

Chapter 34

POLAND

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I INTRODUCTION

Franchising systems have become increasingly popular in Poland over the past 20 years. After an initial period of slow growth, the last decade has seen a definite uptake in momentum. Importantly, the growth trend continues despite the worldwide economic crisis following 2008.

At year-end 2012, there were 864 franchise systems active in Poland having between them over 51,200 franchise outlets, up by 3,200 outlets from year-end 2011. According to preliminary forecasts, by the end of 2013 the total number of franchise outlets may reach almost 55,000 (with approximately 930 franchising systems on the market). This is an impressive number and the growth rate is encouraging.² Franchising systems have been thriving in the food business with the likes of McDonald's as leaders while franchised retail outlets such as clothes and shoe shops are in decline. That said, the fashion retail sector is still Poland's number one in terms of the number of available franchising systems. Franchising systems in the service sector seem to be going through a phase of intensive growth, helping Poland catch up with more mature West European markets such as Germany or France where franchises in the service sector prevail. Another sign of maturity is that there are more home-grown than foreign franchising networks in Poland.

Poland's franchisors include well-known international firms such as McDonald's, Telepizza, Subway, ITM (Intermarché and Bricomarché stores), Carrefour, Makro Cash

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2 All data and forecasts are quoted from franchising.pl and the brochure attached to the 18 October 2013 issue of *Gazeta Prawna*, No. 203 (3593) entitled 'Franchising, sposób na biznes' and are based on the 'Report on Franchising in Poland in 2013' produced by PROFIT system Sp. z o.o.

& Carry, BP and Shell, Accor (Mercure and Ibis hotels), and Polish players, such as Da Grasso (pizzerias), Eurocash Group and Żabka (food stores), Getin Bank and BPH Bank (banking sector), Abra (furniture stores), Fornetti (mini-bakeries).

In 2010 the Franchise Organisation (PFO) affiliated with the European Franchise Federation and in 2011 with the World Franchise Council. Members of the PFO sign up to the European Code of Ethics for Franchising (ECEP).

II MARKET ENTRY

i Restrictions

The Polish market is open to foreign franchisors. As Poland is a Member State of the European Union, EU companies may directly operate outlets in Poland so that the franchise business model is a matter of choice. Non-EU companies, in order to operate a business in Poland, must register a branch or subsidiary company, which in turn opens the door to the whole EU market.

The main vehicles used by foreign franchisors that opt for a local presence are limited liability companies (LLC) and joint-stock companies (JCS). Other vehicles (e.g., partnerships or branches), although utilised (e.g., for tax reasons) are less common and may not be available for companies from outside the EU/European Economic Area (EEA). LLC is the most popular, due to its relatively low costs of operation and simplified corporate governance rules.

There are restrictions on land ownership for foreign companies from outside the EEA. The acquisition by a non-EEA foreign national of an ownership title or perpetual usufruct right³ to land in Poland requires, as a rule, a prior permit from the interior ministry. Similarly, a permit is needed to acquire shares in a Polish company holding such titles to land. Special rules apply to agricultural and forest land. Non-EU franchisors are, however, able to take an ordinary short-term lease for offices, shop or restaurant premises.

Regulatory law in Poland is relatively liberal; generally, no administrative permit is needed to set up a company or start running a business (exceptions apply to some sectors e.g., banking, insurance). Franchisors in the service sector need to take into account that some professions and services remain regulated and must be owned and/or operated by a qualified professional (especially the health care, veterinary and legal sectors).

ii Foreign exchange and tax

Poland is seeking to join the eurozone within a few years (before 2020). The national currency is the Polish zloty, which is traded freely. Monetary obligations can be determined in a foreign currency; however, unless the parties agree otherwise, they can be repaid in zlotys as well. In practice, euros and US dollars are commonly used in international franchise agreements.

3 Perpetual usufruct is a type of public ground lease-like relationship lasting usually 99 years (with an option to extend), under which the State Treasury or local authority retains ownership, while the perpetual usufructuary may use the land and freely sell the perpetual usufruct right.

Poland, as an EU Member State, forms part of the EU Single Market and benefits from free trade within the EU. When Poland joined the EU, foreign exchange law restrictions were reduced to a minimum and now should provide no barrier in day-to-day operations of franchisors.

Franchisors established in Poland will be subject to Polish taxation and must register for tax purposes. In practice, many foreign franchisors operate through Polish subsidiaries or master-franchisors.

The franchise fees or dividends payable to foreign franchisors will generally be subject to withholding tax (WHT). The rate of WHT is dependent on the double tax treaty (DTT) between Poland and the country of the franchisor's registered office.⁴

In the absence of a DTT the rate of withholding tax is 20 per cent. If the franchisor employs a workforce in Poland, it will be obliged to calculate, withhold and remit, on a monthly basis, personal income tax (PIT) and social security contributions due on the employees' remuneration. The employer partially finances the social security contributions of its employees, which increases the costs of employment.

III INTELLECTUAL PROPERTY

i Brand search

Poland, as an EU Member State, gives protection to Community trademarks (CTMs) registered with the Office for Harmonization in the Internal Market (OHIM). Alternatively, if protection throughout the whole of the EU is not needed, the trademark may be registered with the Polish Patent Office (PPO), for protection in Poland only. Finally, Poland is a signatory to the Madrid Treaty; thus trademarks under international registration with WIPO in Geneva benefit from protection in Poland.

Searches for registered CTMs and international trademarks can be easily handled online, in databases available at respectively <http://oami.europa.eu> and www.wipo.int. Trademarks registered in Poland can be searched for on the PPO's website.

ii Brand protection

Registration of a trademark with the PPO is not complicated. If the registration is for a foreign company, the proceedings need to be conducted through a patent agent. The application is subject to a one-time fee of 550 zlotys, which covers up to three product classes.

To benefit from legal protection, a trademark (brand name, logo or graphic) must meet a number of tests. Among others, it needs to be sufficiently distinctive, not mislead recipients (especially in terms of product characteristics and nature) and not cause confusion with any trademark of another entity that was previously registered or submitted for registration for the same or similar product classes (priority rule). Further, one cannot register a trademark that is commonly known and utilised by a third party

⁴ For instance, under the new Poland-US DTT, the withholding tax on dividends, interest and royalties is 5 per cent.

even if it remains unregistered. As is typical for other trademark protection systems, in principle, generic or descriptive expressions (e.g., ‘book’ or ‘the best’) are not protected.

Although the registration proceedings are quite time-consuming, once the protection is granted, it binds from the initial date of the application. The protection is granted for 10 years (and can be prolonged for further 10-year periods) and covers Poland.

Depending on the circumstances, the brand can also be protected under the unfair competition regime or copyright law. Nonetheless, in practical terms, a trademark registration offers much better protection.

iii Enforcement

The protection of trademarks and other intellectual property rights is enforced in court proceedings. Injunctive relief is commonly applied for – often with success – by those whose intellectual property rights were infringed. To obtain an injunction the applicant needs to show that he or she has a probable claim and a legal interest in obtaining relief (i.e., that a failure to obtain relief would make impossible or significantly hinder the enforcement of any future judgment in this case).

iv Data protection, cybercrime, social media and e-commerce

Poland has transposed EU law on personal data protection, sometimes providing for even stricter requirements. Generally, the regime is based on an opt-in system (i.e., explicit consent of the data subject is required to process his or her data). The law also provides for other grounds legitimising data processing that may apply in franchise relations, including performance of the contract with the data subject and fulfilment of legally justified purposes of the data controller/third party. Collection of customer data by the franchisee may require express consent, particularly if the data were subsequently shared with the franchisor for marketing purposes.

Potentially of interest to foreign franchisors: additional restrictions apply on the transfer of personal data to countries that do not provide an adequate level of personal data protection (for instance, the US is recognised as such a country unless the franchisor as data recipient has signed up to the Safe Harbour System). In practice, to facilitate the transfer of data from Polish franchisees to a non-EU franchisor, the parties enter into a contract containing EU standard clauses⁵ whereby the recipient/franchisor agrees, among others, to implement data protection measures at a level at least corresponding to those required under Polish law. No such additional precautions apply to data transfers within the EEA and other countries that are recognised as protecting data at a sufficient level (e.g., Switzerland).

As in other EU countries, business-to-consumer relations are subject to special regulations purposed primarily at consumer protection. In principle, consumers must not be misled and shall receive all necessary information required so that the consumer can make an informed decision on purchase. Additional requirements apply to e-commerce

5 E.g., pursuant to 2001/497/EC: Commission Decision of 15 June 2001 on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC.

where, among others, consumers are entitled to return purchased products without giving any reason within 10 days of purchase. To ensure full compliance with Polish law all consumer-related restrictions should be taken into account when structuring the franchising model or planning marketing activity addressed to consumers. It should be noted, however, that franchisees will not enjoy consumer protection. Consumer protection is only available to the customers of the franchisee.

IV FRANCHISE LAW

i Legislation

In Poland, there is no franchising law. Franchising agreements are recognised as innominate civil law contracts (i.e., not specially regulated by law), benefiting from the freedom of contract principle. Consequently, the parties are free to tailor their legal relationship at their discretion, so long as the content and purpose of the franchise agreement do not violate the law, the nature of franchising or public policy (*bona mores*).

The flexibility of franchisors is limited by some statutory provisions. The main provisions are certain general principles set out in the Civil Code, the concept of a pre-contractual duty of good faith (*culpa in contrahendo* concept) and competition law. Nonetheless, compared to legislation in numerous other EU Member States, Polish law applies a relatively light touch to its regulation of franchising. Although account is taken of the franchisee's tendency to be the weaker party, franchising contracts qualify as business-to-business relations and, in principle, are not subject to the regulations that are designed to protect consumers and certain other categories of market players (e.g., employees, agents).

In the absence of detailed legal regulations, soft law attracts more attention, especially the Code of Conduct of the European Franchise Federation, which is observed by members of the PFO.

ii Pre-contractual disclosure

In stark contrast to the US system, the Polish market has no express statutory disclosure regulations.

However, this does not mean that the franchisor is free to proceed without regard to the situation of the franchisee. Polish law recognises a pre-contractual principle of good faith (the *culpa in contrahendo* concept)⁶ and some other general rules of the Civil Code, including the right to rescind the agreement in case of misrepresentation (this right is designed first and foremost to protect those who were misled by the contracting party as to the content of the agreement). These principles require franchisors to be fair

⁶ *Culpa in contrahendo* offers protection against damage incurred as a result of negotiations conducted unfairly (contrary to law or public policy) if the contract, finally, is not concluded. If fault can be assigned, the party that acted unfairly will be obliged to redress the damage incurred by the other party albeit in a limited scope (i.e., the damage the contracting party would not have incurred had it not started the negotiations (liability does not extend to redressing what the party could have achieved if the agreement had been concluded)).

and open in their discussions with franchisees. Misleading or incomplete statements should be avoided and if information is given it must be accurate and give the correct overall impression. However, one would be hard-pressed to argue with the conviction that based on the above general principles, franchisors have a positive obligation to disclose specifically defined information to potential franchisees. On the contrary, the franchisor's fairness in the pre-contractual phase is instead assessed on a case-by-case basis, taking into account all circumstances accompanying the negotiation process, including the degree of professionalism and experience of the franchisee. Given that most franchisors provide information on their system to franchisees before the contract is signed, franchisors need to ensure that they monitor the information that is provided to ensure it is accurate and not misleading in any way.

In this context, the ECEF might play a helpful role. It obliges franchisors to provide potential franchisees, in writing and in good time, with full and accurate information material for franchising relations so that the franchisee might analyse the situation and reach an informed decision.⁷ Further, all such information (including, specifically, any forecast of future revenues) must be objective, clear and not misleading – a rule that extends to all franchising related materials supplied by the franchisor. The franchisor must be able to substantiate data provided to the franchisee. Thus, any figures relating to possible revenues should represent the real and usual achievements of franchisees operating in a given franchising model.⁸ Finally, franchisors are expected to handle the recruitment process in such a way as to ensure that only those candidates who have at least basic skills, education and personal qualities as well as sufficient funds are selected as franchisees. The ECEF requires that Polish franchising agreements be drawn up and signed in Polish, which is not a legal requirement in business-to-business contracts.

While the ECEF is gaining traction among franchisors, the practices they recommend (on a self-regulatory basis only) are still far from common at present on the Polish market.

iii Registration

There are no franchise registration duties.

iv Mandatory clauses

A number of clauses can be implied into franchise agreements under Polish civil law. Some of these terms are mandatory, while others can be waived in the contract. The following rules might be of material relevance for franchising contracts:

- a* Any provision of a franchise agreement that is contrary to law, public policy or the nature of a franchise might be deemed invalid; for example this would apply

7 It is assumed that such information should encompass description of the franchising model, rights and obligations of the parties, required investments/payments by the franchisee and overall financial information.

8 If exceptionally good results achieved by one or a few franchisees are to be disclosed, they should be presented very carefully and a reservation made that they are extraordinary in nature, so as to avoid any chance of misleading.

- to the exclusion of the franchisor's liability for defects in sold products under the statutory warranty if the defect was intentionally concealed by the franchisor;
- b* The franchisor is responsible – under the statutory warranty – for defects of products sold to the franchisee unless the statutory warranty is limited or excluded (which is permitted in business-to-business relations subject to a few exemptions).
 - c* If the late payment interest agreed by the parties exceeds the maximum specified under Polish law, the latter rate will prevail.
 - d* Any provision excluding liability for damage caused intentionally will be unenforceable.
 - e* The right to terminate a fixed-term franchising contract for important reasons cannot be effectively waived;⁹ this means that both the franchisee and the franchisor can terminate the franchise agreement for important reasons.
 - f* Either party may terminate an indefinite-term franchising contract.

The franchisor's right to unilaterally make material changes to the franchising model could be subject to legal challenge under Polish law, especially if it can be shown that the changes could be detrimental to the franchisee's business. In principle, such amendments should be agreed by both parties. Some flexibility can be provided by authorising specified changes in the contract or providing the franchisee with a reasonable exit option in the event that the changes are detrimental to the interests of the franchisee.

v Guarantees and protection

Polish law recognises a wide variety of security that can be given by the franchisee to the franchisor in respect of payment obligations and contractual performance. Generally, there are two main types of security: (1) a charge over assets and enforceable vis-à-vis any owner of the asset, for example, mortgages (over real estate), pledges (over moveables, shares, receivables); and (2) personal securities, enforceable against the guarantor (debtor) personally such as suretyship, guarantee, cash deposit, promissory note. The security is usually granted by way of an agreement; in certain cases, registration is required (e.g., mortgage or registered pledge). A personal guarantee of the owner of the franchisee company granted to the franchisor is often accepted in dealings with franchisees operating as a legal entity.

V TAX

i Franchisor tax liabilities

Franchisors established in Poland as legal persons are liable to 19 per cent corporate income tax (CIT) applicable to all kinds of income, including dividends.¹⁰

From the franchisor's perspective, franchise fees will constitute income calculated on an accrual basis. Generally, that income arises on the day a service is provided (but

⁹ Based on regulations related to mandate contract applied accordingly to the franchise agreement.

¹⁰ Other franchisors will pay PIT – for rates, please see Section V.ii, *infra*.

no later than on the invoice issue date or day of payment). However, if the parties agree on settlement periods for services rendered periodically, the income generally arises on the last day of the settlement period determined in the franchising agreement (this may apply, for example, to current franchising fees).

Franchisors that are not Polish tax residents and have no permanent establishment in Poland will pay tax only on income generated in Poland. Any withholding tax on franchising fees will be withheld and paid by the franchisee. Generally speaking, licence fees (and, notably, franchise fees may potentially be treated as licence fees) are subject to 20 per cent withholding tax,¹¹ although this rate may be reduced or waived altogether, depending on whether Poland has signed a DTT with the foreign franchisor's country of residence. To be eligible for a DTT-based reduction, the franchisor must present a tax residency certificate issued by its local tax office.

Franchising is generally perceived as a service subject to valued added tax (VAT) of 23 per cent. Any franchisors doing business in Poland must register for VAT if they have taxable annual turnover above 150,000 zlotys. Generally, the duty to assess and remit VAT liabilities lies on the franchisor. However, if a Polish franchisee purchases services from a foreign franchisor that has no permanent place of business in Poland, the franchisee will have to reverse charge VAT on the transaction (import of services).

ii Franchisee tax liabilities

Franchisees established in Poland as legal persons are liable to 19 per cent corporate income tax. Others will pay personal income tax (PIT), which is either 19 per cent (flat rate), or 18 to 32 per cent (progressive rates), depending on the taxpayer's choice.

As franchising fees will be paid by the franchisee with a view to generating business income, they will generally be tax deductible. That said, it will not always be possible to deduct franchising fees in one go. In some cases, they will be subject to depreciation write-offs.

Franchising fees include: (1) an initial fee (usually paid on receipt of the franchising package, including know-how and licence); (2) recurrent franchising fees (usually paid for cooperation and consulting during the period of validity); and (3) marketing fees.

Generally, initial fees take the form of a fee for the licence granted to the franchisee. The acquired licence represents an intangible asset for the franchisee, on which it may post depreciation write-offs. By the same token, the initial fee does not constitute a one-off tax cost but is settled over time, in the form of depreciation write-offs on the licence value. That value will generally not include the portion of the initial fee contingent on future income from the licensed right. This part of the fee will constitute the franchisee's one-off tax cost. Similarly, recurrent franchising and marketing fees will be tax costs on a general basis.

Notably, to correctly qualify each individual franchising fee, it will be necessary to analyse the franchising contract. This is because Polish legal regulations do not give clear guidelines on the tax treatment of franchising fees and their qualification for tax

11 WHT assessments on franchise fees require individual analyses of franchise contracts.

purposes. Franchise fees often cover a range of aspects such as a payment for services and a royalty.

The franchisee will generally be entitled to deduct VAT from the franchisor's invoice, provided that the franchising fees are attributable to the franchisee's business activities subject to VAT. The franchisee will generally also have the right to deduct VAT if it reverse charges VAT on a transaction (i.e., in the case of acquiring services from a foreign franchisor). In practice the VAT reverse charge mechanism means that a franchisee accounts for output VAT on the franchising fees and deducts this VAT (as input VAT) in the same VAT return. Typically, no actual payment to the tax office will be made by the franchisee in such a case.

iii Tax-efficient structures

Before choosing a franchising model, its prospective tax efficiency should be scrutinised. If a structure involves an overseas franchisor, it is essential that it should be located in a country that has signed a DTT with Poland, which will enable it to minimise withholding tax exposure and deduct this tax in the country of tax residency. Good countries from a Polish DTT perspective are, for example, Luxembourg and Holland. The contractual language used with respect to fees should be precisely worded, and the service charges be expressly differentiated from licence or quasi-licence fees. If an agreement is between affiliates, care must be taken to ensure the franchising terms are compliant with transfer pricing regulations.

VI IMPACT OF GENERAL LAW

i Good faith and guarantees

A contractual provision that runs contrary to the nature of the legal relationship or public policy is invalid under Polish law. Further, rights must be exercised fairly so that an abusive exercise of a contractual right cannot, in principle, benefit from legal enforcement. Further, protection is offered to those acting in good faith. Thus, fair dealing and good faith should be seen as fundamental pillars of Polish law. This has a significant practical impact on franchising contracts in the sense that the positions of the franchisor and franchisee should be adequately balanced in the franchise agreement.

ii Agency distributor model

The Polish law does not explicitly extend the protective agency regime (which, following EU regulations, was implemented in Poland) to franchisees.

However, in view of judging discretion vested with Polish courts, one may not exclude that in line with tendencies observed in some other EU jurisdictions, Polish judges may start to apply agency law to franchisees by analogy. This may, in particular, affect claims for compensation after termination of the franchise.¹² *Prima facie*, it seems

12 Generally, the agent is entitled to an indemnity if he or she has brought the principal new customers or has significantly increased the volume of business with existing customers and the

that there might be insufficient grounds for any such claims to be brought by the franchisee. However, in some franchising systems an analogy may prove justifiable.¹³

iii Employment law

In principle, franchising qualifies in Poland as business-to-business relations, and is outside the employment law regime.

In Poland, sole proprietors are quite common in simple franchise models (no partnership required), as it is tax efficient: 19 per cent PIT is available. Naturally, this concept relies on a private individual acting as an independent contractor and taking a business risk. If the above requirements were not met, but instead the franchisee–franchisor relationship met the characteristics typical for an employment contract (e.g., subordination), a risk of reclassification as employment could not be excluded.¹⁴ Thus, franchise concepts based primarily on the franchisor’s assets and full control of franchisees’ operations require very careful drafting to avoid implications as regards employment contracts (in particular, employee-style entitlements should be avoided: sick leave, holiday, 40 working hours a week, etc.).

iv Consumer protection

Individual franchisees are not recognised as consumers under Polish law to the extent they act in relation to the business they run. Consequently, consumer law does not generally apply to franchising agreements.

v Competition law

EU competition law generally prohibits vertical agreements that may affect trade by restricting or distorting competition, subject to the *de minimis* rule or applicable block exemption regulations. In principle, Poland implemented the EU competition law and the Polish competition authority has the power to directly enforce Polish and EU competition laws. While there are no franchise-specific regulations, provisions on franchise can be found in the Polish and EU Block Exemption Regulations on Vertical Restraints (jointly, VBER).

Under the *de minimis* rule, restrictive clauses are permitted¹⁵ if the market share of the parties to the franchise agreement is below a certain threshold. The *de minimis* threshold is 10 per cent under Polish law and 15 per cent under EU law for non-competing businesses and, respectively, 5 per cent and 10 per cent, for contracts between

principal continues to derive substantial benefits from the business with such customers after the agency contract ended.

13 No decision of Polish court speaking in favour of such an analogy has been published thus far.

14 This risk seems rather remote in the case of typical franchising agreement. Reclassification often relates to cases where an earlier employment agreement was replaced by a contract with a sole proprietor (individual contractor) for tax reasons, but the factual and/or legal relations remained unchanged or still significantly resemble employment.

15 Except for enumerated clauses that are particularly harmful for competition (e.g., price fixing, market sharing).

competitors. Otherwise, restrictive clauses can be permitted under the VBER. However, due to a legislative error, the Polish VBER qualifies franchise agreements that do not involve the resale of products as ordinary vertical agreements. This notwithstanding, given the importance of effects on EU trade, generally, EU law will prevail over Polish competition law.

EU and Polish VBER allow potentially restrictive clauses if the aggregate share of the franchisor and the franchisee in the relevant market does not exceed 30 per cent, except for listed 'hard-core' vertical restraints. Franchise agreement provisions that may fall outside the exemption offered by the VBER include:

- a* in-term non-competition provisions that are indefinite or exceed five years;¹⁶
- b* restrictions on the franchisee's right to have its own website;
- c* post-termination restrictions on competition that exceed one year;
- d* certain resale price restrictions; and
- e* certain restrictions on the geographic area in which franchisees can market their products.

Under the Polish VBER the time limit on covenants against competition contains one exception, namely, it is permitted to establish a restraint, without limitation in time, concerning use or disclosure of know-how that is not in the public domain.

A franchisor with a dominant position in the market must obey stricter rules. Any abuse of a dominant market position is prohibited. Dominance is generally presumed if the market share exceeds 40 per cent in a relevant market. There are no exemptions from the prohibition against abuse of a dominant position.

vi Restrictive covenants

In-term non-compete clauses are quite common in franchise agreements, and, in general, are valid under Polish law. The approach taken on post-term non-compete bans usually depends on practical risks involved for the franchisor. The non-compete obligation post-term (up to one year) is generally valid, and, in principle, does not need to be compensated unless otherwise agreed with the franchisee. Some franchisors prefer not to negotiate compensation in which case a post-term non-compete clause is not included in their agreements. Further, it is advisable to provide in the contract a right of the franchisor to terminate the non-compete agreement. By terminating the non-compete agreement the franchisor can escape the obligation to pay compensation in the event that it is no longer interested in enforcing the duty against the former franchisee.

vii Termination

Under Polish law, agreements for an indefinite term may be terminated by either party, by observing the contractual, statutory or customary termination periods. If none is provided, the agreement expires immediately after the termination notice is delivered to

¹⁶ The Commission Guidelines on Vertical Restraints (2010/C 130/01) indicate that traditional non-competition covenants may be acceptable so long as they are necessary to maintain the common identity and reputation of the franchise system.

the other party. Thus, to limit the flexibility in terminating a franchise, one should either have a fixed term contract or provide for a long termination notice.

Another principle of Polish law that may be applied to franchise agreements is the right of both parties to terminate the franchise agreement for important reasons. In practice, fixed-term franchise contracts specify circumstances justifying their termination for important reason by either party. If no such clause is added, the franchisee might be able to rely on the above Polish law principle to terminate the franchise agreement for important reasons (e.g., if the franchisor had committed a material breach).

As the franchise is a long-term relationship requiring certain investments on the franchisee's part, the PFO advises that the term of the franchise agreement should be long enough to allow the franchisee to amortise its initial investment. Consequently, as good practice, the franchisor should not reserve the right to terminate the franchise without justified reasons prior to the lapse of an agreed period of time.¹⁷

The parties may agree that the franchise business can be acquired by the franchisor after the franchise expires. Various legal tools can be used to secure such a right, including a preliminary sale agreement, a call option, a right of first refusal or pre-emption right. Acquisition of a going concern usually needs to meet a number of legal requirements, including prior corporate authorisations (of franchisor and/or franchisee) and third parties' consent for assignment to the franchisor of agreements concluded by the franchisee (e.g., lease contract). The acquiring franchisor will generally, by virtue of law (1) assume joint and several liability with the franchisee for any civil law and tax debts relating to the franchise business that arose before the sale (subject to some exemptions and limitations); and (2) take over the employees of the franchisee under the Polish equivalent of TUPE. For the above reasons, any 'takeover' clauses in the franchise agreement should only create a right (and not an obligation) on the franchisor's part so that the franchisor could decide against going ahead if the acquisition of the franchise business involves unacceptable costs or risks.

viii Anti-corruption and anti-terrorism regulation

Polish law treats bribery as a criminal offence. Generally, criminal liability is personal and allocated to individuals. Consequently, franchisors will not be responsible for crimes committed by franchisees unless they played a role in the crime (e.g., as an assistant or accomplice).

ix Dispute resolution

The choice of law is ruled by EU regulation (Rome I).¹⁸ The parties are generally free to choose the law governing the franchise relationship. However, a choice of law does not in

17 It is a soft law principle only. However, one may not exclude the possibility that early termination of the franchise agreement with no justified reason could, depending on the circumstances, result in an obligation to compensate a damage incurred by the franchisee as a result of the early termination.

18 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

principle prejudice the application of those EU provisions or the closest-related law that cannot be derogated by agreement (e.g., consumer laws). Naturally, in line with other legal systems, Polish law excludes the application of foreign law insofar it runs contrary to Polish public policy (i.e., basic principles of Polish law).

Arbitration clauses are generally enforceable under Polish law. Further, Poland is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral and Awards, and foreign arbitration awards have been enforced in Poland. Usually, the more complex the franchising model is, the more likely the parties are to opt for arbitration. There are a few recognised arbitration tribunals in Poland,¹⁹ but no arbitration court operates at the PFO.

Mediation is recognised in Poland but as a relatively new legal instrument, it is still quite rarely chosen by the parties as an alternative dispute resolution.

EU court judgments can be enforced in Poland without formal recognition (if an enforcement clause is attached). The judgments of other foreign courts generally require formal recognition by the Polish courts. A foreign judgment will not, however, be recognised if it is contrary to Polish public policy.

Although the Polish court system is being systematically reformed (especially, to speed up proceedings, the judge may demand the parties to provide all supporting evidence by a set deadline), it remains relatively slow. It takes one to two years to obtain a judgment, especially, as some local courts might be overloaded. Franchise cases are decided in standard proceedings.

Injunctions are often applied and granted as an interim security of claims. The injunction may prohibit a certain practice (e.g., further use of intellectual property rights). Usually, the courts have one week to decide on the injunction. Injunctive relief can be granted in the course of the main proceedings or even before, but in the latter case the deadline fixed by the court for filing the claim needs to be observed, as otherwise the injunctive expires. The court can make the injunction conditional on posting a deposit (to secure possible damage occasioned to the other party).

In principle, contractual liability covers actual damage and lost profits. The breaching party is liable for the normal result of its action or omission. The liability extends to damage caused by intentional action and negligence. If the party incurring damage contributed to it, the compensation is decreased *pro rata*. Contractual penalties are enforceable and often used to prevent breach of material covenants. Contractual penalties can, however, be decreased by court if exorbitant.

Court fees are calculated proportionally to the claim value and are capped at 100,000 zlotys. Delivery of evidence (e.g., an expert report, sworn translation) may result in additional costs. Generally, the court fees and costs are reimbursed by the party losing the dispute on a *pro rata* basis. Attorneys' fees for representing the party in court are usually pre-agreed with a represented party; in the absence of such an agreement, maximum fees prescribed by law apply.

19 Including the Arbitration Court at Polish Chamber of Commerce (KIG) and the Court of Arbitration at the Polish Confederation Lewiatan.

Surprisingly, published Polish court judgments related to franchise disputes that would be precedential for franchise relations are few and far between. Thus, it is difficult to foresee how Polish case law will develop in legal interpretations related to franchise agreements.

VII CURRENT DEVELOPMENTS

Despite the dynamic growth seen in recent years, there is still considerable potential for expansion for new franchising chains in Poland. Nevertheless, new concepts may take more effort to get off the ground due to fiercer market competition than several years ago. It is estimated that the Polish market will be able to absorb approximately 1,000 franchising chains, and this level of market saturation could be achieved quite soon.

As it becomes more challenging to develop new franchise systems, franchisors are seeking to boost their credibility on the market, in particular, by joining the Polish Franchise Federation and by following the best practices recommended under the European Code of Ethics for Franchising. The PFO currently has 40 members and partners, most of whom are leading franchisors in Poland (including McDonald's, Carrefour, ITM, Telepizza, etc.). Association with the PFO makes it easier to attract new franchisees and develop their franchise network.

It is worth noting that some recognised franchisors have decided to re-enter the Polish market in recent years after earlier failed attempts. An example is Domino's Pizza, which started operations in Poland in the 1990s but enjoyed little success, which prompted its withdrawal. Now, Domino's Pizza is aggressively developing its network in Warsaw and its environs. Chocolate Company and Sagafredo Zanetti should also be listed among the new international entrants in Poland.

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Magdalena Karpińska is a counsel at Dentons' Warsaw office. She graduated from Warsaw University (1998 Masters of Laws) and qualified as a legal counsel in 2002. She has been working for Dentons since 1999, primarily in its commercial law practice. Magdalena specialises in civil law and business contracts, in particular, franchising, distributor and agency agreements. She has advised clients on various legal matters relating to day-to-day business operations, including on the structuring of the most efficient business models tailored to the needs of her clients. Her work includes drafting, reviewing and negotiating of various categories of business agreements in the domestic and international environment. Magdalena has broad transactional experience in different areas, including the FMCG, manufacturing, retail, IT and media sectors. Her experience also encompasses advertising, consumer law and personal data protection issues. She speaks Polish and English.