

POLAND

Legal System

Basically Poland has a **civil law** system with Roman, German or Austrian influences and many new laws being put on the statute book to bring it towards a Continental European model.

Historically, Polish law was based on unwritten customary law and, at the time of partition in 1792, such laws were based largely on German or Slavonic municipal rules. To this can be added the canon law of the Church and the *corpus juris civil*—‘the body of civil law’—that was the cornerstone of Roman law. By the time of independence in 1919, apart from these historical influences, there were laws derived from Russian, French and German laws, applied in different parts of this partitioned land. In 1919 a codification commission was established to create a single system, but this was unable to produce an entirely new set of codes. Nonetheless, a new constitution was adopted in 1921, based primarily on French law, and in 1934 a code of obligations was adopted drawn from Austrian and French laws of Obligation and Contract. The rest of the codes of persons, property and inheritance were ready for promulgation when the Germans invaded in 1939. After the war the whole process was reversed with the aim of creating a new system based on the Soviet Socialist model.

In 1997 Poland adopted an entirely new constitution. With accession to the European Community the process began of bringing the laws of the country closer into line with the Community. A Civil Code (*Dziennik Ustaw*) had been adopted in 1964 and this has undergone substantial revisions. The sections that deal specifically with property include: Book One, Title III. Property, arts. 44–55; Book Two, Title I. Ownership, arts. 140–305 (inc. transfer, usucaption, co-ownership, usufruct, servitude, pledge; Title IV. Possession, arts. 336–352; Title XVII. Lease and Tenancy, arts. 659–709; Title XVII. Contract of Leasing, arts. 709–709; Title XXVI. Section II. Property Insurance, arts. 821–828. Drawing on the earlier sources of law, the Code and new statutes, a sophisticated civil law is rapidly emerging. In addition, the issue of ‘restitution’ (see below) is being addressed.

Property Law

Ownership

Land may be owned absolutely (*własność*—similar to *pleine propriété* in French law, *eigentumsrecht* in German law, or **freehold** in English law). It includes the right to possess, use, encumber, transfer and dispose of property as the owner wishes, subject to the rule of law. The right is governed by the Polish Civil Code.

A foreigner requires a permit from the Ministry of Interior Affairs and Administration (www.mswia.gov.pl) prior to acquiring real property in Poland (Act of 24 March 1920 on Acquisition of Land by Foreigners and 26 April 2004 Regulations). This approval is required prior to an acquisition, otherwise the transaction is null and void. Prior to this approval the Ministry of Defense, and for agricultural land, the Ministry of Agriculture and Rural Development, has to be consulted. This permit requirement applies to the acquisition of the ownership of land and buildings, as well as a perpetual usufructuary right, either by an individual or an entity that acquires a controlling interest in a company holding such rights. As a rule, entities from the European Economic Area (EU-27, plus Iceland, Lichtenstein and Norway) are exempt from this requirement. Although there are exceptions in the EU regulations for agricultural land, forestry and a second home (generally one not intended as a permanent residence). A permit may be refused also as a matter of social policy or public security.

Approval is generally not required for the purchase of an undeveloped plot in a city boundary with an area that does not exceed 0.4 hectares; when a foreign bank is enforcing a mortgage right; an apartment is acquired as a permanent residence.

Poland is a signatory to the European Convention of Human Rights which protects the right to “**possessions**” (including land and buildings) (Article 1 of Protocol 1). The Constitution of 2 April 1997, Article 64 provides:

Everyone shall have the right of ownership and other property right in relation to assets, and the right of succession

Everyone, on equal basis, shall receive legal protection of their ownership, other rights to and the right of succession

The right of ownership may only be restricted by statute and only to the extent that there is no violation of the substance of such rights.

In addition, land may be held as a right of perpetual usufruct (RPU) (*użytkowanie wieczyste*) (Polish Civil Code, art. 236). This right is granted by the State or a local authority and is similar to full ownership, but is granted for a limited duration and is subject to the payment of a fee. An initial fee is payable at the start of the term to ‘purchase’ this right and an annual fee is payable for the term of the agreement. The initial fee of is the region of 15-20% of the value of the land and the annual fee ranges from 1-3% according to the permitted use. The right is generally granted for the maximum permitted term of 99 years, but it may be limited to 40 years. At the end of the term, in most cases the holder has a right to an extension for a similar term. If no such extension is granted the holder of the RPU is normally entitled to compensation for the value of the buildings. The fee may be revised annually as set out in the terms of the agreement, usually in accordance with an index. The use of the property under the agreement is normally restricted to a particular purpose (such as the development of the land or for agricultural purposes) and, if there is a change in the use of the property, the annual fee may be increased. The rent may also be increased on a sale of the property. Any buildings erected on the land are the property of the perpetual usufructuary and may be removed at the end of the term of use. In addition, any building on the land at the start of the term is normally the property of the owner of the land, unless there is an agreement to the contrary. The holder of a RPU has the right to transfer this right by sale, gift or bequest, as well as to mortgage the property. There is no automatic right to convert a RPU into full ownership. However, in 1998 a statute was passed to promote the conversion of perpetual rights granted before 1 January 1998 into full ownership. In addition, the public authority may agree to a sale of the land at a later stage.

In addition to the RPU, there is a more limited form of **usufruct** (*użytkowanie*) which is personal to the user and is normally granted for a shorter term (in many cases it is a form of life interest). This right expires automatically if not the land is not used for a period of 10 years. This right is more applicable to agricultural land.

Land acquired from the State or a local authority is commonly subject to a right of pre-emption in the event of a sale of undeveloped land, as well as most agricultural land and forests (although this right is frequently waived).

There is also the right to a ‘cooperative’ apartment (*własnościowe spółdzielcze prawo do lokalu mieszkalnego*), a ‘cooperative’ commercial property (*spółdzielcze prawo do lokalu użytkowego*) and a house in a ‘residential cooperative’ (*prawo do domu jednorodzinnego w spółdzielni mieszkaniowej*). Such rights are registered as for full ownership and may be freely transferred.

All transfer of land must be made by a notarial deed (act notarialny) and registered at the Land and Mortgage Registry (Księgi Wieczyste) maintained at the relevant court for which a fee is payable. This registry provides details of land ownership (location, property description, name of owner), as well as limited real rights. Limited real rights include a mortgage (*hipoteka*), easement and servitude (*sluzebnosc*).

The registration of any title to land provides a guarantee to a purchaser or mortgagee, provided he has acted in good faith against the claim of a third party; although in some areas there may be a delay between a transfer and registration, there is no effective system to resolve inconsistencies between land boundaries and many minor rights over land, such as easements of necessity (or many similar rights), and short term leases, are not always registered. In addition, there is no formal system to register re-privatisation claims.

Thus, in addition to obtaining a copy of the land registry documents, an examination of the situation on the ground, as well an examination of all documentation is advisable. In addition, insurance against a defect of title may be taken out.

An agreement for the transfer of land may be made in the form of a preliminary sale agreement (*umowa przedwstępna*). If this agreement is concluded by a notarial deed, the purchaser cannot prevent the transfer of title, but can only claim damages.

Restitution

After 1989, the Polish government has not disavowed any previous nationalization laws. These are considered to have been passed by an internationally recognized government of the time. Strictly, this leaves the former owner recourse only if he or she can be proven that the land was taken illegally. This leaves the onus on the expropriated owner to prove that the taking was not carried out in accordance with the law of the time or there was an illegal administrative procedure. On the other hand, land taken without the payment of compensation, even by an official government entity, is contrary to the constitution and may give a right to a claim for compensation

Legislation has been passed to promote the restitution of property taken under previous governments to the former owner or their heirs. Generally this legislation provides a 'right of first refusal' in the event of a sale of the land by the state or a municipality for a concessionary price (Land Management Act 1997). Restitution has to take account of title based on the old land register and the current situation of the ground; suitable access to the land; and factors that might limit the future disposal of the land. In certain cases compensation may be deemed more appropriate, especially when this would result in the significant fragmentation of the land.

Restitution is generally only available for land that is now owned by the state or a municipality. Land owned by an individual can not normally be recovered, unless it was originally acquired from the state in bad faith. Proposals have been put forward to pass a new restitution law that would not reverse the acknowledgment of the legality of law passed between 1944 and 1989 and grant a broader right to recover land expropriated during this period. However, no such legislation has been passed to effect such a change.

In some cases compensation was paid as part of a national agreement leaving the foreign state to deal with claims; this mostly applied to businesses and industrial property. Citizens of other socialist states generally received little as they were required to give up any claims that might arise against them on a reciprocal basis. In addition, German citizens are not included in any such proposal as it is considered by the Polish government that any payment is withheld represents compensation for war damage.

Easement/Servitude

As with all civil law systems, Polish law recognises a servitude (*szluzebnosc*) over land as positive or negative. These rights are close to the French right of a **servitude**, which may be a *servitude positive* or a *servitude negative*. The former is similar to an **easement** in English law, e.g. a right of way, and the latter a **restrictive covenant** (in the US sometimes called a 'negative covenant'), which limits the use or development of land for the benefit of neighbouring land.

Terms in **bold** are defined and explained in the Encyclopedia of Real Estate Terms (Third Edition hardcopy and ONLINE) <<http://realestatedefined.com>>

This information is intended as an introductory guide and is intended to point out issues that may be of interest to a foreign investor.

It does not constitute legal advice and should not be relied on as such. Professional advice is recommended on any issue referred to herein.

Further information may be found in our **Bibliography**.

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