



POST-CLOSING TIPS

Simple legal guide for the
foreign investors who
made acquisitions of the
Polish real estate projects

INTRODUCTION

So you bought a real estate project in Poland.

You want to be sure that your project will operate well.

That you will avoid:

- problems with collecting rents,
- unexpected costs,
- troubles with re-development (if you plan one),
- difficulties at the exit stage.

Careful planning of the project's operations may help you avoid these challenges (or at least lower the risk of their occurrence).

If you intend to organize your local team to deal with asset and property management – the below tips may be helpful. If you hired local asset / property managers, they will probably guide you through the process. Nevertheless, if you would like to get some knowledge about what they will be dealing with – and what is worth double-checking – these guidelines may also be helpful.



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TIPS TO REMEMBER

TIP NO.

1

Pay attention to „loose ends”

Close all post-closing issues

TIP NO.

2

TIP NO.

3

Pay attention to leases

Check the amount of arrears
If needed – work on it systematically

TIP NO.

4

TIP NO.

5

Choose your consultants optimally

Pay attention to the requirements specific for Poland

TIP NO.

6

TIP NO.

1



Pay attention to „loose ends”

This is the first tip on the list, as failure to meet it often causes problems in other fields. There are often areas where the allocation of responsibility is not clear. As a result, they may remain in the “gray zone” – it is not clear who should deal with them (and in fact sometimes no one does).

Avoid this wherever possible. Check if responsibility for given areas is clear: are they dealt with by lawyers? by property managers? by accountants? internally?

Close all post-closing issues

The closing is behind you and probably it was a time-and-effort consuming exercise. Your team will now want to focus on these tasks that were put on hold during the closing phase. But it is worth to still devote some energy to the post-closing issues.

Otherwise, you may find yourself in a situation similar to moving to a new apartment – when all boxes which are not immediately unpacked have a big chance to remain unpacked for next 2 years.



CASE STUDY

The ABC fund bought an office building from the Polish developer XYZ. The construction of the building was finished prior to the transaction but the occupancy certificate was conditional.

ABC team was focused on further acquisitions. The condition was not met in the time prescribed in the decision. As a consequence, the building authority declared the expiration of the occupancy certificate.

In effect, further use of the building became illegal and ABC had to face a lack of rental payments and claims from tenants (who could not use the premises they lease in the building).

STEPS TO BE TAKEN

your checklist 

1. Make sure lawyers / agents prepared for you a “transaction bible” – a complete set of scanned transaction documents; such set will most probably include:

- (preliminary / conditional / final) sale agreement(-s),
- escrow agreement / notarial deposit,
- notifications to (and acknowledgments from) tenants / banks / general contractors (etc.),
- (if the acquisition involved third-party financing (e.g. facility agreement) you may need a separate “transaction bible” covering financing documentation).

2. Make sure you have taken over the original documents.

3. Check the due diligence report prepared by your legal counsel – it should include recommendations regarding dealing with certain issues; they are often described as “post-closing” or “house-keeping issues” and they commonly include:

- transferring administrative decisions (typically planning permits, environmental decisions, building permits and water permits obtained by the seller),
- pending proceedings (action point: join the proceedings, if applicable, and notify the relevant court / authority),
- completion of certain works or delivery of certain documents (e.g. new bank guarantee securing the lease) by the seller
- outdated entries in the land and mortgage registers (action point: apply to the relevant court for the removal of such entries),
- construction-related decisions missing confirmation of their finality (action point: apply to the relevant authority for a stamp-confirmation),
- missing documents,
- defective / uncomplete agreements, decisions, resolutions, etc.,
- updating details in the land register,
- change of authorizations to the bank accounts, update of data in the commercial register (in the case of share deals).



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Pay attention to leases

If you purchased the project, you must have decided that the existing lease agreements at least meet the minimal criteria of the institutional lease. It may be the case with respect to the model lease agreement and most of the leases, but some of them might have been amended during the negotiations with tenants in a way weakening the landlord's position. It is also possible that the documents you collected from the seller may not be complete (or their quality is not 100% sufficient).

The box on the right lists common defects / deficiencies of the leasing documentation. Due diligence reports usually identify them but sometimes their scope is more general (so certain details are not analyzed). Also, some problems may occur some time after the closing and can become "loose ends" (see Tip no. 1).

- lease agreements expiring soon
- tenants' right to prolong / terminate the lease
- bank guarantees expired / expiring soon
- bank guarantees which are not freely transferrable to the buyer / its financing bank
- parent company guarantee not freely transferable
- so-called "777 submission" to enforcement not covering the prolonged period (in the case of a lease extension);
- wording of older "777 submissions" impeding their application in the currently initiated enforcement proceedings (court practice in this respect has been evolving).





CASE STUDY

ABC fund bought a warehouse. 3 months after the acquisition the bank guarantee delivered by tenant XYZ was to expire. XYZ provided the new guarantee. Its wording, however, included a new provision: “the bank’s obligation to pay does not apply in the case of tenant’s bankruptcy”. The addition was not identified (it was not clearly indicated in the ABC / its advisors' team whose responsibility it was).

XYZ went bankrupt and ABC could not limit its losses as the bank rejected the demand for payment under its guarantee.





TIP NO.

4

Check the amount of arrears If needed – work on it systematically

High amount of arrears may be a signal of future problems – reasons for which a given tenant failed to pay its rents may end up in accumulating debts, failure to provide security, attempts to terminate the lease or tenant's bankruptcy.



CASE STUDY

ABC fund bought a shopping center. 6 months later tenant XYZ went bankrupt. As ABC did not manage to react quickly, a bankruptcy officer was appointed. For the next months ABC was not able to take over the premises and lease them to a new tenant. As a consequence, ABC had to face:

- lowering NOI
- risk of other tenants terminating their leases (some lease agreements had a clause requiring minimum leasing threshold and – without tenant XYZ, the threshold was not met)
- risk that the financing bank may accelerate the loan (without tenant XYZ certain financial covenants have not been met)

STEPS TO BE TAKEN

NEXT PAGE



STEPS TO BE TAKEN

your checklist 

- **check the level of receivables** (total level in your projects as well as the level applicable to a given tenant; proportion of the tenant's debt to its rent / security / annual turnover is worth checking)
- **verify if there is a procedure of debt collection adopted for the project** (if not – ask your legal counsel to prepare and help you implement it)
- **check if you can apply tax instruments** limiting your losses (“bad debt” tax relief)
- **do not wait too long with using the security instruments and taking over the premises** - if a tenant goes bankrupt, it may be impeded
- **check if there are tenants in your project endangered with insolvency**; you may consider these methods:
 - **check the most recent financial statement** (publicly available in Poland)
 - **check the warning signals** (delayed payments, low stocks of goods in the premises, attempts to move the tenant's property from the leased premises)
 - **listen to the rumors** (often very useful source of information)
 - **ask your legal counsel to check information about potential problems of the tenant's mother company** and to conduct the monitoring at the bankruptcy registers



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TIP NO.

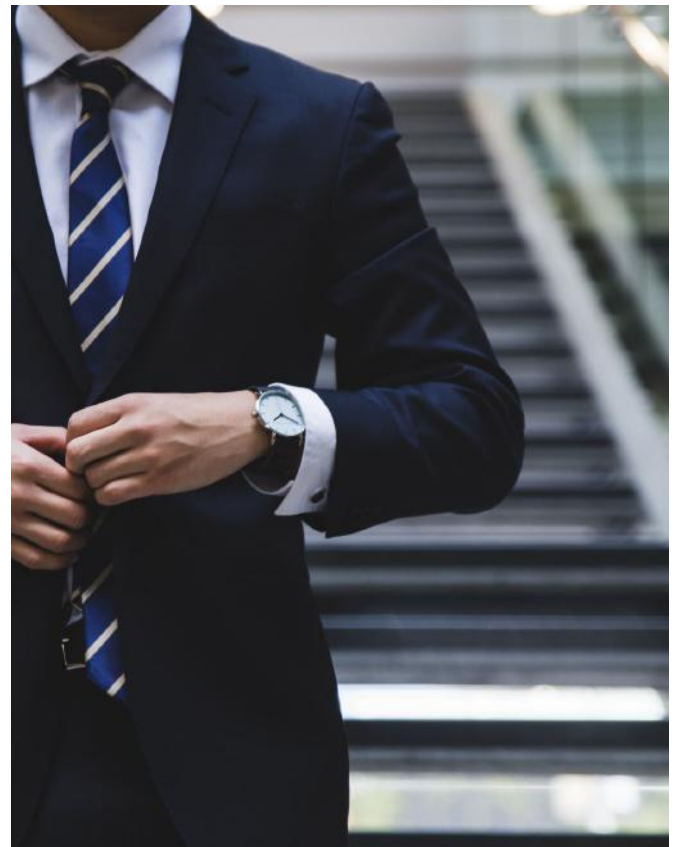
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Choose your consultants optimally

Even if you plan to build your local structures, you will probably outsource a substantial part of the tasks connected with your project. There are international consulting companies operating in Poland in the fields of brokerage and asset / property management. The Polish market is maturing, so there are also local firms, often founded by alumni of international companies.

The situation is similar with lawyers (this is also our case – the founders of Argon have previously worked for Clifford Chance, PWC, CMS Cameron McKenna, Chadbourne & Parke).

When choosing consultants for ongoing service, it is worth distinguishing transaction teams from ongoing service teams (transaction specificity – with intensive closings – often makes it difficult for transaction consultants to address the ongoing needs of the project with the speed (and attention) required by the circumstances).



CASE
STUDY





CASE STUDY

ABC fund bought a mixed-use project. It was its first investment in Poland, so it hired an internal lawyer to deal with leasing and it retained International Law Firm (ILF) as its counsel advising with respect to bigger issues (ILF previously helped ABC in the acquisition of the project).

ILF identified in its due diligence report a risk of a dispute with the general contractor resulting from potential defects of the building. The risk materialised – defects indeed occurred, causing delays in delivery of the premises to the anchor tenant. ILF was being involved only from time to time (to issues the gravity of which justified it). The internal lawyer was a leasing specialist without substantial experience in the area of disputes with contractors. Thus, the problem was not at first identified. As a consequence, the issue that could be addressed on the early stage, escalated to time-and-cost-consuming litigation with the general contractor and the tenant.

WHEN CHOOSING THE LAW FIRM IT IS WORTH ASKING THE FOLLOWING QUESTIONS

your checklist 

1. Does it have a practice focused on assistance related to the ongoing management of the real estate projects? Does it have lawyers for whom it is a major part of work? Will it have time, experience, resources?
2. Does it have a practice dealing with dispute resolutions (litigation and mediation – increasingly important in resolving disputes in Poland)? Will its team provide assistance with respect to debt collection (in and outside of courts)?
3. Does it have lawyers with auxiliary specializations, including:
 - bankruptcy (to get involved in the case of tenants facing solvency problems),
 - corporate,
 - compliance,
 - areas specific for Poland (see Tip no. 6)?
4. Does it have staffing / operational / cost structure serving well ongoing assistance?



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Pay attention to the requirements specific for Poland

There are a number of law requirements working in Poland specifically. It is quite common that Poland implements in a more restrictive way certain regulations adopted also in other countries. E.g. GDPR regulations regarding protection of personal data were adopted in the whole European Union, however, their local Polish version seems stricter than in some other EU member states.

Several regulations provide for fines (sometimes really high) in the case of their breach. This causes that – although many minor breaches are never identified by the authorities – the companies usually decide to implement systemic solutions limiting compliance-related risk. Some of these areas may affect your operations.

Also, they may affect your exit strategy – although rarely perceived as deal breakers, they may probably be identified during the due diligence preceding your sale of the project and may cause the buyer's request regarding a price decrease or hold-back.



SAMPLE LIST OF TROUBLESOME POLISH REQUIREMENTS

your checklist 

- **GDPR regulations** – action point: implement GDPR policy, adjust your procedures, adjust your agreements, conduct periodic audits
- **UBO** (ultimate beneficiary) and **AML regulations** – action point: identify your UBO, proceed with registration in the UBO register
- **regulations regarding “large enterprise”** – action point: identify if you meet criteria of a large enterprise, if yes – adjust your agreements
- **BDO – Waste Database** – action point: check if you qualify for mandatory registration in the Waste Database (most probably you do)
- **Register of trusts and company service providers** – action point: if you qualify; you may qualify e.g. if your entity provides the office & secretarial services to your “Propcos” (companies owning specific real estate projects)
- **Tax-related requirements** – too broad to be covered in this guide



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