Global Corporate Real Estate Guide - Poland

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Select a topic from the menu and explore the questions within.

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# Authors

# Real Estate Law

## What is included in the term “real estate”?

The term “real estate” includes the following:

Land

Buildings permanently attached to the land and parts thereof (premises); these can be the object of different ownership than the owners of the land only if there are specific regulations authorizing separate ownership rights (e.g., condominium rights and the ownership of a building erected on land on which the right of perpetual usufruct has been established)

As a consequence, if the law does not provide otherwise, all structures erected on the land (e.g., a building) are always owned by the owner of the land and cannot be a separate object of ownership (superficies solo credit).

## What laws govern real estate transactions?

Property law is governed by the Civil Code. The management of property owned by the state or communes is also governed by the Property Management Law.

## What is the land registration system?

Legal title to land can generally be assessed based on entries made in land and mortgage registers maintained for each real property by the relevant district courts. The content of the registers is deemed conclusive as to the legal title held by an owner or a perpetual usufructuary.

The principle of reliability of land and mortgage registers protects those who acquire real property relying in good faith on the entries made in land and mortgage registers by courts. Those who acquire land free of charge cannot claim protection under the principle of reliability of the registers. A person acquiring land from an entity registered in a land and mortgage register as the landowner would effectively become a new owner even in cases where the entry was erroneous, provided that other conditions for the operation of the principle of legal reliability of the registers are met.

Land and mortgage registers also contain entries relating to the area of the land and the structures existing thereon. However, such entries are not legally conclusive and must be confirmed in each local commune’s land and building registers.

## Which authority manages the registration of titles?

Title registration is managed by the district courts that maintain land and mortgage registers for real property.

## What rights over real property are required to be registered?

The following rights are required to be registered:

Ownership

Perpetual usufruct

Usufruct

Easements

Mortgages

Legal interests of third parties such as lease agreements, commitments to sell the real property or the rights of first refusal, may also be evidenced in the land and mortgage registers. However, it is not mandatory to register them. Once registered, such interests become binding on the third parties acquiring the real property and no party can effectively claim a lack of knowledge of such interests.

## What documents can landowners use to prove ownership over real property?

Ownership of land may be proven by an extract from the land and mortgage register issued by the district court. If a property is not registered in any land and mortgage register, a notarial deed documenting the agreement transferring an interest in the real property will be sufficient to prove ownership.

## Can a title search be conducted online?

Yes. The land and mortgage registers maintained by the relevant district courts are available to the public online. Information about the ownership of real property can be searched for free.

## Can foreigners own real property? Are there nationality restrictions on land ownership?

Yes. Foreigners who are not citizens or companies of a member state of the European Economic Area (EEA) are required to obtain a permit from the minister of the interior to purchase land.

From 1 May 2016, residents of a member state of the EEA are not required to obtain a permit to purchase agricultural and forest real estate.

Note, however, that since 30 April 2016, the government has placed restrictions on trade in agricultural property that apply to all entities operating in the Polish market, irrespective of whether they are considered foreigners. The government has also suspended the sale of agricultural land that are owned by the state treasury and managed by the State Agricultural Support Center (“**State Center**”), for 10 years from the date the new law creating these restrictions became effective. The general rule is that only individual farmers can acquire agricultural property. In all other cases, with few exemptions, the consent of the State Center is required for a transfer of ownership. Moreover, the new agricultural property owner is under a statutory obligation to manage the farm located on the new agricultural property for at least five years following acquisition.

In the case of sale of agricultural property, a preemptive right will be vested to the tenant of such property (if additional conditions are fulfilled). If a tenant has not exercised its preemptive right or if there is no tenant, the preemptive right shall be vested by the force of law to the State Center.

The State Center will have a preemptive right over the shares of commercial companies that own agricultural property of an area of at least five hectares (or agricultural properties of a joint area of at least five hectares) and a right to purchase agricultural property of an area of at least five hectares (or agricultural properties of a joint area of at least five hectares) owned by a limited partnership when a partner changes or a new partner joins the partnership. The State Center will also have a right to purchase an agricultural property that is sold in any manner other than a sale agreement, including mergers, divisions and transformations of companies.

A foreigner may purchase apartments without obtaining prior consent.

## Can the government expropriate real property?

Yes. Real property can be expropriated by the government if it is necessary for public use and appropriate compensation is paid.

## How can real estate be held?

Generally, a real property interest is held by any of the following means:

Ownership

Perpetual usufruct

Condominium rights

As it is referred to in Poland, ownership is a title to real property equivalent to the “freehold title” in the English system. Ownership conveys freedom of use and includes the collection of benefits and the right to transfer for an unlimited period.

The right of perpetual usufruct is a title to real property owned by the state or a commune. This right can be established for a specified term of 99 years. In exceptional cases, such a period may be shorter, but not less than 40 years. The term of perpetual usufruct may be renewed. Perpetual usufruct is a transferable, alienable, and mortgageable right of use.

Natural persons and legal entities can be granted the right of perpetual usufruct to land owned by the state or a commune. Under Polish law, perpetual usufruct ranks second in the hierarchy of interests in real property.

## What are the usual structures used in investing in real estate?

The typical structure that is used is a Polish limited liability company (special purpose company).

## How are real estate transactions usually funded?

Most real estate transactions are funded with a combination of internal financing and bank loans. Typically, a portion of the internal financing is provided in the form of intercompany loans. Internal financing is structured (directly by a shareholder or by a group financing entity located in a favorable jurisdiction) to allow for the tax-efficient distribution of interest and deducibility of the interest in Poland.

## Who usually produces the documentation in real estate transactions?

The seller usually prepares the letter of intent, which is the first document in any real estate transaction. The letter of intent specifies the basic conditions of the transaction and the exclusivity period for due diligence and negotiations of the transaction.

Generally, the buyer prepares the initial draft of the preliminary purchase and sale agreement (optional) and the final purchase and sale agreement. However, the parties may agree on different responsibilities on a case-by-case basis.

## Can an owner or occupier inherit liability for matters relating to the real estate even if they occurred before the real estate was bought or occupied?

Yes. If land contamination existed before 30 April 2007, the landowner may be obligated to clean up the contamination. If contamination occurred after 30 April 2007, the polluter will be liable.

If the agreement establishing the perpetual usufruct right or the decision granting such right imposes an obligation to develop the real property (within a specified term), then such obligations are inherited by the future perpetual usufructuary.

## Does a seller or occupier retain any liabilities relating to the real estate after they have disposed of it?

Yes. The owner is liable on the basis of statutory warranty for defects in land title and in the building. However, these warranties may be excluded by agreement.

The owner or occupier may be liable for contamination if that owner or occupier contaminated the land after 30 April 2007.

# Acquisition of Real Property

## What are the usual documents involved in such transactions?

Letter of intent

The first document in any real estate transaction is a letter of intent, specifying the basic conditions of the transaction and the exclusivity period for the due diligence and negotiations of the transaction.

Due diligence report

Once the letter of intent is signed, the buyer or the buyer’s lawyer conducts due diligence concerning the real property to be acquired. This includes title and zoning searches and a review of any leases and surveys of the property. In addition, an independent environmental assessment is often recommended along with a review of the property by an independent engineer. These types of independent reviews are common for properties containing older buildings.

Preliminary purchase and sale agreement (optional)

The parties may also execute a preliminary purchase and sale agreement which provides that the parties undertake to complete the final purchase and sale agreement in the future.

This preliminary agreement must include the essential elements of the final agreement, such as a description of the property, the purchase price, the advance payment, and any other special terms. It is recommendable that the preliminary agreement specify the closing date. If the closing date (i.e., a deadline to conclude the final sale agreement) is not specified within a year of concluding the preliminary agreement, neither party may demand the conclusion of the final agreement. Typically, preliminary agreements contain conditions to the benefit of the buyer and representations and warranties of the seller. If one party to the preliminary agreement fails to conclude the final agreement, the other party will be entitled to claim compensation for the damage it sustained for this failure. The amount of the compensation may be open-ended or limited in the preliminary agreement (e.g., the parties may agree on contractual penalties). The preliminary agreement may be concluded in any form. However, if the parties conclude the preliminary agreement in the form required by law (notarial deed for real estate), then in the event of one party’s withdrawal, the other party will be entitled to force the conclusion of the final agreement in court. In such a situation, the court’s ruling will substitute the other party’s declaration of will and the definite agreement will be concluded.

Purchase and sale agreement

This agreement unconditionally transfers the title (ownership or perpetual usufruct) to the real estate. The agreement should contain all necessary business terms for the transaction, including the description of the land, the purchase price, the representations and warranties of the seller and any other special terms.

## What are the warranties given by a seller to a buyer?

A seller usually gives the following warranties:

The legal title is free from legal defects, is not encumbered and has been acquired in good faith.

There are no financial liabilities encumbering the property.

No claims have been filed with respect to real property, including restitution

There is no pending litigation impacting the value of the property.

There is no contamination of the property.

There are no unpaid taxes

## When is the sale legally binding?

The sale becomes binding at the moment of the execution of the purchase and sale agreement. A preliminary agreement may also be enforced if it is prepared in a form of a notarial deed.

## When is title transferred?

The title is transferred upon the execution of the purchase and sale agreement.

In the case of perpetual usufruct right, the title is transferred at the moment when the right is registered in the land and mortgage register by the district court with a retroactive effect as of the date of submitting an application for registration with the district court.

## What are the costs usually shouldered by the parties?

The buyer usually pays for the following:

Buyer’s agent’s fees

Buyer’s legal costs

Due diligence costs for consultants who have prepared the building condition reports, environmental assessments, valuation appraisals and real estate surveys

Due diligence inquiries made to statutory and government bodies

Notary fees

Court registration fees

Transfer tax if the sale is not subject to VAT

The seller usually pays for the following:

Listing agent’s fees

Seller’s legal costs

Income tax on any profit made on the sale of the real estate

# Leases

## What are the usual forms of leases?

Ground leases

One form of lease is a long-term ground lease under which a tenant leases vacant land for development. Once the development is completed, the ground tenant will sublet space to retail, office, or industrial tenants, depending on the type of the development. This structure is rarely used because the ground leasehold interests cannot be bought and sold in a manner similar to freehold property interests.

Commercial leases

A commercial lease is used for most commercial office and retail space and some standard industrial space. Most commercial lease transactions commence with an offer to lease, which contains the business terms agreed upon by the parties, including the space, term, rent and any tenant inducements. Commercial leases are typically on a net/net rental basis, which requires a tenant to pay basic rent plus additional charges (additional rent) for a proportionate share of realty taxes, insurance, utility, and common area maintenance charges. In a retail lease, a tenant may also be required to pay rent based on a percentage of its annual sales.

Residential leases

Residential leases are regulated in more detail by the special Tenant Protection Law, which overrides any contrary terms of the lease contract, regardless of the intention of the parties. This law imposes limits on the rent increase and limits the ability to terminate the lease.

## Are lease provisions regulated or freely negotiable?

Lease provisions are regulated in the Civil Code. However, to a large extent, they are freely negotiable. The Civil Code provisions on leases have a semi-imperative character, which means that the legal provisions can be changed but only in favor of the tenant. However, residential leases are fully regulated and the ability to negotiate different terms are limited.

## Is there a maximum term for leases? Can these be extended?

The maximum term for a lease with an individual is 10 years. The maximum term for a lease with a company or for a ground lease is 30 years. The maximum term of the leases cannot be extended. In order to extend the term, a new lease needs to be concluded after the expiration of the maximum term of the lease.

## What are the usual lease terms?

The usual terms of the lease are three, five or 10 years. These terms can be extended up to the maximum lease term under Polish law.

## Are there instances where tenants may demand an extension of the lease?

A tenant may request an extension of the lease only if they have a right to do so under the lease agreement.

## On what grounds may a lease be terminated?

A landlord can generally terminate the lease when the tenant breaches the terms of the lease. The typical tenant breaches include the late payment of rent for more than two rent periods, use of the premises in a manner that is contrary to the agreed use, assignment or sublease of the property without the consent of the landlord, or the tenant becomes insolvent (subject to statutory restrictions).

## Must rents be paid in local currency?

No. Rent can be paid in a foreign currency. However, rent is typically paid in euros in an amount equivalent to the local currency.

## Is rent paid on a monthly basis? Is it required to be paid in advance?

Typically, rent is paid in advance on a monthly basis. However, this may change depending on the agreement of the parties.

## How is rent reviewed? Are there limits to the increase in rent?

Rent is usually fixed for an initial term and subject to yearly indexation. Rent for renewals or extensions may also be fixed or may be adjusted to reflect the market value at the time of such renewal or extension.

The Tenant Protection Law sets an allowable annual percentage increase in rent for residential leases.

## What are the basic obligations of landlords and tenants?

The following are usually required of landlords:

Repair and maintain the structure of the property

Provide standard services relating to the functioning of the property

Insure the property

The following are usually required of tenants:

Pay rent on time

Keep the property in good order

Inform the landlord if repairs are needed and give the landlord access to the property to carry out repairs

Give the landlord access (often by appointment) to the property for inspections and to perform landlord’s work

## What provisions or restrictions typically apply to the transfer of the lease by the tenant? May a tenant sublet the leased premises?

The tenant is required to obtain the landlord’s consent to assign or sublet the premises.

## What happens in the event of destruction of the leased premises?

If the premises are substantially damaged or destroyed, the lease will expire. If the damages are less than substantial, rent is generally reduced according to the extent of the damage or destruction.

If the premises are damaged or destroyed due to causes attributed to the tenant, the tenant may be liable for repairs or replacement.

## Who is usually responsible for insuring the leased premises?

The landlord is responsible for insuring the leased premises. The tenant is responsible for insuring the property it brings into the premises.

## Will the lease survive if the owner sells the leased premises?

Yes. However, the new owner may terminate the lease. The former owner will be liable to the tenant for damage caused by an earlier termination.

However, the new owner will not be able to terminate the lease if the lease is for a fixed time with an authenticated date (e.g., signed in front of a public notary) and the tenant has taken possession of the premises.

## Will the lease survive if the leased premises are foreclosed?

Yes. However, the new owner may terminate the lease unless the lease is for a fixed time with an authenticated date (e.g., signed in front of a public notary) and the tenant has taken possession of the (subject to further termination rights of the new owner).

Additionally, the lease may be terminated if the lease agreement was concluded after the commencement of foreclosure proceedings concerning the real property.

# Planning and Environmental Issues

## Who has authority over land development and environmental regulation?

The local authorities of the relevant communes have authority over land development and environmental regulation.

## What environmental laws affect the use and occupation of real estate?

The Environmental Protection Law governs the use and occupation of real estate.

## What main permits or licenses are required for building or occupying real estate?

Zoning plan or site permit, if there is no zoning plan for the area being developed

Building permit

Occupancy permit

## Can an environmental cleanup be required?

Yes. Generally, an environmental cleanup may be required if the activities of the owner or occupier have a negative impact on the environment.

## Are there minimum energy performance requirements for buildings?

Yes. The Building Law and the Technical Conditions for Buildings Law provide the parameters for the energy performance of new buildings as well as buildings that are being renovated.

Currently, under the Building Law, all new and old buildings that are subject to a sale transaction must have an energy performance certificate.

## Are there other regulatory measures that aim to improve the sustainability of newly constructed and existing buildings?

No. However, if an existing building is being restored, the building design needs to comply with the energy performance requirements of the new buildings.

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