Global Private M&A Guide - Limited External Content - Poland

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*This content was last reviewed around October 2023.*

# Quick reference guide

## Due diligence, pricing and closing

**Typical due diligence issues**

It is most common to finalize the due diligence before executing the acquisition agreement. In rare cases, the parties agree on a confirmatory due diligence that takes place after signing, but prior to completing the transaction (this can be either full confirmatory due diligence, or limited to specific areas). In these circumstances, it may be a condition to closing that the outcome of the confirmatory due diligence is satisfactory.

The scope of the legal due diligence will largely depend on the specific transaction and the target involved, but typically covers: corporate; real property; employment; regulatory; financing; material contracts; litigation; environmental issues; IP/IT; and data protection. Considering the limitations described below on the acquisition of agricultural real property (that affect both foreigners and Polish entities), the verification of title to relevant real property (both in ownership and perpetual usufruct) and the status of real property are crucial issues to consider in the context of the acquisition of shares and real property assets. Recently, areas such as environmental, social and governance and compliance due diligence are also coming within the scope of the due diligence exercise. In addition, in Poland, it is increasingly common to conduct IT-specific due diligence.

Based on the due diligence exercise, the parties will identify issues requiring rectification as conditions precedent to closing, as well as additional measures of protection to be provided to the buyer under the purchase agreement, e.g., specific representations and warranties, indemnifications, price retention mechanism (most commonly, escrow account or deferred purchase price payment) or a reduction in the purchase price.

**Pricing and payment**

For both share and asset transactions, there is no legal requirement to have an independent appraisal report to support the valuation of the company or assets, respectively.

In an asset deal, Polish law distinguishes between the acquisition of assets and business as a going concern. A proper qualification of an asset deal is crucial from a tax perspective and should be performed by the tax advisers. Similar but independent qualifications should be performed from a contract law and employment perspective; the outcome of these qualifications will determine which legal procedures will apply to the asset transaction.

There are no specific restrictions regarding payment of the purchase price in Poland. The purchase price may be expressed and paid in any currency. It is usually wire transferred to the seller on the closing day or deposited in an escrow account before completion of the transaction, with release instructions to be signed upon closing. In the case of acquisition of shares in joint-stock companies, payments are quite often made with an intermediation of a brokerage house. However, payments exceeding certain thresholds cannot be made in cash.

**Signing/closing**

It is most common, especially in share deals, for the transaction to be completed in two stages, i.e., signing and closing. Usually, closing is conditional upon satisfaction of specific conditions precedent agreed between the parties or set by law, such as obtaining regulatory approvals (e.g., merger control or foreign direct investment approval) or waivers/consents of third parties to the transaction (change of control clauses), completing restructuring (e.g., spin-offs, asset carve-outs), obtaining financing for the transaction or rectifying certain issues discovered during the due diligence process.

In asset deals, one of the crucial conditions to closing is usually obtaining creditors' consents for the transfer of all (or material) contracts, as this is a legal requirement for an effective transfer of a contract in an asset transaction.

## Approvals/registrations

**Foreign investment restrictions**

Poland has a mandatory and suspensory foreign investment screening procedure, which means that transactions that meet certain criteria need to be notified to the relevant authority and cleared before they can be completed. Notwithstanding the foregoing, in some circumstances the notification obligation is only triggered after the material stake in, or dominance over, the protected company (i.e. the company that is subject to the foreign investment screening procedure) has been acquired.

The foreign investment review regime is limited to certain sectors. For further information, see the more detailed section on "Foreign investment restrictions".

**Antitrust/merger control**

Poland has a mandatory and suspensory merger control regime, which means that transactions that meet the relevant criteria need to be notified to the competition authority and cleared before they can be completed.

It is also necessary to consider EU merger control rules. Mergers involving companies active in several member states and reaching certain turnover thresholds are examined at European level by the European Commission. This allows companies trading in different EU member states to obtain clearance for their mergers in one go. For further information, see the more detailed section on "Antitrust/merger control".

**EU Foreign Subsidies Regulation**

As of 12 October 2023, the EU Foreign Subsidies Regulation (FSR) requires qualifying transactions, and bids in response to certain large public tenders in the EU, to be notified for upfront clearance by the European Commission where the companies involved have benefited from foreign financial contributions (a broad concept) that exceed certain (low) thresholds. Acquisitions of a target with annual revenues in the EU of at least EUR 500 million will trigger FSR deal notifications. Acquisitions of smaller targets will not, regardless of deal value. Outright mergers and large joint ventures will trigger a notification requirement if the EUR 500 million EU-wide revenue threshold is met by one of the merging parties or the joint venture.

**Other regulatory or government approvals**

*Permit for acquisition of real property or shares in a company holding real property*

Purchasing real property by foreigners is governed by the Act on Acquisition of Real Estate by Foreigners of 24 March 1920 ("**Act on Acquisition of Real Estate by Foreigners**"). With certain exceptions (e.g., a company's transformation), a permit is required in each case of real property purchase (i.e., acquisition of ownership title or perpetual usufruct right to real property or purchase, or taking up of shares in a company that has a registered place of business in Poland and is the legal owner or perpetual usufructuary of the real property). A permit is required if, by purchasing shares in a company that is the legal owner or perpetual usufructuary of real property, a foreigner will take control of that company, or if shares in an already-controlled company are acquired or taken up by a foreigner who is not the company's shareholder. The minister of internal affairs may grant the foreigner a permit to purchase real property or shares in a company owning real property if there is no probability of threat to national security, public safety or public order, and if the foreigner can demonstrate the existence of circumstances confirming the foreigner's ties with Poland.

In general, the above obligation does not apply to residents of the European Economic Area (EEA) and/or Switzerland.

*Acquisition of agricultural real property or shares in a company holding agricultural real property*

The Act on Shaping the Agricultural System introduced several limitations on the transfer of the legal title to agricultural real property, transfer of shares in companies holding agricultural property or reorganizations of companies holding ownership or perpetual usufruct rights to agricultural real property.

In principle, only persons meeting certain criteria (such as individual farmers) may acquire agricultural land. Other entities are obliged to obtain the consent of the head of the National Agricultural Support Centre (NASC) before the effective transfer of the title to the land. There are several exceptions to this. Among others, the limitations do not apply to agricultural real property of specific size or that is located on the areas designated in the local zoning plans for non-agricultural purposes.

The NASC also has a preemptive right in relation to the purchase of shares in companies that hold ownership title to agricultural real property. This preemptive right does not apply to the sale of stocks on the stock exchange.

The NASC also has various other rights relating to mergers, divisions, transformations and acquisitions of shares in companies holding agricultural real property. These limitations are taken into account when structuring the transaction, most commonly as conditions to closing.

*Acquisition of real property subject to the statutory pre-emption rights*

In transactions involving the acquisition of rights to real estate, attention should also be paid to statutory rights of pre-emption, which may apply, mainly in connection with the specific status of the real estate or its location. Such pre-emption rights of the State Treasury may concern among others: (i) properties located in a special economic zones, (ii) forests (iii) undeveloped real properties acquired by the seller from the State Treasury or local authorities, (iv) real properties located in the areas designated for revitalization, (v) lands comprising inland standing waters, etc.

*Other regulatory requirements*

For acquisitions of control of financial institutions (e.g., banks, insurance companies, investment and pension funds, or investment firms) and of companies operating in specific sectors, such as telecommunication, energy, media, air and railway transport sectors, the approval of the relevant industry regulator is usually required before the share sale transaction due to change of control. The definition of control and the rules for the issuance of this regulatory approval vary according to the rules of the specific regulatory authority, depending on the specific sector or industry. These regulations are applied equally to foreign and domestic investors.

In asset transactions in a regulated industry or sector, it is commonly required to obtain new permits and approvals for operation.

Within seven business days of the share transfer, disclosure of changes to the target's beneficial owners must be disclosed in the Central Register of Beneficial Owners. As the filing can only be made electronically, and may involve extensive documentary preparation, it is prudent to consider the requirements well in advance of closing.

## Employment

**Share sale**

In share acquisitions, there is no change in the employer/employee relationship, so consent from employees or unions is not required. Notice to employees, unions or works councils is not required. Notice to employees, unions or works councils may be required in case of changes in the employment sphere, e.g., planned redundancies or changes in organization of work in accordance with applicable provisions of Polish law.

Despite lack of explicit legal obligation, the employee, unions or works council could be proactively notified about the share sale for transparency reasons.

**Asset sale**

The employee transfer procedure is fairly simple. In an asset acquisition that involves the transfer of a business as a going concern or its part, the employees transfer automatically. Polish law requires notification of unions or the employees (if there is no union) 30 days in advance of the transfer. The notice must include: (i) the proposed date of the transfer, (ii) the reasons for the transfer, (iii) the legal, economic and social implications of the transfer for the employees, and (iv) any measures envisaged affecting the conditions of their employment, in particular the conditions of work, remuneration and retraining.

If there are trade unions and the current employer is aware of any actions regarding employment conditions, negotiations with the trade unions will be required in order to conclude an agreement in this regard (within 30 days of notification of such actions). If the employer and the unions do not reach an agreement in the above period, the employer may take actions unilaterally, taking into account arrangements made with the unions.

If there is a works council, the employer is obliged to inform and consult with the works council on the transfer. Polish law does not determine the deadline or duration of such consultations, but usually it is done before or at the same time as information/consultation with employees/unions. The opinion of the works council is not binding for the employer.

The transfer of employees as a result of the transfer of the business or its part does not require the termination of the employment agreements. Labor law foresees the transfer of the same employment terms and conditions to the acquiring company if the employees transfer together with the assets, as part of the economic activity. In the case of a part business transfer, the former employer and new employer are, by virtue of law, jointly and severally liable for the labor-related liabilities resulting from the period before the transfer. In the case of a full business transfer, the new employer is liable for any such liabilities.

The employees may terminate their employment agreements within two months of the transfer by serving the employer seven days' notice. This termination does not trigger payment of the severance pay, unless termination was caused by a severe change of the terms or conditions proposed or introduced by the employer.

Termination of the employees due to reasons solely related to the transfer is not allowed. However, termination as a result of post-transfer harmonization is justified.

An automatic transfer of employees results in a transfer and continuation of obligations of an employer as a tax remitter of personal income tax (PIT) for the employees transferred.

## Tax

**Share sale**

The sale of shares in a Polish company is subject to 1% transfer tax, irrespective of the residency of the parties to the agreement and the place where the sale agreement was signed. The sale of shares is normally out of the scope of (or exempt from) Polish value-added tax (VAT).

From the perspective of a Polish corporate or individual seller, the capital gains on the sale of the shares will be subject to 19% corporate income tax (CIT) or PIT. Additionally, a so-called solidarity surcharge of 4% is applicable for individuals (on excess of their income above PLN 1 million, if their total income for the tax year exceeds PLN 1 million). There is no universal participation exemption regime under which these capital gains could be exempt from taxation. However, the participation exemption for Polish holding companies was introduced into the CIT regulations as of 1 January 2022. In order to benefit from the exemption, the selling Polish holding company must, among others, be established as a joint stock company, limited liability company or simple joint stock company, perform genuine business activity and hold at least 10% of shares for un uninterrupted period of at two years. Also, to benefit from the exemption the shares must be sold to unrelated party and upfront notice must be filed with the Polish tax authorities. The sale of real estate rich companies is generally excluded from the exemption regime.

For foreign sellers of shares (both individuals and entities), capital gains will also be subject to income tax (CIT/PIT) at the rate of 19%, if the capital gain is deemed to be from a Polish source. Foreign sellers can be protected from Polish taxation under the relevant tax treaty. If the foreign seller is domiciled in a jurisdiction defined by the Polish tax rules as a low-tax jurisdiction, 19% withholding tax on the payment may be applicable.

The tax loss carryforward of a company that has been subject to a change of control should, as a rule, continue to be carried forward, despite the change of control, pursuant to the general rules. There are limitations to the utilization of losses related to M&A transactions involving the acquisition of a business by existing entities. These limitations apply if the taxpayer took over another entity, acquired an enterprise or its organized part or the taxpayer received a cash contribution for which an enterprise or an organized part of an enterprise was acquired. The limitation applies only where: (i) the scope of the actual core business of the taxpayer will change, in whole or in part; or (ii) at least 25% of the rights to the taxpayer's profit were acquired by an entity not holding such rights before the transaction.

In a share deal, the buyer will inherit all past (hidden) tax arrears of the acquired company (i.e., the target). Carrying out due diligence is, therefore, of utmost importance. The statute of limitations in Poland is generally five years following the end of the year during which the deadline for paying the tax liability has lapsed.

**Asset sale**

The transfer of assets will normally be subject to CIT at the rate of 19% in the hands of the seller. As a result, the purchase will lead to a step-up in basis in the hands of the buyer, including goodwill on the sale of an enterprise or its organized part. In an asset deal, it is generally possible to offset the financing costs (if any) against the income from the acquired assets/business.

The sale of assets is normally subject to VAT at the standard rate of 23%. The transfer of certain assets and, as a rule, the transfer of going concern (TOGC) may be out of scope or exempt from VAT. The VAT due on the transfer is normally paid by the buyer to the seller, who will remit such VAT to the tax authorities.

TOGC, being out of scope of VAT, is subject to transfer tax at the rate of 1% (property rights) or 2% (movable and real estate assets).

The buyer of assets qualifying as an enterprise or an organized part of an enterprise can be held jointly liable for almost all of the tax arrears of the seller related to the seller's business activity, up to the value of the acquired enterprise or organized part of the enterprise. Joint liability can be avoided if a "clean" certificate (i.e., a certificate confirming that the seller has not defaulted on its tax obligations and has no tax arrears) is obtained from the relevant authority.

**OECD's Two Pillar Solution**

The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting has put forward a so-called Two-Pillar Solution to address the tax challenges arising from the digitalization of the economy. Pillar Two is intended to introduce a global minimum effective rate of tax of 15% for large businesses in each jurisdiction where they operate and will lead to fundamental changes in the international tax system. It is currently being implemented in a large number of jurisdictions.

Groups will need to consider how the Pillar Two rules could impact on the life cycle of M&A transactions from the pre-acquisition phase (including transaction planning (such as the choice of acquisition structure and financing) and due diligence of the target group), the acquisition phase (such as contractual risk allocation around Pillar Two) to the post-acquisition phase and the impact of Pillar Two on any post-acquisition integration.

## Post-acquisition integration

For information on post-acquisition integration matters, please see our [Post-acquisition Integration Handbook](https://www.bakermckenzie.com/en/insight/publications/resources/post-acquisition-integration-2023).

# Common deal structures

## What are the key private M&A deal structures?

In Poland, a business is usually purchased by way of (i) a share purchase or (ii) an asset purchase (either through the acquisition of specific assets of the target or part of or the entire enterprise of the target). Although a merger, demerger and other forms of corporate reorganization are also available, they are commonly applied as part of a pre-transaction, interim period or post-transaction group or assets reorganization, rather than for acquisition purposes directly.

The transaction structure highly depends on the specifics of a given transaction (such as tax considerations, non-transferability of permits or specifics of the assets forming the target, etc.). Most common transaction structure is a share deal. As certain limitations and a different tax treatment may be applicable to a transfer of assets or part of or the entire enterprise (both described in the sections below), such transactions are more commonly structured as a transfer of shares performed following a target reorganization. In addition, in September 2023 a new form of demerger was introduced into Polish law which provides for a transfer of the assets or business to an existing or newly established company in exchange for shares being issued to a divided entity, which simplifies the structuring of a transfer of assets or part of an enterprise of the target and is expected to become commonly used.

Transactions are still usually performed by way of a sale of the target to an interested buyer, either through direct discussions between the parties or as part of an auction processes. If an auction process is applied, it is usually divided into at least two stages: (i) in the first stage, interested bidders provide indicative, nonbinding offers, on the basis of which those attractive for the seller are selected for the next stage of the auction; (ii) in the second stage, selected bidders are permitted to perform due diligence of the target, after which they are requested to submit a binding offer, usually together with comments to the draft transaction documents. On that basis, a preferred bidder or bidders are chosen.

## Which entity is likely to be the target company (on a share sale) or the seller (on an asset sale)?

The limited liability company (spółka z ograniczoną odpowiedzialnością (sp. z o.o.)) and the joint-stock company (spółka akcyjna (S.A.)) are the two most common corporate forms in Poland. Both have legal personality, with the economic liability of shareholders limited to the amount of their equity contribution. Shares in these kinds of companies are freely transferable unless their statutory documents provide otherwise.

## What are the different types of limited liability companies?

The limited liability company (sp. z o.o.) is well suited to carrying out business activities of all kinds. The shareholders' liability is limited to the amount of their contributions to capital. The minimum share capital of a limited liability company is PLN 5,000. The shares are not represented by security instruments and, assuming no restriction is provided for in the articles of association, may be transferred in written form by way of signed and notarized agreement. A limited liability company is managed by a management board consisting of one or more directors appointed by the shareholders (unless the articles of association provide otherwise). The management board must be composed of one or more members. Certain strategic decisions, in particular those relating to approval of annual reports, distribution of profits, claims for the reparation of damages, etc., are made at the shareholders' meeting.

## Is there a restriction on shareholder numbers?

There are no restrictions on the number of shareholders for any company. However, in limited liability companies (sp. z o.o.) where the share capital exceeds PLN 500,000 and the number of shareholders exceeds 25, there is an obligation to establish a supervisory board.

It must be noted that a limited liability company cannot be formed solely by another limited liability company (or foreign equivalent), although such a company can subsequently become the sole shareholder of a limited liability company.

## What are the key features of a share sale and purchase?

The acquisition of a target company may be achieved by acquiring its shares, which will result in the acquisition of the target company shareholder's rights and liabilities.

## What are the key features of an asset sale and purchase?

The acquisition of a target company may be achieved by acquiring the assets of that company. If the assets acquired, in aggregate, form an independent business, subject to meeting conditions specified in Polish legislation, such a transaction may be qualified as an acquisition of part of or an entire business. Whether a transaction involves a standard acquisition of assets or an acquisition of a business will depend on the nature of the assets being acquired. Similar but not identical concepts are used by civil, employment and tax regulations, and it needs to be analyzed on a case-by-case basis whether the assets acquired form: (i) a business from a civil law perspective; (ii) an employment establishment from an employment perspective; and/or (iii) a going concern from a tax perspective.

The acquisition of a business involves the acquisition of all elements of the business, unless specifically excluded from the transfer by the acquisition contract or by provisions of law. The buyer of a business will be liable jointly and severally with the transferor for the transferor's debts and obligations relating to running the business unless, at the time of acquisition, the buyer was not aware of those obligations despite having investigated this with due care. The statutory liability of the buyer is limited to both of the following:

The value of the acquired business at the time of the acquisition

The amount owing to the creditors of the business at the time of the acquisition.

The condition and composition of the acquired business at the time of acquisition is assumed for valuation purposes. This liability cannot be excluded or limited without the creditor's consent.

If assets to be acquired do not form a business pursuant to Polish regulations, the transaction needs to be performed on an asset-by-asset basis. In such a case, all such assets should be listed in a detailed inventory to ascertain which elements are subject to the transfer.

Both the acquisition of assets and the acquisition of the business require the consent of creditors before the seller's liabilities arising out of contractual obligations relating to the acquired assets will be validly transferred. In addition, commercial agreements (which often form part of the acquisition of assets or the acquisition of a business) usually require that the seller obtains the other party's consent in order to transfer the benefit of the seller's rights under the agreement to the buyer.

In September 2023, a new form of demerger was introduced into Polish law, which provides for a transfer of assets or a business to an existing or newly established company in exchange for shares being issued to a divided entity. A demerger must be approved by and registered with the relevant registry court to become effective. An acquiring company or a newly formed company assumes, at the date of the demerger, all the rights and obligations of the divided company pertaining to the assets or business being transferred. The same applies to administrative permits, consents and reliefs; however, specific provisions of law (or the permits, consents or reliefs themselves), may contain provisions preventing such a transfer. As such form of demerger simplifies a transfer of assets or part of an enterprise of the target, it is expected to become commonly used as a pre-transaction or interim period reorganization followed by a transfer of shares in a newly formed or existing company.

# Preliminary documents

## Is it customary to prepare a letter of intent or term sheet and, if so, to what extent are they binding on both parties?

Letters of intent or term sheets are often prepared. They are not binding on the parties for transaction purposes (i.e., excluding, for example, provisions on confidentiality, exclusivity, etc.), unless the parties decide otherwise.

## Does a term sheet, in this context, customarily include provisions on exclusivity, break fee or confidentiality?

**Exclusivity:** Depending on the transaction, if the parties agree on exclusivity for a certain bidder, particularly in auction processes, such exclusivity is usually reflected in the term sheet or a separate exclusivity letter.

**Break fee:** Term sheets usually do not provide for any break fees, but they sometimes provide for a cost cover.

**Confidentiality:** Term sheets usually include provisions on confidentiality obligations.

## Are exclusivity, break fee and confidentiality provisions supplemented with separately negotiated agreements?

Usually, if there is a term sheet, the relevant preliminary arrangements of the parties are covered in the term sheet. A separate nondisclosure agreement is usually signed at an early stage of the transaction, before disclosure of sensitive information pertaining to the parties or a target.

## Is there a duty or obligation to negotiate in good faith?

In accordance with the provisions of the Civil Code, there is a general duty to negotiate in good faith under Polish law. If there is a breach of such a duty, the breaching party is obliged to compensate the nonbreaching party by paying damages that the party incurred by assuming the agreement will be concluded. The damages are limited to the costs incurred from being involved in negotiations (e.g., advisory fees, travel, accommodation, etc.) but will not include damages that the nonbreaching party incurred because the planned agreement has not been concluded and performed.

# Agreeing to the acquisition agreement → Purchase price

## Is a purchase price adjustment common?

Frequency/market practice: Purchase price adjustments are common.

## What type of purchase price adjustment is common (e.g., debt-free, cash-free)?

Frequency/market practice: Various types are seen, while cash-free, debt-free and working capital adjustments are the most common. The "locked box" mechanism is also popular for the most sought-after assets.

## Is there a collar on the purchase price adjustment?

Frequency/market practice: Rarely.

## Who usually prepares the closing balance sheet (where applicable)?

Frequency/market practice: Pre-closing estimates are usually prepared by the target company on instruction of the seller. A closing balance sheet is usually prepared by the target company on the instruction of the buyer and verified post-completion by the sellers.

## Is the balance sheet audited (where applicable)?

Frequency/market practice: Rarely.

## Is an earn-out common?

Frequency/market practice: Fairly common; earn-outs are common in private equity transactions when sellers continue to manage the target company after closing. They are also increasingly common to bridge valuation gaps. Otherwise, they are not very common.

## Is a deposit common?

Frequency/market practice: Rarely.

## Is an escrow common?

Frequency/market practice: An escrow is fairly common as a completion mechanism to ensure price payments, which, in the case of an acquisition of shares in joint-stock companies, is replaced with an intermediation of a brokerage house. It is increasingly less common as collateral of the seller's liability for representations and warranties (although it depends on the bargaining position of the parties).

## Is a break fee common?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Conditions precedent

## Express Material Adverse Event (MAE) closing condition?

Frequency/market practice: Fairly common, especially in case of a long period between signing and closing.

## Is the MAE general or specific?

Frequency/market practice: The MAE is becoming more specific. In connection with COVID-19, there is a tendency to expressly indicate that the parties have properly evaluated the risks connected with the same and any such circumstances will not constitute the MAE.

## Is the MAE quantified?

Frequency/market practice: Fairly common; increasingly common.

# Agreeing to the acquisition agreement → Covenants

## Is a noncompete common?

Frequency/market practice: A noncompete is fairly common.

## Is it common to use waterfall or blue pencil methods to interpret contractual provisions?

Frequency/market practice: Blue pencil provisions are common. Waterfall provisions are not so common.

## Are nonsolicitation provisions (of employees) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are nonsolicitation provisions (of customers) common?

Frequency/market practice: Fairly common (in conjunction with a noncompete).

## Are seller restrictions usually imposed on the target business between signing the purchase agreement and closing?

Frequency/market practice: Fairly common; interim period covenants are quite common, especially if the locked box mechanism is applied.

## Is there broad access to books, records and management between signing and closing?

Frequency/market practice: Fairly common; there are competition law issues around potential "gun-jumping".

## Is it common to update warranty disclosure or notify of possible breach?

Frequency/market practice: Fairly common; it is common to update warranty disclosures. There are usually no consequences as long as updates in relation to the period between signing and closing do not result in MAE.

# Agreeing to the acquisition agreement → Representations and warranties

## Materiality in representations — how is it quantified (e.g., by a USD amount)?

Frequency/market practice: Fairly common; materiality qualifiers are commonly seen. Quantification by a certain amount is often used (if applicable).

## How is knowledge qualified (e.g., specific people, actual/constructive knowledge)?

Frequency/market practice: This entirely depends on the relative bargaining positions (from imputed to actual knowledge).

## Is a warranty that there is no materially misleading/omitted information common?

Frequency/market practice: Fairly common; it is still commonly requested by buyers, but often resisted by sellers.

## Is disclosure of the data room common?

Frequency/market practice: Fairly common; it is common to include data room documents recorded on a USB drive as an annex to the agreement.

# Agreeing to the acquisition agreement → Repetition of representations and warranties

## Is it common to repeat warranties at closing?

Frequency/market practice: Fairly common; repetition at completion is common.

## Is it common to repeat warranties at all times between signing and closing?

Frequency/market practice: Rarely.

## Is a bring-down certificate at closing common?

Frequency/market practice: Rarely; a bring-down certificate at completion is not very common.

## What is the applicable repetition standard, e.g., true in all material respects or Material Adverse Effect?

Frequency/market practice: True (as understood by Polish law) is most common. Not misleading is also commonly accepted, whereas accurate and complete is quite heavily resisted by the sellers.

## Is double materiality common (a materiality qualification in bring-down at closing and in representation(s))?

Frequency/market practice: Rarely.

# Agreeing to the acquisition agreement → Limitations on liability

## What is the common cap amount (as a percentage of purchase price)?

Frequency/market practice: It is commonly 100% for the title to the shares and key warranties and/or specific indemnities (e.g., capacity or solvency).

The cap for non-key warranties is usually within the range of 10-30% of the purchase price.

## Does the cap (and other liability limitations) apply to the whole agreement or just warranties (or particular terms)?

Frequency/market practice: They usually apply to warranties and damages claims (with respect to the scope of damage and its kind).

## What are the common exceptions to the cap?

Frequency/market practice: Key warranties are often excepted or limited with a higher cap. Specific indemnities are usually limited to 100% of the price or estimated amount of claim. The parties may not limit liability for fraud (willful misconduct) due to statutory limitations.

## Is a deductible or basket common?

Frequency/market practice: Both are fairly common. Deductible is more often resisted and a tipping basket is more common.

## Is a de minimis common?

Frequency/market practice: Fairly common.

## How long does seller liability survive?

Frequency/market practice: Operational warranties: 12-24 months; key warranties: 5-10 years (e.g., title and capacity, etc.); tax: 6-7 years (statute of limitations period). The parties may not limit liability for fraud (willful misconduct) due to statutory limitations.

## Are there any common carve-outs from limitation on seller liability (e.g., fraud, tax, key warranties)?

Frequency/market practice: Tax: 6-7 years (statute of limitations period); title warranties: sometimes not limited in time. The parties may not limit liability for fraud (willful misconduct) due to statutory limitations.

## Is warranty insurance common?

Frequency/market practice: Fairly common.

# Agreeing to the acquisition agreement → Set-offs against claims

## Is a set-off against claims for tax benefits common?

Frequency/market practice: Fairly common; common for actually received.

## Is a set-off against claims for insurance proceeds common?

Frequency/market practice: Fairly common; common for actually received.

## Is a set-off against claims for third-party recoveries common?

Frequency/market practice: Fairly common; common for actually received.

# Agreeing to the acquisition agreement → Damages, knowledge

## Is there an obligation to mitigate damages?

Frequency/market practice: Fairly common; additionally required by law.

## Is there an exclusion of consequential damages?

Frequency/market practice: Very common.

## Are provisions that there is no liability if the buyer has knowledge common, or does buyer knowledge have no effect?

Frequency/market practice: Fairly common; it is commonly requested by the seller for the buyer to provide for a representation that, except as disclosed in the agreement, it is not aware of any breach of the representations at the time of closing, but it is often resisted by the buyer. Also, it is very common for information fairly disclosed in the data room to release the seller from liability for a breach of operational or tax warranties (as opposed to key warranties, such as those pertaining to the title, capacity, solvency etc., which are usually not qualified by the knowledge of the buyer or disclosure).

# Agreeing to the acquisition agreement → Dispute resolution

## Does local law allow for a choice of governing law?

Frequency/market practice: Yes

## What is the common governing law?

Frequency/market practice: Polish law is the most common choice (unless the Polish target is part of a multijurisdictional transaction).

## Is litigation or arbitration more common? If arbitration, where?

Frequency/market practice: Both common; if arbitration, usually either the Polish Chamber of Commerce, ICC or ad hoc arbitration under the United Nations Commission on International Trade Law (UNCITRAL) (Warsaw is common as a venue). Sometimes Stockholm or Vienna is used.

# Agreeing to the acquisition agreement → Stamp duty and tax

## If stamp duty is payable, is it normally shared?

Frequency/market practice: No stamp duty applies. Transfer tax applies (sometimes involvement of a brokerage house may provide for an exemption) and is borne by the buyer according to the statutory provisions. Notarial fees are usually borne by the buyer, but are sometimes shared.

## Is a separate tax covenant/indemnity or tax deed common?

Frequency/market practice: It is common to have tax representations and warranties/relevant indemnity included in the purchase agreement.

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