumption of their correctness (including the existence of the registered right and the extinction of a de-registered right) and the presumption that the data are publicly known (one cannot claim that one didn't know of a registered right). Those presumptions prevail over presumptions resulting from physical possession.

Third, the sequence of registrations determines the ranking of the rights. Registered rights rank higher than unregistered ones.

Fourth, registration of rights *in personam* makes them effective against third parties.

Lastly, and most importantly, according to the principle of public faith in 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 the entity registered as the holder of the right (even if such entity didn't hold it). This is one of very few exceptions to the principle of *nemo plus iuris in alium transferre potest quam ipse habet*. In certain situations, the principle of public faith in mortgage registers doesn't work (e.g. free of charge acquisitions, warning notices, registered motions pending, taking over of certain unregistered rights, etc.). 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).

One does not act in good faith if one knew, or should have known, that the legal status of the property is different from the one resulting from the register. According to the Supreme Court jurisdiction, the level of diligence of professionals (e.g. banks) necessary to consider that they acted in good faith is higher than that applicable to individuals. In particular, the bank should check whether the property forms part of marital co-ownership if only one of the spouses is registered as an owner¹⁴. Additional title checks are recommended in situations where the actual possession or the use of the property contradict the contents of the mortgage register (“one should have known”).

If a purchaser acquires a property in good faith from a non-owner registered as owner, the acquisition is perfect and the true owner cannot invalidate the transfer. His only recourse is an indemnity claim against the vendor.

2.6 Rank and Priority Notice

The relevant provisions of the law on mortgages and mortgage registers state:

¹⁴ Supreme Court Judgement of 5 May 1993, III CZP 52/93

Art. 11. Ograniczone prawo rzeczowe na nieruchomości, ujawnione w księdze wieczystej, ma pierwszeństwo przed takim prawem nieujawnionym w księdze.

Art. 11. A limited property right over real estate, which is registered in the mortgage register, has priority over any right which is not registered.

Art. 12. 1. O pierwszeństwie ograniczonych praw rzeczowych wpisanych do księgi wieczystej rozstrzyga chwila, od której liczy się skutki dokonanego wpisu.

Art. 12.1. The ranking of limited property rights registered in the mortgage register depends on the moment from which the registration is effective.

12.2. Prawa wpisane na podstawie wniosków złożonych równocześnie mają równe pierwszeństwo.

12.2 Rights registered on the basis of motions filed simultaneously have equal ranking.

Art. 29. Wpis w księdze wieczystej ma moc wsteczną od chwili złożenia wniosku o dokonanie wpisu, a w wypadku wszczęcia postępowania z urzędu - od chwili wszczęcia tego postępowania.

Art. 29. Registration in the mortgage register is effective retroactively, from the moment of the filing of the registration motion, and in the case of the proceedings commenced ex officio – from the moment the proceedings began.”

Case: Owner grants first a mortgage to A, and later another mortgage to B. Finally, creditor C has a third mortgage registered on the same property in an execution procedure. The order of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

Under Polish law, the registration of the mortgage has constitutive effect (it does not exist before registration). The ranking of the mortgages in the above case therefore follows the sequence of registrations (B, C, A). The sequence of registrations must always follow the sequence of filing of registration motions (i.e. the court must not make a registration on the basis of a subsequent motion without first dealing with a prior one).

Under Polish law, registration motions must not be subject to terms or condition. It is therefore impossible to directly secure a future registration. The relevant provision of the Law on Mortgages and Mortgage Registers states:

Art. 32.3. Zgoda na dokonanie wpisu nie może być uzależniona od warunku lub terminu.

Art. 32.3. Consent for making an entry must not be subject to any terms or conditions.

However, agreements on the priority of registered rights are admissible and it is also possible to secure a priority for one's right (whether existing or future) by an entry in the mortgage register. Let us assume that A is the owner, B is the holder of the "first in time" right (e.g. a mortgage) and C is the holder of the "second in time" right (e.g. another mortgage), which will be granted priority. Priority may be granted either together with the creation of the first in time right, or after its creation. In the first case

– the granting of priority to C requires a declaration by A (the owner); in the second case – the granting of priority to C requires both a declaration by A (the owner) and the consent of B (holder of the “first in time” right). The priority must then be registered in the mortgage register in order to be effective (constitutive effect). In such a case, the right to which priority was given might be entered in the mortgage register based on the stipulated priority, even if another right has been registered in the meantime, unless the scope of the right to which priority has been granted is to be larger than that described in the priority notice. The stipulation of priority requires notarisation of signatures and is not limited in time.

The relevant provisions of the law on mortgages and mortgage registers state:

“Art. 13.1. Ustanawiając ograniczone prawo rzeczowe, które ma być wpisane w księdze wieczystej, właściciel może zastrzec pierwszeństwo przed tym prawem lub równe z tym prawem dla innego prawa.

Art. 13.1. In creating a limited property right, which will be registered in the mortgage register, the owner may stipulate priority over this right, or equal to this right, for another right.

Art. 13.2. Zastrzeżenia można dokonać także po ustanowieniu prawa, za zgodą osoby, której prawo to przysługuje.

13.2. The stipulation may also be made after the creation of the right, subject to the consent of the holder of this right.

Art. 13.3. Do zastrzeżenia pierwszeństwa ograniczonego prawa rzeczowego niezbędny jest wpis w księdze wieczystej.

13.3 Stipulating priority for a limited property right requires registration with the mortgage register.

Art. 14. Jeżeli przed wpisaniem prawa, dla którego było zastrzeżone pierwszeństwo, zostało wpisane inne prawo, do wpisu prawa z zastrzeżeniem pierwszeństwa nie jest potrzebna zgoda osoby, której to inne prawo przysługuje, chyba że prawo, dla którego zastrzeżono pierwszeństwo, miałyby być wpisane w szerszym zakresie, niż to wynika z zastrzeżenia pierwszeństwa.

Art.14. If, before the registration of the right for which priority has been stipulated, another right is registered, the registration of the right for which priority was stipulated does not require the consent of the holder of this other right, unless the right for which priority was stipulated is to be given broader scope than that stipulated in the priority notice.

3. Sale of Real Estate among Private Persons (consumers)

3.1 Procedure in general

In Poland, both potential sellers and potential buyers of residential properties often use real estate agents. When the seller has found a buyer, the parties choose a notary who drafts a sales contract. It frequently happens that a preliminary contract is signed first, to allow the buyer to raise funds or to make sure the property is in good legal and physical condition. The contracts (both preliminary and final) are executed before a notary. A registration motion is included in the final sales contract and the notary is obliged to file the deed with the relevant mortgage register court within 3 days of execution. In preliminary contracts, parties may also include a motion to register the buyer's claim towards the seller (to ensure he does not sell it to another party), but this is not typical practice in dealings between consumers.

The notary takes care of all the costs (his own fee, court fee and stamp duty). However, if VAT is due, it is paid directly by the seller to the tax office.

Transfer of the property and registration of the new owner do not depend on payment of the price (transfer of ownership of real property must not be conditional). Indeed, Polish regulations sometimes make it quite difficult to sign the deed and pay the price at the same moment (unless the price is paid in cash straight to the seller). The reason being that notaries consider the reading of the contract and the subsequent signing as one act which must not be interrupted by any other (e.g. payment in between reading the contract and signing it). So one either pays before or after the acquisition of the property. This inconvenience is now remedied by various means, e.g. escrow accounts (sometimes held by notaries) or direct payment of a bank loan to the seller.

The time frame depends on practical issues – the availability of the notary, bank formalities in the case of debt financing, etc. It is reasonable to say that a notary needs a week's notice in order to prepare the deed (provided that all the necessary documents are delivered). The interval between the preliminary contract and the final one may range from two weeks to several months. The registration of title is probably the most time-consuming element, but it depends on the court. In Warsaw, registration may take more than one year, but should not take longer than one month in courts that cover provincial locations.

3.2 Real Estate Sales Contract

Each contract (or declaration) concerning the creation or transfer of a right *in rem* over real property must take the form of notarial deed in order to be valid. Notarial deeds are signed immediately after an oral hearing in the presence of the parties and the notary.

In dealings between consumers, the notary prepares the sales contract. In business relationships, notaries often accept drafts that have been pre-negotiated and agreed between the parties (and prepared by themselves or, more often, by their attorneys). Nevertheless, the notaries remain responsible for the validity of the deed.

The concept of preliminary contract exists and is very popular in Poland. Preliminary contracts should specify the essential terms of the future contract (e.g. the property and the price) in order to be valid. In addition, they should also specify the date by which the future contract should be executed, failing which each party may unilaterally fix such a date within a year of signing the preliminary agreement (and if neither party does so within a year – the preliminary agreement expires). The preliminary contract is not equivalent to a sales contract (as in French law) and a final sale agreement must always be executed in order consummate it.

A preliminary contract may have two effects: “weak” and “strong”. The weaker effect consists in the possibility of the non-defaulting party claiming damages from the defaulting party. Such damages, however, are limited to the “negative interest of the contract” (e.g. costs that the non-defaulting party incurred in anticipation that the future contract would be executed). To avoid this limitation on damages, parties often stipulate contractual penalty clauses. The stronger effect comes down to the capacity to sue the defaulting party for specific performance. In such a case, a court judgment replaces the final (sales) contract.

A preliminary contract that contains the essential terms of the future agreement has a weak effect. If the preliminary contract also fulfils other requirements for the validity of the future contract (especially as to the form), it has both weak and strong effect, and the non-defaulting party may choose one of the claims described above. In other words, if the preliminary contract for the sale of real property has a simple written form – the non-defaulting party may only claim damages from the defaulting party. If it is concluded in the form of a notarial deed – the non-defaulting party may sue the defaulting party either for damages or for specific performance.

The future purchaser’s claim to buy the property may be registered in the mortgage register, which is the rule in business dealings (especially if the term for the conclusion of the final sale is long). In a sale between consumers, it is far less common.

There are no official forms for sales contracts in Poland. However, drafts used by notaries in typical “repetitive” transactions, such as the purchase of apartments or houses, are quite standard.

There are a number of manuals available containing forms of purchase contracts, but they are far from being accepted as “officially binding” guidelines.

Please see Attachment no 2 for the typical form of a sales contract.

3.3 Transfer of Ownership and Payment

The transfer of real property under Polish law is “causal” – both materially (existence of a valid obligation to transfer) and formally (causa must be mentioned in the transfer deed). In principle, the contract (sale, exchange, donation, etc.) transfers the ownership of the real property by itself, without the need to execute a separate transfer deed. However, the contract may stipulate otherwise, and in particular may provide for a future term or condition of transfer. In such a case, a separate transfer deed is necessary, as the ownership of real estate may not be transferred conditionally or with a future term.

The payment of the purchase price may not be a condition of transfer, which sometimes causes serious practical problems.

The ownership title is transferred upon execution of the contract, and registration in the mortgage register has mere declarative effect. However, registration is necessary for the validity of the transfer (and creation) of perpetual usufruct as well as for the creation of separate premises.

Making the payment “simultaneous” with the transfer of ownership is always the subject of heated debate, even more so as notaries usually refuse to make a break in the process of reading and signing (e.g. after initialising the contract) to allow the parties to settle the accounts. In business dealings, guaranteed cheques or escrow accounts are often used (though notarial escrows are rather rare), as well as parent company guarantees or other forms of security. In consumer-to-consumer relations, it still sometimes happens that cash is brought to the notary’s office (although far less frequently than before). If the acquisition is financed by a bank loan – it is less of an issue, as the payment is made by the bank directly to the seller’s account. Sometimes the signing also takes place at the purchaser’s bank to make the payment quicker and more secure.

If the parties do decide to defer payment – various forms of security may be used. Those most frequently encountered are the mortgage (established by the new owner in the acquisition deed) and voluntary submission to enforcement (see below).

The seller may enforce payment through execution, whether voluntary or following court proceedings. Voluntary execution requires a submission made by the purchaser in a notarial deed (usually in the sales contract) (art. 777.4 or 777.5 of the Civil Procedure Code). Such a notarial deed should then be granted the “enforcement clause” by the district court (a formality, which takes a week or so). Voluntary submission to enforcement is a rule in sales contracts with deferred payment.

Having acquired the property, the buyer will obviously have a claim towards any other possessor, unless the other possessor’s title conflicts with the buyer’s (e.g. lease, usufruct, easement etc.). This is the owner’s claim (*rei vindicatio* or *actio negatoria*). The owner must not take over possession from the possessor by himself (even if such possessor does not actually have a title or is in bad faith) – he must get a court judgement and instruct a bailiff. If the owner acts of his own accord, the possessor will have a valid claim against him (possessor’s claim or *actio possessoria*).

Taking over possession is a practical issue requiring some degree of diligence by the buyer. It sometimes happens that possession is transferred before the title is secured.

3.4 Seller’s Title

Although the Polish system is causal, it is in principle sufficient to check just the seller’s title, provided that the buyer is in good faith and that there are no other circumstances excluding the principle of public faith in the mortgage registers (see point 2.5). If such circumstances do exist (which is rare), more in-depth checks are recommended (in extreme cases – going back up to 30 years, which is the bad faith usucaption period). If there is no mortgage register for the property, it is advisable to have the seller create one before signing the contract.

A good faith buyer will only take over those encumbrances that are registered in the mortgage register, provided that there are no circumstances excluding public faith in the mortgage registers. There are some minor exceptions to this rule (e.g. “necessary road” easement).

If there are registered encumbrances that the buyer does not want to take over (e.g. a mortgage), part of the price may be paid directly to the beneficiary of the encumbrance in return for his/her agreement to waive the right. The beneficiary’s statement should be executed in writing, with notarised signatures, and may be attached to the transfer deed. The deed would then contain a motion to delete the encumbrance, thus ensuring an unencumbered transfer.

Title insurance has become quite popular in Poland, especially in business transactions. The increased demand for this product has two basic sources. Firstly, sometimes the purchaser has to buy the property without the benefit of public faith in the mortgage registers (this includes pending restitution claims). Secondly, registration still takes a long time, especially in larger cities. This is an issue in cases where registration has constitutive effect (e.g. mortgage or perpetual usufruct). In these cases, the insurance covers not only the title but also the effective registration of the mortgage or perpetual usufruct. The costs of title insurance range generally from 0.35% to 0.5 % of the real property value.

According to a general rule, the purchaser enters into a lease encumbering the sold property but has the right to terminate it with the observance of statutory notice periods (unless cumulatively: (i) the lease was concluded for a fixed term and (ii) the property has been handed out to the tenant and (iii) the lease has a certain date, in which case the lease may only be terminated in accordance with its provisions). However, the principle of public faith in mortgage registers prevails over this rule, which means that a good faith buyer will only take over those leases registered in the mortgage register. A good faith purchaser is one who, despite due diligence, was not aware of the existence of leases.

The seller usually reveals the leases in the sales contract. The existence of undisclosed leases is a legal defect in the property and gives rise to various legal warranty claims (see below).

3.5 Defects and Warranties

The responsibility of parties other than the seller for legal and physical defects is limited to indemnities (general rules of contractual responsibility). In the case of property agents, lawyers and other consultants – it will depend on the provisions of the contract between them and the buyer. Notaries and lawyers are not responsible for physical defects.

The seller’s responsibility is twofold. Apart from the general regime of contractual responsibility for damage, the seller is responsible under the regime of legal warranty for physical and legal defects. The claims under warranty include a reduction of the price, repairs to the defects and rescission of the sales contract. The term of the legal warranty is three years for buildings, and one year for other assets. The purchaser must inform the seller of the defects within a month of learning of them (in business dealings – immediately), otherwise he loses legal warranty claims.

The seller is not usually responsible for zoning laws or other administrative restrictions, unless a specific representation was made in the contract in this respect. However, property agents and lawyers may be liable for such “defects”.

See Attachment no 3 for a typical clause used in business dealings.

The buyer of real estate may become jointly and severally responsible for only two kinds of the seller’s debts: (i) tax arrears (all kinds of taxes and not just land tax, as well as social security premiums) and (ii) debts related to the seller’s business (or farm). The buyer will be responsible for the seller’s taxes if he buys a property forming part of an enterprise (but not necessarily the whole enterprise). On the other hand, the purchaser will be responsible for the seller’s business debts (or debts related to a farm) only if he takes over the enterprise (or the farm) as such, and not just the property.

In both cases, the responsibility is capped at the value of the purchased property (or enterprise/farm). In order to avoid any risk of tax responsibility, the buyer (with the consent of the seller) may demand a certificate from the tax office that indicates the exact amount of the seller’s arrears. If the transfer takes place within three days of issuing this certificate – the purchaser will only become responsible for the amount indicated in it (even if the correct amount is higher). It often happens that the arrears appearing in the certificate are paid by the purchaser directly to the tax office. Responsibility for business debts may only be excluded with the consent of the creditor. Direct payments by the purchaser to the seller’s business creditors are also quite common.

3.6 Administrative Permits and Restrictions

As a rule, no administrative permits are required in a typical conveyance of a residential property. The most important exceptions are listed below:

If a developer signs a contract in which it undertakes to construct a building and transfer the ownership of premises that will be located in it, then he must have a building permit in order for the contract to be valid (see below point 5.3). It is the duty of the notary to check whether such a building permit exists.

If premises are sold in a newly constructed house (block), the developer should first obtain a special certificate from the local architecture authority confirming that the premises may be considered “independent” (although it is not a permit *sensu stricto*). In such a case, the notary is obliged to check this certificate, as well as plans of the property enabling him to calculate the shares in common parts. These documents are attached to the deed.

The notaries are also obliged to check the master plans and excerpts from the land register in order to ascertain whether the property is zoned for agricultural use or not (and if it is – the pre-emption right of the tenants and the Agricultural Property Agency will apply).

In certain cases, the acquisition of real estate by foreigners requires a permit of the Minister of Internal Affairs (see point 6.3).

Where a property worth more than 50,000 Euro is sold by a state-owned enterprise, a permit of the Minister of State Treasury is required, otherwise the transaction is null and void. However, this permit is not needed in the case of companies whose sole shareholder is the State Treasury when, according to the company's Articles of Association, the consent of the shareholders meeting should be obtained for such transactions, or when property is sold during liquidation or bankruptcy proceedings.

In other cases, it is not obligatory to check master plans, planning, building, occupancy or other permits, or environmental contamination, but buyers (or their lawyers) often do so.

Public bodies may have pre-emption rights with respect to certain types of real property. The most important cases are listed under point 1.6. Other statutory pre-emption rights are far less common and mainly concern port authorities (with respect to properties located in ports) and managers of special economic zones (with respect to properties located in such zones).

Save for the pre-emption right vested with the Agricultural Property Agency and transition periods lasting until 1 May 2016 (with respect to agricultural properties) and until 1 May 2009 (with respect to second houses), during which European Economic Area residents need to obtain a permit for the acquisition of real estate, there are no other restrictions on the acquisition of agricultural land.

In cases where a permit is necessary for the validity of the contract, it is the responsibility of the notary to make sure that it exists. The buyer's lawyers also need to check this.

In cases where a permit only adds value to the property, it is the responsibility of the buyer (and his lawyers) to check its status.

3.7 Transfer Costs

The level of notary and registration fees depends on various factors, such as the parties (e.g. public bodies), the category of the property (agricultural, apartment, etc.) and the value of the property. They are subject to statutory tariffs and are calculated based on degressive rates with caps. The cap on notarial fees is six times the average salary (around 3,000 euro) and the cap on registration fees may be either 20,000, or 10,000, or 5,000 PLN (4,500, 2,250 and 1,625 euro respectively). There are also fixed fees (at very low levels 7 – 10 euro) for certain kinds of registrations.

The notarial fee for the transfer of a property worth 100,000 euro would amount to approx. 660 euro (and approx. 1,480 euro for a property worth 300,000 euro) plus 22% VAT. The registration fee would be 1,070 euro for a property worth 100,000 euro, and 3,070 euro for a property worth 300,000 euro. The calculations above assume that no exemptions or discounts apply (e.g. in the case of apartments, notary fees would be twice as low, and registration fees – four times as low).

The transfer of real estate may be subject to either VAT or stamp duty (tax on civil transactions). VAT will apply if the sale is made by a professional, unless the property fulfils certain conditions (it is considered "used" in the case of buildings and apartments, or it is not developed or zoned for development in the case of land). 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%. 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 tax office.

Real estate agents are mainly active on the secondary market, however they sometimes represent developers on the primary market too. It would be correct to say that in larger cities they are involved in around 50% of secondary market transactions.

The agent's commission may range from 2.9% to 3.5% of the value of a property and usually the agents receive commission from both sides of the transaction. In some cases, when the value of the property is over 50,000 Euro, it may be possible to negotiate the agent's fee.

3.8 Buyer's Mortgage

If the acquisition is financed by a bank, the bank will obviously require a mortgage to be established on the property. Under Polish Banking law, establishing a mortgage in favour of a bank does not require a notarial deed. The buyer consents to mortgaging his future property in the loan agreement in simple written form, on the condition that he acquires it. The loan is disbursed immediately after signing the sales contract, and the bank sends a special statement to the mortgage register court, which is sufficient to register the mortgage. The period between disbursement of the funds and registration of the mortgage is usually secured by the loan repayment insurance, paid by the buyer.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1 The Conclusion of the Contract

After inspection, the buyer informs the seller that he wishes to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under the usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

If a preliminary or a conditional sales contract contains essential terms of the sale (e.g. the property and the price) and is concluded in notarial form, then it is fully enforceable, which means that either party may sue the defaulting party for specific performance. The decision of the court will replace the final contract and will convey ownership. It will also serve as a basis for registration.

If the agreement is signed in simple written form, then none of the parties may sue for specific performance. However, the non-defaulting party may claim damages from the defaulting one. In the case of a conditional agreement, damages are not limited by law, but in the case of a preliminary agreement they are capped at the “negative interest of the contract”, which basically means transactional costs (see point 3.2). These statutory indemnification rules have relatively little meaning in practice, given the fact that in such “forward purchase” arrangements either (i) the parties stipulate contractual damages clauses, or (ii) the purchaser pays an advance payment (if the purchaser withdraws – he loses it, if the seller withdraws – he has to reimburse double the amount of the advance payment). Unless otherwise agreed, both the contractual penalty and the advance payment play the role of “liquidated damages”, i.e. the indemnity is due in the agreed amount, regardless of the exact amount of damage caused.

4.2 Seller’s title

A has sold real property to B. Now, B wishes to sell it to C. However, before entering into the contract, C discovers that the sales contract concluded between A and B was invalid,

a) because it lacked the required form;

b) because A did not possess legal capacity;

c) because an administrative permit required for the contract was never applied for.

May C go ahead with the contract nonetheless and acquire the property validly?

If C knows that B’s title is defective (for whatever reason), he may not enter into a valid sales contract, as he would be in bad faith, which excludes public faith in the mortgage registers. In such a case, the rule of *nemo plus iuris in alium transferre potest quam ipse habet* would apply directly (one cannot acquire title from a non-owner).

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A sells his property to B, who pays the purchase price and has the transfer registered on the land register. Only afterwards, it turns out that A was not the true owner. B has however relied in good faith on A's title. (This may happen, for e.g., when the seller was believed to have inherited the property from his uncle under a will, but another will is subsequently found in which the uncle leaves his entire assets to a charity. To make the case more interesting, let us suppose further that the seller has become insolvent and cannot repay the money.)

How is B protected?

May he retain the property?

How is the buyer protected if, during the transaction, it transpires that the seller is not the true owner?

All depends on whether A's title was registered in the mortgage register. If it was and B was acting in good faith, he would acquire the title. If A's title was not registered, B could not acquire the property, regardless of his good or bad faith, or the fact that he had paid the price or was himself registered. Registration of the purchaser does not cure the defects of the acquisition.

B's claim against A will be based on unjust enrichment (repayment of the price). The true owner will sue B with *rei vindicatio* (owner's protection claim) and the title will be checked and finally established in the litigation. However, if B, acting in good faith, has incurred costs related to the property, he may claim reimbursement from the owner (as a rule, only "necessary" spending will be reimbursed) and may retain the property until this is done. If B, acting in good faith, has constructed a house (or another structure) on the land, he may require the owner to transfer the property to him against remuneration (which means that he would have to pay the price a second time).

If it transpires that the seller is not the owner before the contract is signed, the purchaser will simply withdraw from negotiations. If the lack of title becomes apparent after the signing of the contract but before the payment of the price, the purchaser will not have to pay, as the contract is still ineffective on the seller's side (which, according to the "causality" principle, also invalidates the buyer's undertaking).

After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

Are there risks for the buyer (e.g. of losing his payment)?

How may the buyer protect himself (e.g. through the drafting of the sales contract)?

The buyer should not incur any risk in such a case, provided he has acted in good faith (i.e. provided that he didn't know about the distraint). Distraint on a property is good as against the purchaser only if it is registered prior to the sale (and not prior to registration of the sale). However, the buyer will need to sue the bailiff and obtain cancellation of the distraint from the district court (not the mortgage register court) –

unless the bailiff agrees to withdraw the distraint amicably. The mortgage register court will strike out the distraint mention based on the judgement of the other court (or the bailiff's withdrawal).

If the buyer acts in good faith, and the seller's title is registered, the buyer may rely on the contents of the mortgage register. It is very common to mention in sales contracts that no enforcement proceedings exist over the property (which is a reinforcement of the legal presumption of the buyer's good faith).

4.3 Payment

The buyer pays late. What are the seller's remedies?

May the seller rescind the contract?

Does the buyer have to pay a (statutory) penalty or is he liable for damages?

Late payment of the price does not authorise the seller to rescind the contract. He may sue the buyer for the price (together with penalty interest and indemnification, as long as the total sum does not exceed the amount of the actual damage). If the payment was not secured with a mortgage, the seller may obtain an injunction on the property (forced mortgage, ban on transfers, etc.). If the payment was secured by a mortgage and voluntary submission to enforcement, the seller may foreclose on the property.

4.4 Defects and Warranties

Six months after the buyer moves in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.

In spring, the basement floods. Neighbours tell the buyer that the seller used to complain to them that the flooding happened every year in spring.

An extension on the house has been built without the necessary permit from the building authorities. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by a previous owner.

For which of these defects is the owner/buyer liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is on the date of conclusion of the contract? What are the buyer's remedies?

Legal warranty for defects may only be excluded by an express statement. A general statement that the buyer knows of the state of the property at the time of conclusion of the contract is not sufficient if the buyer proves that he was unaware of a specific defect before signing; such a statement may only shift the burden of proof.

The importance of the "defect" should always be assessed in the context of the case. A breakage in a pipe that is several decades old might be considered normal (rather than defective) and thus legal warranty would not cover it.

On the other hand, the flooding of a basement would most probably be considered a defect, as it is not normal for basements to “regularly” flood. The seller will be responsible, unless the buyer knew about the regular flooding. In fact, the seller’s responsibility for “dissimulated defects” (which seems to be the case here) is even more severe, as the seller is deemed obliged to inform the buyer of the defects.

The seller is responsible for defects irrespective of whether he/she knew about them. The lack of a building permit is clearly a defect and the seller will be responsible for all the consequences.

As mentioned under point 3.4, the buyer’s remedies include: (i) a claim to repair (e.g. the pipe), or (ii) a claim to lower the price (if the defect is not repairable but the buyer does not intend to rescind the contract), or (iii) rescission of the contract.

After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

May the buyer rescind the contract or does he have to pay the purchase price?

May the seller rescind the contract? Is he liable for damages? Is there voluntary or mandatory insurance available in these cases?

The transfer of the risk of casualty damage is associated with the transfer of possession of the property (which is not necessarily at the actual moment of signing the contract). If possession had been transferred at the time of the fire – the buyer would bear all such risks and would have to pay the price, with no possibility of rescinding the contract. However, if possession had not been transferred at this stage, the seller’s delivery (handing over of the property) becomes impossible and the contract expires by virtue of law (there is no need for either party to rescind the contract). In such a case, the buyer may require reimbursement of the price, if he has already paid, and will have to transfer back to the seller any “remaining” part of the property.

The seller is liable for damages according to general rules of contractual responsibility. He would not be liable if the damage was accidental.

5. Sale of a house or apartment by a building company (vente d'immeuble à construire/Bauträgervertrag)

5.1 Statutory Basis

There are two different legal regimes regulating the sale of future apartments (or houses) by a “building company”. One applies to “commercial” developers and the other to co-operatives.

Art. 9 of the Law on the Ownership of Apartments¹⁵ regulates the sale of “future” apartments by a developer. This law only applies to apartments to be held in ownership. The sale of future houses by private developers is not regulated by law.

The law dated 15 December 2000 on Housing Co-operatives¹⁶ regulates the sale of future apartments and houses by co-operatives. It concerns both co-operative rights to apartments and houses, and full ownership of apartments and houses. The co-operative system is very insecure, as the co-operative member must always pay the amount corresponding to actual cost of construction of his apartment (house), no matter what the provisions of the contract¹⁷ say. Co-operative developments are, by definition, financed by their members and there is no mechanism protecting members against the default of other members.

In addition, various provisions of the Civil Code apply to forward sales of apartments and houses, including art. 385.1 – 385.3 on forbidden contract clauses, art. 384 on contract forms, etc.

There is also a draft law on the protection of buyers in development contracts, which is being elaborated by the Ministry of Infrastructure (September 2004). Its main objective is to secure the funds paid by future owners before the delivery of the apartments (or houses). At present, there is no regulation giving such protection to customers.

The Unfair Terms Directive was introduced to the Civil Code in 2000 (art. 385.1 – 385.3). Given the relatively short period of time since accession, there has not been any significant influence of ECJ jurisprudence.

5.2 Procedure in general

Please describe the procedure for a standard contract: A construction company (the “builder”) buys a large piece of land and splits it up into several smaller plots. On these plots, it plans to build town houses. The builder sells the smaller plots, with the houses (which have not yet been built), to several buyers. Let us assume that all the buyers are consumers, and that the builder uses his own standard contract terms.

¹⁵ dated 26 June 1994 (Dz. U. 2000, no. 80, item 903).

¹⁶ (Dz. U. 2003, no. 119, item 1116).

¹⁷ Supreme Court Judgement of 19 May 1989, III CZP 47/89.

Are such contracts governed by any special regulation?

When does the buyer have to pay the purchase price (e.g. after termination of the building or according to the state of progress of construction)?

Are there statutory warranties for material defects?

As mentioned above, the sale of future houses by private developers is not, as yet, regulated by law (apart from general regulations on unfair contract clauses, etc.). This is a source of market pathology, which results in regular fraud and bankruptcy.

Although the sale of future houses by co-operatives is regulated, this regulation is not complete and is generally far from perfect. It requires that the contract contain certain clauses, e.g. terms of payment of the price (called “construction contribution” in Polish co-operative relations), the means of calculating this contribution, a description of future premises, etc. It does not protect the co-operative member against excessive construction costs or a lack of financing by other members. The contract should be executed in simple written form and can be terminated by any member without reason. Termination by the co-operative is only possible if a member has not fulfilled his contractual obligations to cover the cost of investments. This is a “advance sale” so the actual transfer of ownership requires that a separate sales contract be executed.

Let us assume that the builder does not sell a single house, but an apartment in a condominium which he is planning to build. Are there any differences as compared with the previous case?

There is no difference as far as co-operatives are concerned.

Unlike the advance sale of houses, the advance sale of apartments by private developers is regulated and the contract should fulfil the criteria listed in point 5.3. There are no statutory requirements as to the payment of the price (typically it is paid according to the progress of the works) or warranties for defects (the general regime applies).

Another variation: Let us assume that the builder has bought an old house which he wants to renovate and split up into separate apartments. He sells the apartments before completing the renovation. What, if any, are the differences as compared with the first and second cases above?

Sale of apartments in an existing (renovated) building is only regulated in the Law on Housing Co-operatives, but this regulation does not differ from the general one (newly built buildings). It is not regulated by the Law on Ownership of Apartments.

5.3 Conclusion of the Contract

Law on Ownership of Apartments:

The following conditions should be met in order for the advance sales contract to be valid: (i) the developer must be the owner of the land, (ii) the developer must have a building permit, (iii) the contract should be executed in the form of notarial deed and (iv) it should be registered in the mortgage register. Given the fact that in the vast majority of cases some of these conditions are not fulfilled, most advance sales con-

tracts are invalid. This is a very serious defect in the law, as the negative consequences of the contract being invalid are in fact on the side of the consumer (whose only claim is based on unjust enrichment of the developer).

Law on Housing Co-operatives:

None of the requirements provided in the Law on Ownership of Apartments applies in the case of housing co-operatives. The contract for the building of the apartment should be executed in simple written form and must contain certain elements, such as a description of the premises, the means of calculating construction costs, a payment schedule, etc. Both parties may terminate the contract, but the co-operative may only do so in the case of breach by a member, which makes the building of apartments very difficult or impossible. Another important difference with the Law on Ownership of Apartments is that following the signing of the contract, the member acquires the “expectation” of a co-operative right to the apartments (or an expectation of full ownership of the apartment), which is a tradable *in personam* right.

5.4 Payment

There are no statutory rules concerning the method of making payments. As mentioned above, a draft law is being elaborated that will deal, among other things, with developers’ escrow accounts.

The buyer may submit to voluntary enforcement, as described under point 3.3.

Guarantees or insurance are very rare. The only practical security under the Law on Ownership of Apartments is the registration of the future owner’s claim in the mortgage register.

At present, Polish law does not grant any security to the effect that the buyer will pay if he/she is sure to become the owner. The only practical solution at present is to buy apartments that are ready, rather than those that are still to be constructed.

The Law on Mortgage and Mortgage Registers provides for a possibility of gradually paying off the mortgage securing the construction loan. According to the general rule, in the case of division of the encumbered property (e.g. through the creation of separate apartments), the mortgage covers all the newly created properties (joint mortgage). However, if the owner has paid the full price and the construction loan contains the relevant provisions, the main mortgage may be annulled over his apartment.

There are no statutory rules as to whether the buyer must pay before or after the building is finished. In almost 100% of cases, the buyer pays according to progress of the works.

The buyer usually finances his purchase with a bank loan. Such a loan can be secured with a mortgage only after the apartment has been created (e.g. after acquisition). The period between disbursement of the loan and creation of the mortgage is usually covered by loan repayment insurance. If the developer took a loan himself – the main mortgage would be cancelled as described above, in order for the buyer’s bank’s mortgage to be registered with highest rank.

It also sometimes happens that the developer, rather than take out a loan himself, arranges loans for his customers.

5.5 Builder's Duties - Protection of Buyer

Typically, floor plans, or at least apartment plans, are attached to the advance sales contracts. A certain degree of tolerance (2-5%) is often stipulated. In some cases, more detailed specifications may be attached, but this is far less common.

The contracts usually set out a date for termination of construction (with a possibility of an x month extension). However, there is not much that the buyer can do if delays do occur. In housing co-operatives, members can do little more than replace board members. Under the Law on Ownership of Apartments, it is theoretically possible for the court to appoint a new developer to continue the execution of the contract at the cost and risk of the previous developer.

The buyer's claims are as described above under point 3.5. The buyer doesn't have any direct claims against the subcontractors, unless they were contractually assigned to him.

5.6 Builder's Insolvency

Let us suppose that the buyer buys an apartment on the third floor of a building yet to be built and that the builder goes insolvent after completing the basement. Is there any protection for the buyer?

At present, the only protection for a buyer against the developer's insolvency is getting title to the apartment (or to the land – it sometimes happens that developers sell a relevant share in the land to their customers upfront, although it may seriously complicate the financing). If this is not possible – the buyer will have to file his claim with the bankruptcy estate, but his claim will not have priority over other unprivileged claims. The draft law on developers' escrow accounts may exclude such accounts from the bankruptcy estate and give certain privileges to the buyers.

Let us suppose that the buyer rescinds the contract because the builder is late in finishing the building and that there are numerous material defects in the completed parts of the building. However, after the buyer has terminated the contract, the builder goes insolvent. May the buyer expect repayment if he has already paid some instalments?

The buyer's claim will be addressed to the bankruptcy estate, with no privilege (as the law stands today) over other claims.

6. Private International Law

6.1 Contract Law

In Poland, both the legal regime of *in rem* rights and the regime of contracts related to real estate are governed by *lex rei sitae* (Polish law). There are no exceptions to this rule. As far as contracts are concerned, Polish law applies not only to contracts creating or transferring *in rem* rights to real property, but also to those granting *in personam* rights (e.g. leases).

There is no jurisdiction in cases where more “remote” contracts are subject to foreign law (e.g. loans, securities, etc.). However, it is common practice to do so (e.g. large cross border loans are usually submitted to English law; the same for FIDIC based construction contracts). As their relation to the real property is not “direct”, such a practice seems perfectly correct (provided, that there is a link between the contract and the chosen legal system).

An obligation to transfer real property requires a notarial deed in order to be enforceable. According to Art. 12 of the Polish Private International Law, the form of the contract is subject to the law of the contract (Polish law in the case of contracts related to real estate). However, it is sufficient to satisfy the requirements as to form of the law where the act was executed (*lex loci actus*). This rule has very little practical meaning as far as contracts as such are concerned. However, it does play an important role as concerns powers of attorney. For example, under French law, a company may grant a power of attorney to encumber real property in simple written form (which is not possible under Polish law), and such powers of attorney executed in France (even on behalf of a Polish company) may not be questioned in Poland.

6.2 Real Property Law

As mentioned above, *lex rei sitae* applies both to the regime of *in rem* rights to real estate and to all contracts whose object is real estate. The relevant provisions of the Polish Private International Law state:

Art. 24.1. Własność i inne prawa rzeczowe podlegają prawu państwa, w którym znajduje się ich przedmiot.

Art. 24.1. Ownership and other rights in property are subject to the law of the country where their object is located.

Art. 24.2. Nabycie i utrata własności, jak również nabycie i utrata oraz zmiana treści lub pierwszeństwa innych praw rzeczowych, podlegają prawu państwa, w którym znajdował się przedmiot tych praw w chwili, gdy nastąpiło zdarzenie pociągające za sobą wymienione skutki prawne.

Art. 24.2. The acquisition and the loss of ownership, as well as the acquisition, the loss and the change of priority of other property rights are subject to the law of the country where the object of those rights was located when the event causing the above mentioned effects took place.

Art. 24.3. Przepisy paragrafów poprzedzających stosuje się odpowiednio do posiadania.

Art. 24.3. The provisions of the paragraphs above shall apply accordingly to possession.

Art. 25.1. Strony mogą poddać swe stosunki w zakresie zobowiązań umownych wybranemu przez siebie prawu, jeżeli pozostaje ono w związku z zobowiązaniem.

Art. 25.1. The parties may submit their contractual obligations to the law of their choice provided that it has a link with such obligation.

Art. 25.2. Jednakże gdy zobowiązanie dotyczy nieruchomości, podlega ono prawu państwa, w którym nieruchomość jest położona.

Art. 25.2. However, obligations concerning real estate shall be subject to the law of the country where the real estate is located.

According to the Supreme Court Judgement dated 8 January 2004 (I CK 39/03), it is possible to celebrate a transfer of real estate located in Poland in another state. In such a case, the contract will still be subject to Polish law, but its form may comply either with Polish law, or with the law where the contract was signed. The mortgage register court may not refuse the registration of such a transfer deed, but some practical issues may arise, e.g. as to the formal requirements of the foreign law, etc.

6.3 Restrictions on Foreigners acquiring Land

According to the Law on Acquisition of Real Estate by Foreigners¹⁸, the acquisition of real estate by foreigners may be subject to the authorization of the Minister of Internal Affairs (issued after consultation with the Minister of Agriculture, in the case of agricultural properties, and the Minister of Defense). A foreigner is an individual not having Polish citizenship, a company with its seat abroad or a Polish-registered company controlled by foreign individuals or foreign companies. The most important exception applies to individuals and companies from European Economic Area, who do not need any authorization to acquire real estate, except in the cases of agricultural property (until 1 May 2016) and second houses (until 1 May 2009). Other exemptions involve the acquisition of up to 4,000 m² of undeveloped urban land by a Polish-based and -controlled company, foreclosure by foreign banks on mortgaged properties, or the acquisition by foreign individuals residing in Poland for more than 5 years after being granted a permanent residency card (or for more than 2 years if married to a Polish citizen).

In certain cases acquisition of real estate may require other permits. The need to obtain such a permit is not related to the purchaser being a foreign party, but, in practical terms, it may be “politically relevant”.

6.4 Practical Case: Transfer of Real Estate among Foreigners

Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider transferring ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties to do this. What do you rec-

¹⁸ dated 24 March 1920 (Dz. U. 2004, no. 167, item 1758)

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ommend – or what is considered to be best practice?

Firstly, a foreign purchaser of a vacation house (“second house” or “residence secondaire”) will need a permit from the Minister of Internal Affairs (until 2009). This does not concern foreigners that are statutory heirs of the sellers (e.g. children), or foreigners with a permanent residency card for more than 5 years, or for more than 2 years if they are married to a Polish citizen.

It would be far more practical to execute the sales contract before a Polish notary (Polish notaries may only practice in Poland), or, if there is a need to execute it abroad, before a Polish consul in the relevant country. As mentioned under point 6.2, the sales contract may also be executed before a foreign notary, provided that he is allowed to do so under his legal system (the contract will remain subject to Polish law which the foreign notary is unlikely to know).

7. Encumbrances/Mortgages (and Land Charges)

7.1 Types of mortgages/land charges

In Poland, there currently exists only one *in rem* security on real property – the mortgage (*hipoteka*), which is accessory in nature. No non-accessory land charge (*dlug gruntowy*) exists yet, but a draft law is being elaborated to introduce such a concept.

The mortgage is regulated by Arts. 65 – 112 of the Law on Mortgage and Mortgage Registers. The following categories of mortgage may be distinguished: (i) ordinary “contractual” mortgages, (ii) capped mortgages (*hipoteka kaucyjna*), securing a debt resulting from an existing relationship but whose exact amount is not yet known – capped mortgages are thus accessory to the legal relationship, rather than to the debt itself, (iii) joint mortgages (*hipoteka łączna*) – one mortgage encumbering several properties, which may be either statutory, in the case of a division of the property, or contractual, (iv) forced or “compulsory” mortgages (*hipoteka przymusowa*) – securing a possible claim under an interim injunction or a claim under an enforcement title and (v) mortgages on a mortgaged receivable.

The most popular are bank mortgages (which are capped in most cases) and ordinary mortgages (e.g. securing future instalments of the purchase price). Joint mortgages are established in portfolio acquisitions.

Under Polish law, the mortgage is an *in rem* security on real property (which may found a claim against a third party purchaser).

7.2 Setting up a mortgage

The bank grants a loan to the debtor. What steps does the bank have to follow in order to establish a security right over real property owned by the debtor?

Firstly, the bank and the customer have to agree on the terms of the loan. The loan agreement will include the borrower’s consent to the mortgage being granted and to the bank’s issuing of an enforcement title.

Once the loan is signed, the bank sends a statement to the mortgage register court specifying certain terms of the loan (or the loan agreement itself) and requesting the registration of the mortgage. Bank mortgages do not require a notarial deed in order to be established – the court will register the mortgage based on the bank’s statement in simple written form. The mortgage cannot be registered before the loan is signed, as the legal relationship must exist in order for the condition of being accessory to be met (the borrower cannot create a mortgage for himself). However, the mortgage may be registered prior to disbursement.

The court then registers the mortgage. The period before registration is usually covered by loan repayment insurance. It should be noted that according to the internal by-laws of the courts, bank mortgages benefit from a “fast-track” registration procedure.

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Although there is a law on consumer credit in Poland¹⁹, it does not apply to loans whose purpose is to finance the acquisition of real estate (including separate apartments and co-operative rights), nor to loans whose amount exceeds 18,000 euro.

As a rule, the creation of a mortgage requires the signing of a notarial deed of establishment by the owner and registration in the mortgage register.

Bank mortgages do not require notarial form – it suffices for the borrower to consent to the mortgage in the loan agreement and for the bank to issue a special statement to the court, based on which the mortgage is registered. In addition, bank mortgages may encumber properties with no mortgage register – the mortgage is created by simply filing the bank’s statement in the “set of documents” (*zbiór dokumentów*), a file containing various documents relating to the given property.

Forced mortgages are registered on the basis of interim injunctions, enforcement titles and certain other official documents.

Statutory joint mortgages are created by operation of law, as a result of division of the property.

Registration in the mortgage register has constitutive effect (with the exception of bank mortgages created on properties with no mortgage register – see above). The registration contains the following data: (i) amount and currency of the mortgage, (ii) category of the mortgage, (iii) the number of contractual interests, (iv) the secured receivable, (v) the term of payment, (vi) the creditor, (vii) the ranking, as well as (viii) the date the motion was filed, the date of registration, the basis for registration and the signature of the judge/court clerk making the entry.

The speed of registration depends on the court. In big cities, it may take several months; in smaller ones, a week. As mentioned above, bank mortgages have registration priority according to the courts’ internal by-laws. If the process is really delayed, it may help to address an “acceleration motion” to the President of the court.

Priority notices, mentioned under point 2.6, may also be used for mortgages. In fact, such notices may secure the ranking of future rights, which means that priority may be stipulated for a mortgage before the loan is signed (breaking the requirement that the mortgage be accessory).

What are the costs for establishing a typical security for (a) €100,000.- and (b) €300,000.-?

Lawyers’ fees depend on the contract with the client.

Notary fees: (i) mortgage securing a bank loan for residential purposes: (a) 100,000 euro – 165 euro, (b) 300,000 euro – 370 euro; (ii) other mortgages: (a) 100,000 euro – 330 euro, (b) 300,000 euro – 740 euro.

Registration: (a) 100,000 euro – 540 euro, (b) 300,000 euro – 1,540 euro.

¹⁹ Law on Consumer Credit dated 20 July 2001 (Dz. U. 2001, no. 100, item 1081)

Stamp duty (tax on civil transactions): (i) in the case of capped mortgage – 19 PLN (4 euro), (ii) in other cases – 0.1% of the amount of the mortgage, i.e. (a) 100 euro and (b) 300 euro.

All the above costs are collected by the notary (if the notary executes the deed).

7.3 Causality and Accessoriness

Let us assume that the loan contract is invalid. How does this affect the mortgage - assuming that all other requirements for creating a mortgage have been complied with?

In Poland, a mortgage is accessory and may not exist without an underlying debt (ordinary mortgage) or at least an underlying legal relationship (capped mortgage). If the loan contract is invalid, neither the secured debt, nor any legal relationship exists, so the mortgage cannot survive. However, in the case of a transfer of such a mortgage (which is only possible together with the secured claim), the principle of public faith in the mortgage registers will cover the existence of both the mortgage and the secured debt (this only applies to ordinary mortgages, and not to capped or forced ones).

Let us assume that the debtor-consumer has a statutory right to withdraw from the loan contract. The debtor exercises this right after the mortgage on the real estate has already been established. (This might be possible if the bank did not inform the debtor properly about his right to withdraw and, as a consequence, the deadline for the withdrawal has not yet expired.)

Can the bank still use the mortgage to secure its right to repayment of the loan?

This will depend on the legal nature of such a withdrawal. As it is not regulated by law in Poland, the right of withdrawal may only result from the contract and will always be conditional upon (or will trigger) the immediate repayment of the loan. Consequently, even though the loan is terminated, the debt under the loan still exists and continues to be secured by the mortgage.

The debtor has repaid the loan for which the mortgage was granted. Now, he applies for another loan. Can the old mortgage be used to secure the new loan (and if so, under which conditions)? Or is it necessary to set up a new mortgage?

The old loan expires with repayment of the loan and may not be used to secure a new one. A new mortgage should be created to this effect.

Let us assume that 30% of the mortgage loan has been repaid. Now, the mortgagee wants to take up another loan for his business, amounting to 25% of the old loan, but with a much higher annual amortisation and under a different interest rate. Can the “free” part of the old mortgage be used to secure this loan? What has to be done in such a case?

If only 30% of the loan has been repaid, the mortgage has not expired. If the parties intend to secure a new loan with the free part of the mortgage, they would need to change the terms of the mortgage. As it comes down to redoing the whole process, creating a new mortgage would probably be simpler. In addition, the consent of the

parties whose rights rank equal to or lower than the mortgage in question would be necessary in order to change its terms.

Let us assume that the debtor has agreed on a loan secured by a mortgage. However, the house to be financed has not been yet built, although its completion has been agreed upon as a condition for the disbursement of the loan. Therefore, the debtor wants to take up an interim loan from another bank. Can the mortgage be used to secure this interim loan until it is replaced by the final mortgage? How does this happen?

As the creditors are different, the mortgage securing the main loan may not secure the interim financing, even if the parties change the terms of the mortgage as in the example above. The only theoretical possibility would be to refinance the interim loan by the final one by way of assignment of the secured receivable. However, as the terms of the final loan will probably be different, this would also involve the changing of the terms of the mortgage. Summing up, creating two separate mortgages would be a much more practical solution under Polish law.

The bank and the mortgagor have agreed on a mortgage loan for a five year term at a fixed interest rate. Now, this period is over, and both sides want to agree on a new loan for another five years, but at a different interest rate. Can the old mortgage secure the new loan?

If the loan has expired (and the debt has been repaid), the mortgage has expired as well. A new one will be necessary to secure a new loan.

What if, in the last example, the mortgagee wants the new loan from another bank? Could the old mortgage be used for the new loan? If yes, what steps need to be taken? Is the consent of the old bank necessary?

A new mortgage will have to be established.

What if the new loan is not designed to finance property but a car or the mortgagee's company and is subject to different conditions, e.g. a higher interest rate and a higher amortisation?

A new mortgage will have to be established.

The mortgagee runs a business and is in permanent need of credit. He agrees with his bank on a maximum credit line, which is used for various different loans. Can this credit line be secured by a mortgage? Are there special forms of mortgages in such cases?

A credit line can be secured by a capped mortgage (the legal relationship exists, but the exact amount of the debt is unknown).

In your legal system, is there anything like an independent/abstract promise of payment (garantie personnelle autonome/cédule abstraite)? If so, can it be secured by a mortgage?

The only kind of abstract promise of payment that is accepted by the Polish law is a bank (or insurance company) guarantee. Theoretically, it could be secured by a

mortgage but, given the quality of the issuer, such an instrument is good enough in itself.

Can a mortgage also be set up in favour of the land owner (Eigentümergrundschuld)? Can this be done without a loan contract? Could he set up the mortgage “on stock” when negotiating with several banks? How is a pre-existing mortgage assigned to a later loan?

May the owner reserve priority to himself for a future mortgage?

Under Polish law, the owner cannot create a mortgage for himself.

7.4 Enforcement and other rights of the bank

The debtor did not pay the interest or did not repay the loan. Therefore, the bank wants to enforce the mortgage/land charge.

Please describe the main steps of the enforcement procedure!

Is a court decision necessary to render the mortgage enforceable?

How long does the enforcement procedure usually take before the bank receives the proceeds of the mortgage? Can the debtor slow down the procedure, especially if the mortgage is on his residential home? Can the bank act in receivership in the meantime (Zwangsverwaltung)?

Can the bank sell the real estate without foreclosure, i.e. without a court decision and a compulsory auction? Can the owner grant the bank the right to purchase or the power to sell the property by means of a normal real estate sales contract (in the event that the loan is not repaid)?

Are there any instruments for public administration or courts to stop or suspend foreclosure for social or economic reasons?

What happens in the event that insolvency procedures over the debtor’s estate are initiated? Will the foreclosure procedure be barred? How are the mortgagee’s rights protected in an insolvency procedure?

The first step necessary to foreclose on the mortgage is obtaining the enforcement title. Banks may issue such titles themselves, provided that the debtor agreed to them doing so (e.g. in the loan contract). In other cases, debtors usually submit themselves to voluntary enforcement proceedings in the notarial deed establishing the mortgage. If neither of the above cases applies, the creditor will need to obtain a court judgment.

Secondly, the enforcement title should be granted an “execution clause” by the relevant district court. This is just a formality, the purpose of which is to check the formal correctness of the enforcement title, and should not take more than a week (one – two days in most cases).

Then, the creditor chooses a bailiff, files a motion to start enforcement proceedings attaching the enforcement title, and pays an advance towards the bailiff’s fees.

The bailiff distrains on the property by filing a notice with the mortgage register court. The distraint is registered and from that moment on is opposable to third parties (any purchaser would take over the pending enforcement proceedings). If a third party knew of the distraint before it was registered, he/she will be subject to it from the moment he learned of its existence.

Along with the distraint, the bailiff addresses a final request for payment to the debtor. Usually, the debtor continues to manage the property, unless he is denied management for important reasons.

The bailiff instructs one or more **valuators** to value the property and organizes the first auction with a starting price not lower than $\frac{3}{4}$ of the assessed value. If the first auction is unsuccessful, the bailiff organizes a second one with a starting price not lower than $\frac{2}{3}$ of the assessment value. If the second auction is also unsuccessful, the creditor or the co-owner may take over the property for $\frac{2}{3}$ of the assessment value. If both auctions are unsuccessful and nobody takes over the property, the bailiff discontinues the proceedings and no auction should take place within the year.

If the enforcement procedure is well organised, it should not take longer than 6 months. However, it often drags on for more than a year. The debtor has various opportunities to slow down the process, including filing appeals against certain acts of the bailiff.

According to Art. 75 of the Law on Mortgage and Mortgage Registers, the mortgage can only be executed through enforcement sale. Although, it sometimes happens that the debtor authorises his creditor to sell the property (granting him a special power of attorney to this effect) if the debt is not repaid, this should be considered an independent kind of security (and not an “adjusted” mortgage). In any case, this solution does not yet seem to be generally accepted.

Simple enforcement proceedings may be suspended (as a temporary measure) if a bankruptcy motion is filed against the debtor. Proceedings are discontinued on pronouncement of the debtor’s bankruptcy.

7.5 Overriding interests and priority

Ordinary enforcement proceedings:

The proceeds are distributed in the following order: (i) costs of enforcement proceedings, (ii) alimony claims, (iii) payroll, (iv) claims secured by mortgage, registered pledge or other registration, (v) taxes, social security premiums and other public levies, (vi) claims secured by a simple pledge or other securities not mentioned above, (viii) claims of the creditors participating in the foreclosure, (ix) other claims.

Each subsequent category may only be satisfied on condition that the previous category was fully satisfied. Receivables within the same category are satisfied proportionately (with the exception of categories (iv) and (vi), where the ranking of securities prevails).

Bankruptcy proceedings:

The proceeds are distributed in the following order: (i) costs of bankruptcy proceedings, social security premiums, payroll, farmers’ deliveries, alimony claims, claims

under continuing contracts, (ii) taxes and other public levies, (iii) other claims, (iv) interests. However, claims secured by mortgage are satisfied from the proceeds of sale of the property (after the payment of the costs of the sale) and according to their ranking. This means that they have priority over the privileged claims mentioned above – as far as the proceeds of sale of the property are concerned.

See discussion under point 7.5. In simple enforcement proceedings, there are privileged creditors that take priority before the mortgagee. It is very difficult to assess what percentage of the proceeds such privileged claims amount to. In bankruptcy proceedings, the beneficiary of the mortgage has priority in satisfaction from the proceeds of sale of the property (the only overriding interest being the costs of the sale).

7.6 Scope of the mortgage

Mortgages encumber the whole of the property (including its integral parts and appurtenances). Therefore, a mortgage will always cover buildings (irrespective of whether the land is held in full ownership or perpetual usufruct). A separate mortgage over the buildings is not possible.

Mortgages extend to integral parts (buildings, permanent installations, infrastructure) and appurtenances (machinery, tools and other assets used for the purposes of the business carried out on the property). However, if such integral parts or appurtenances are sold (with a certain date) and are removed from the property (which is not possible after distraint), the mortgage over such assets expires. The mortgagee may object to the removal of such objects from the property if it violates the principles of good business.

If the mortgaged house is destroyed (e.g. by fire), the insurance company must pay an indemnity to the owner solely for the purpose of bringing the property back to its initial shape (repairing the damage). Any payment of indemnities to the owner for other purposes requires the consent of the mortgagee.

If the debt is due and payable, the mortgagor may pay the creditor and in so doing redeem the mortgage. He will also obtain all the creditor's rights as regards the debtor (provided he is not a personal debtor himself). If the creditor does not cooperate and makes payment impossible – the mortgagor may instead pay the relevant amount to the court deposit account.

The mortgagor may redeem the mortgage even after foreclosure.

7.8 Security granted by a third party

Let us assume that the debtor is not able to offer any kind of security for the loan. However, his wife is willing to mortgage her real estate.

Are there any limitations on the liability of a third party either in the statutes or under case law, e.g. if the mortgage is to secure the debts of the husband's enterprise, including all future debts?

The only limitation is that the waiver by the personal debtor of any of his/her rights or objections towards the creditor after the creation of the mortgage will not affect the situation of the mortgagor (who can still raise such rights or objections).

7.9 Plurality of mortgages

If the owner has already set up (and registered) a mortgage and then wants to set up a second mortgage with another bank, can he do so without the consent of the first bank? Would the holder of the second mortgage have a direct claim against the owner? What would happen if he wanted to execute the mortgage? Could he do so without the consent of the holder of the first mortgage? What would be the consequences for the first mortgage? Would it become due – or would the property be foreclosed – auctioned with the first mortgage on it?

According to Art. 72 of the Law on Mortgage and Mortgage Registers, the mortgagor may not validly undertake not to transfer or encumber the property before the expiry of the mortgage. However, in practical terms, the creation of the second mortgage without the consent of the first bank would probably constitute a breach of the first loan. The second mortgagee will have a direct claim towards the mortgagor and may start enforcement proceedings by himself. In such a case, the first mortgagee will be a party to the enforcement proceedings by virtue of law.

According to Art. 1000 of the Civil Procedure Code, the enforcement sale is free of any encumbrances (including mortgages). Mortgage 1 will thus be converted into a claim to be satisfied out of the proceeds of sale, in accordance with its rank. If the first mortgage is capped and the debt is not yet due in the full amount, the first mortgagee may require that the unpaid amount of the mortgage be put on the deposit – as a security that would replace the mortgage.

What happens to the second ranking mortgage, if the loan of the first mortgage has been repaid completely or partially? Does the second mortgage get a better position or even the first rank? (Or does the owner get the right on the position for the re-funded parts of the first mortgage, and the second mortgage remains at its position?)

The first mortgage will remain in place until full repayment of the first debt. When this is done, the first mortgage will expire automatically and the second one take first rank.

Mortgages can be of equal ranking (and in such a case they are satisfied proportionately, rather than one after the other). This can be best achieved by an agreement on ranking (usually included in the mortgage deeds) as discussed under point 2.6, since filing the motions at exactly the same time may create practical problems.

The ranks of mortgages may be exchanged and/or altered by agreement of the parties, as explained under point 2.6. However, if the change in priority is likely to affect the rights of other parties, the consent of these parties is required (e.g. if in between mortgages A and C wishing to exchange rank, there is a mortgage B). Then, the change in rank is registered in the mortgage register.

7.10 Several properties

The same mortgage may cover several properties (joint mortgage or *hipoteka łączna*). This may happen: (i) by operation of law (in the case of division of the property) or (ii) by contract. A simple mortgage may also be extended to another property. The creditor (joint mortgagee) is free to decide on the method of foreclosure: he may require satisfaction of the whole or a part of the debt from one, several or all encumbered properties. If the mortgagee forecloses on one property only and the mort-

gagor concerned has a recourse claim over other mortgagors, he/she acquires the mortgage(s) on such other property(ies) to the amount of his recourse claim.

7.11 Transfer of the mortgage

The debtor has set up a mortgage/land charge to the benefit of bank 1 in order to secure a loan. Now, bank 1 wants to refinance the loan with bank 2. How can bank 1 transfer the mortgage to bank 2? Please describe the necessary steps!

Bank 1 may assign the receivables under the loan to bank 2. If the mortgage is “ordinary”, the claim may be transferred only with the mortgage. If it is capped, it may be transferred with or without the mortgage. If the claim is transferred together with the mortgage (in either of these cases), the transfer needs to be registered in the mortgage register in order to be effective.

Polish law is not flexible enough to allow the smooth assignment of parts of the secured debt. It is impossible in the case of “ordinary” mortgages, as the claim may only be transferred together with the mortgage and there is no statutory mechanism for sharing it between several creditors (e.g. main creditor and assignee). In the case of capped mortgages (where the claim may be transferred without the mortgage), bank 2 should be granted a new mortgage (with an agreed rank), covering only the assigned part of the debt.

Can bank 1 transfer the mortgage without transferring also the secured claim (i.e. the claim arising out of the loan contract)? If not, are there any other options for bank 1 to use the mortgage as collateral for its debt with bank 2?

The mortgage cannot be transferred without the secured claim. There do not seem to be any other options to use the first mortgage as collateral for the debt.

Does the transfer have to be registered? (Is the registration necessary for the transfer to be valid or to be valid as against third parties? This question applies particularly in the case of insolvency of the transferring bank (bank 1).) What other ways exist to make the transfer insolvency-proof?

The transfer needs to be registered in order to be valid.

May the debtor or the land owner object to the transfer of the mortgage? Does the debtor or the land owner have to be informed about the transfer?

Neither the debtor nor the land owner may object to the transfer of the mortgage (with the secured claim), unless there is a special contractual provision prohibiting the transfer (*pactum de non cedendo*). As the transfer must be registered (i.e. public) in order to be effective, the lack of specific information on the part of the land owner has limited consequences only: if he has paid interest to the assignor in good faith, he is relieved from this payment vis-à-vis the assignee.

What are the approximate costs for the transfer of a mortgage – and what is the time required?

The transfer of claim is subject to 1% stamp duty (tax on civil transactions). The registration fee is capped at 20,000 PLN (approx. 4,500 euro). Registration time should be as in the case of registration of the mortgage.

Let us assume that bank 1 does not have a valid claim (as in question 7.3.1). If it transfers the mortgage to bank 2, can the latter still acquire the mortgage in good faith?

Although the mortgage cannot exist without a valid claim, the acquisition of a secured claim benefits from public faith in the mortgage registers – both with respect to the existence of the mortgage and the existence of the claim. This rule does not apply to capped mortgages (the majority of bank mortgages) or forced mortgages.

Let us assume that there is a valid claim, but the creation of the mortgage is invalid. Can bank 2 still acquire the mortgage in good faith?

Yes, it can.

If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, how can bank 2 enforce the mortgage? (Or does bank 1 have to enforce the mortgage?)

The transfer is effective only upon registration. Bank 2 must wait until the registration is in order to enforce the mortgage. In the meantime, it may appoint bank 1 as an agent for this purpose.

If bank 1 has transferred the mortgage to bank 2, but bank 1 is still registered, whose consent is necessary for any changes in the registration (the consent of bank 1 or of bank 2)?

Any future changes in the registration may only be effected after all the previous pending motions have been dealt with. This means that such changes will be made only after bank 2 has been registered and this is why bank 2 should agree to any changes (such agreement would contain a deemed condition of registration of bank 2).

Typically the bank may want to split up and syndicate the loan. Can the loan and the mortgage be split up and only a portion be transferred to bank 2? Can portions be transferred to different banks? Could those banks transfer the loans and the mortgage(s) to other banks later on?

As mentioned above, Polish law is rather inflexible in this respect and transfers of parts of secured claims are difficult in the case of ordinary mortgages. In the case of capped mortgages, it is easier (the mortgage does not have to be transferred with the claim), but separate mortgages need to be created in favour of the new banks, as there is no mechanism for sharing an existing mortgage between several banks (assignees).

May the mortgage be administered by a trustee or fiduciary? In case of insolvency of the trustee, would the mortgage fall to the insolvency estate?

Due to the lack of regulation, such arrangements may be purely contractual. In addition, in order for several creditors to benefit from the same mortgage, the receivable must be joint and several. This means that administration of a mortgage by a fiduciary (unlike administration of a pledge) is very rare.

7.12 Conflict of Laws Issues

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The real estate is situated on national territory whereas the debtor (who is also the owner of the real estate) resides in another EU-country.

Which law is applicable (to the loan contract, the security contract and the mortgage) when the debtor takes a loan with a bank in the host country where the real estate is situated? Could a law different from the law governing the property be chosen for the loan contract?

The mortgage will always be subject to *lex rei sitae*. The loan may be subject to another law, provided that there is some link with the legal relationship. The default rule of the Polish Private International Law is that the loan contract will be governed by the law of the country of its conclusion.

Which law is applicable (to the loan contract, the security contract and the mortgage) when the debtor takes a loan with a bank in his country of residence?

Answer given under point 7.10 above.

Which law is applicable (to the loan contract, the security contract and the mortgage) when the debtor takes a loan with a bank in a third EU-country? Could a law different from the law governing the property be chosen for the loan contract?

Answer given under point 7.10 above.

Does your national law contain other restrictions or de facto disadvantages for foreign debtors which might negatively affect cross border transactions involving real property and therefore fall foul of EU law?

According to Art. 68 of the Law on Mortgage and Mortgage Registers, the mortgage may be denominated in a foreign currency if the secured debt is expressed in such a currency (in conformity with foreign exchange regulations).

Debtors from outside the EEA (other than banks) need a permit from the Minister of Internal Affairs in order to take over the mortgaged property in cases where the second auction is unsuccessful (see point 7.4 above).

In addition (and on the creditor's side), it is unclear whether certain privileges granted to banks under Banking Law (e.g. mortgages not requiring notarial deeds, the possibility of issuing enforcement titles, etc.) apply to foreign banks. At this stage, it is safe to say that only Polish-based banks may benefit from them.

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