A NEW LEGAL FRONTIER IN POLAND: AN EVALUATION OF NEW ECONOMIES AND THEIR RESULTING OPPORTUNITIES

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L Introduction: Why Do Business in Poland?

Why should business organizations from the United States and other countries be interested in doing business in Poland? Not long after the fall of Communism, Polish official Marek Kulczycki,[1] identified the unfolding trade and business opportunities in Poland.

> Dramatic and radical changes have been taking place in Poland during the last [few] years. After many long years, democracy, freedom and justice are coming to the fore, and the process is irreversible. This situation is unprecedented in world history. The changeover is complex and difficult. We face a far-reaching transition form the centrally planned command economy to the free market system ... In the long run, the objective is an irreversible transformation of the Polish economic system into a free market economy. . . . Needless to say, the concept of central planning has been entirely abandoned, and the process of demonopolization and decentralization has begun. The parliament has adopted new laws on banking, foreign exchange, customs, foreign direct investments, antimonopoly, property rights, and privatization.
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> [F]oreign investments and foreign business will be welcome in Poland if they come. . . . The safety of investments is assured by agreements on the promotion and protection of foreign investment concluded with eleven countries, including the United States.[2]

Investment in Poland continues to rise because foreign companies see its potential domestic market and its attractiveness as a supply base for both the West and the East.[3] Poland has cultural and economic ties to the newly independent states of the former Soviet Union. Polish producers and exporters understand the

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[2] Marek Kulczycki, *Trade and Business Opportunities in Poland*, 24 VAND. J. INT'L L. 361, 361-366(1991).

[3] Karen Lowrey Miller et al., *Poland, Rising Star of Europe*, BUS. WK., Dec. 4, 1995, at 64, 65.

preferences of consumers in these states and can help foreign investors enter these markets. Poland also has entered into a free trade agreement with the European Union.[4] It has joined the Central European Free Trade Association (CEFTA) along with the Czech Republic, Hungary, Slovakia, Slovenia, Romania, and Bulgaria, and has joined the European Free Trade Association (EFTA) along with Iceland, Norway and Switzerland. Poland also has free trade agreements with Israel, Lithuania, Estonia, Latvia and the eastern provinces of Germany. These trade agreements give firms operating in Poland increased access to all of these markets.[5]

Poland is one of ten countries selected by the U.S. Department of Commerce to participate in its "Big Emerging Markets Program,"[6] a designation that gives Poland access to a variety of trade and investment programs. For example, Poland has received access to financing and guarantees from the Oversees Private Investment Corporation (OPIC) and the Export-Import Bank of the United States (ExiinBank). The U.S. Congress established the Polish-American Enterprise Fund in 1989 to make possible loans, grants, insurance and guarantees to U.S.- Polish joint ventures. The U.S. Agency for International Development (AID), under the U.S. Department of State, funds programs that provide technical and training assistance to emerging business in Poland.[7]

Many economic signs in Poland are positive. In 1998, Polish exports reached US $30.2 billion, and imports hit US $43.9 billion.[8] While Germany is Poland's largest trading partner, by early 1999, U.S. corporate investments in Poland reached US $4.9 billion. U.S. investment constituted 18% of the foreign corporate investment in Poland and made U.S. organizations the number two foreign investor in Poland.[9] In 1998, Polish imports from the United States totaled

4. In 1992 Poland signed an Association Agreement with the European Union, [Belgium, Denmark, Germany, the Hellenic Republic, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom], *See* Association Agreement, Dec. 31, 1993, Pol.-E.U., *available in* Official Journal of the European Community, No. L348/2. In 1998 Poland formally initiated accession negotiations with the EU which they hope will lead to membership by 2003. *See* U.S. Department of State, U.S. Embassy Warsaw, *FY 2000 Country Commercial Guide: Poland,* ch. II, § A, *Major Trends and Outlook,* and ch. VI, § A, *Trade Barriers* (released July, 1999) (visited July 24, 2000) <http://www.state.gov/www/about_state/business/com_guides/2000/europe/poland_CCG2000.pdf> [hereinafter *FY 2000 Country Commercial Guide],*

5 *See FY 2000 Country Commercial Guide, supra* note 4. at ch.. VI, § N, *Membership in Free Trade Associations,* Embassy of the Republic of Poland, *Business Opportunities in Poland, A Guide for American Investors,* § 4, *Investment Risk,* (last modified April 1997) (visited July 24, 2000) <http://www.polishworld.com/polemb/english/ business/>[hereinafter *Business Opportunities in Poland],*

6. *See Business Opportunities in Poland, supra* note 5, *at* § 15, *Commercial Relations between the U.S. and Poland.*

7. *See FY 2000 Country Commercial Guide, supra* note 4, at ch. VIII, § D *How to Finance Exports/Methods of Payment* and at ch. VIII, § E, *Types of Export Finanang and Insurance Ava.lable.*

8. *FY 2000 Country Commercial Guide, supra* note 4, at app. C, *Trade.*

9. *Id.,* at app. D, *Investment Statistics.*

US $882 million, 3.8% of all Polish imports.[10] Unemployment, although high immediately following the fall of communism, has dropped dramatically in the past decade." Gross Domestic Product has risen since 1992,[12] and consumer prices and inflation rates are dropping.[13] By the mid 1990's, the Polish economy was growing faster than any other European country.'[1]

Poland's 38.6 million people[15] have a 99% literacy rate,[16] and the labor force is well educated and highly skilled.[17] One of Poland's advantages over other Eastern European countries is that it is almost completely ethnically, linguistically and religiously homogenous. With 98% of the population of Polish heritage, and 95% of the population Roman Catholic,[18] Poland offers the potential for long term

[10] *Id.*, at app. C, *Trade.* This was a decline from 1997 when U.S. exports to Poland were $1.17 billion, 5.5% of all Polish imports.

[11] By mid 1999, 11.6% of employees were officially registered as unemployed. Many of the registered unemployed actually work full or part time in the unofficial, or gray economy, which constitutes 12%-15% of Poland's Gross Domestic Product (GDP). Major areas such as Warsaw and Cracow have unemployment rates between three and six percent. In 1997, the unemployment rate in Poznan Province was 3.6% and in the city of Poznan was 1.5%. In agricultural areas in the northeast and northwest, unemployment can exceed 25% *See FY 2000 Country Commercial Guide*, *supra* note 4, at ch. VII, § N, *Labor*; U.S. Department of State, American Embassy Warsaw, *1999 Country Commercial Guide: Poland*, ch IV, § A(1 *)(c) Poznan* (visited July 24, 2000) <http://www.mac.doc.gov/eebic/countryr/poland polccg99.htm>.

[12] In 1997, GDP was US $143 billion, in 1998 US $158 billion. The GDP growth rate (real % change) was 6.8% in 1997 and 4.8% in 1998. *See FY 2000 Country Commercial Guide*, *supra* note 4, at app. B, *Domestic Economy.* The GDP per capita in 1989 was US $2000. The GDP per capita in 1999 grew to US $4500. *See* John Rossant, *Special Report: Europe Ten Years Later*, BUS. WK., Nov. 8, 1999, at 59.

[13] Annual inflation rates have fallen steadily; 1992-44.4%, 1993-37.6% 1994-29.5% 1995-21.6 %. *See* Polish Agency for Foreign Investment *[PAIZ]*, *Poland - Fundamental Figures and Regulations*, Annex D (last modified March 1997) <http://www.polska.net/>. Inflation for 1996 was 18.5%, 1997-13.2%, and 1998-8.6%. *See FY 2000 Country Commercial Guide*, *supra* note 4, at app. B, *Domestic Economy.* Inflation in late 1999 was 7.5% compared to 70.3% 10 years earlier. *See* Rossant, *supra* note 12, at 59. *See also Eastern European Finance Creditable*, ECONOMIST, July 13, 1996, at 72.

[14] Casper W. Weinberger, *Commentary on Events at Home and Abroad: Three Central European Tiger Cubs*, FORBES, Aug. 12, 1996, at 35.

[15] *See* CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK 1999, (last modified Jan. 1, 1999) <http:www.odci.gov/cia/publications/factbook/pl.html> [hereinafter CIA WORLD FACTBOOK 1999], See *generally* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGIONAL DEVELOPMENT PROBLEMS AND POLICIES IN POLAND 10 (1992); BUREAU OF PUBLIC AFFAIRS, U.S. DEPARTMENT OF STATE, BACKGROUND NOTES POLAND, June 1991, at 1; Bureau of European and Canadian Affairs, U.S. Department of State, *Background Notes Poland* (last modified June, 1997) <http://www. state.gov/www/background notes/poland_0697_bgn.html>; *Poland, Population Continues to Grow, Doing Business in Europe*, CCH E. EUR. NEWSL., Jan. 1997, at 25 (39.6 million population figure for 1996).

[16] *See* CIA WORLD FACTBOOK 1999, *supra* note 15. *See also* BUREAU OF PUBLIC AFFAIRS, *supra* note 15, at 1.

[17] In 1995, approximately 7% of the total population were university graduates, 26% were secondary school graduates, and 34% were vocational school graduates. *See* Polish Agency for Foreign Investment *[PAIZ], Doing Business in Poland)(*visited July 24, 2000) <http://www.paiz.gov.pl/> at *Profile of Poland: Main Macro-economic Indicators.*

[18] *See* CIA WORLD FACTBOOK 1999, *supra* note 15. *See also* BUREAU OF PUBLIC AFFAIRS, *supra* note 15, at 1.

political stability that is often questionable in other emerging economies. Poland is less likely to experience the ethnic and religious division and strife plaguing several other Eastern European and Baltic countries.

A significant risk factor in global business is political and legal instability. The Polish government recognizes that to attract new business, it will have to establish a government and legal system that is subject to the rule of law and not to the whim of party interests. The new system must be stable, consistent, predictable and supportive of business and free markets. Poland has made dramatic progress in this direction. For businesses interested in expanding into the large and open markets of Central and Eastern Europe, Poland's evolution of the past decade has given it the greatest stability of any of the former communist states in the region.

II. Constitutional and Political Change

In assessing political and legal risk, foreign investors can look favorably on Poland's long history of constitutional rule and its amazing ability to adapt and survive two centuries of turbulent times on the European continent. Poland was the first country with a written constitution in Europe (May 3, 1791), second in the world only to the United States.[19] The Polish constitution was "a widely hailed document intellectually rooted in the philosophy of the Enlightenment."[20] After World War II, Poland became part of the Soviet block, and its constitution was rewritten in 1952 to replicate the Soviet Union's 1936 constitution. Following forty-four years of communist control, the communist Polish United Workers' Party (PZPR), Solidarity and various other political parties drafted "the round table agreement" of 1989 that set the stage for the peaceful revolution to a democratic, free market society. The agreement created a radical change in the political system, including a freely elected parliament and president.

Also in 1989, the new parliament removed all Marxist terminology from the constitution and restored the name of the country to the "Republic of Poland." A Constitutional Commission was appointed to draft a comprehensive document that would meet the needs of a democratic society. Passage of the new constitution required approval by a two-thirds vote of the National Assembly (a joint session of the Sejm and Senate),[21] followed by a national referendum. A document often

19. *See* Internet Polska, *Poland s 1997 Constitution: Summary of Key Provisions* (visited July 24, 2000)<http:/Avww.polishworld.com/polemb/const/key.html>. *See also* Internet Polska, *Constitution of May 3■ 1791* (visited July 24, 2000) <http://www.polishworld.com/polemb/ const indexhtml[1].

20. Federal Research Division of the Library of Congress, Poland a Country Study 184(1994).

21. The Polish Parliament consists of two houses, the Sejm and the Senate. The Sejm is the highest representative body of the people and has primary legislative authority to pass laws and to approve the national budget. The Senate reviews laws and the budget and proposes amendments to the Sejm, which they

referred to as the "Little Constitution," adopted in 1992, solidified the current structure of government, dividing power among the executive, legislative and judicial branches. It also guaranteed the right to ownership of private property and affirmed that Poland is a democratic state of law guided by principles of social justice.[22] In a few short years Poland moved from a centrally planned economy to a market driven economy and transformed its government from socialism to democratic capitalism.

To ensure individual rights and liberties under the new government, the Polish Charter of Rights and Liberties was adopted in November of 1992. The Preamble stated: "To confirm that the Polish Republic is a democratic and law-ruled state, the Charter of Rights and Liberties is constituted. The Charter delimits the bounds of the will of the majority in a society of free people."[23] Poland's first comprehensive post-communist constitution incorporated much of the Charter of Rights and Liberties and was adopted by the National Assembly on April 2, 1997. A majority of Polish voters endorsed the new constitution in the Constitutional Referendum of May 25, 1997. The Supreme Court upheld its constitutionality, and President Aleksander Kwasniewski signed it into law on July 16, 1997.[24]

A. *The Constitution of the Republic of Poland*

The Polish Constitution should be of interest to businesses operating in Poland. Chapter I, "The Republic," guarantees the Republic of Poland will be a democratic state ruled by law.[25] It will respect international law,[26] ensure freedom of the press,[27] and protect the ownership of property and the right of succession."[8] "A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland."[29] "Limitations on

may accept or reject. *See e.g.,* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, *Poland Law Digest,* POL-1 (2000).

[22] *See* FEDERAL RESEARCH DIVISION *supra* note 20, at 187.

[23] Polish Charter of Rights and Liberties, *translated at*, 1992 WL 563319 (N.T.I.S.), NTIS No. PB93-961003.

[24] *See Poland's 1997 Constitution: Summary of Key Provisions, supra* note 19. For English translations of the 1997 Polish Constitution see 4 PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, CENTRAL AND EASTERN EUROPEAN LEGAL MATERIALS [hereinafter CEEL], release 48 (Vratislav Pechota ed. 1999), *also translated in* Polish Parliament (Sejm) web site (visited July 24, 2000) <http://www.sejm.gov.pl/english/konstytucja/konl.htm>.

[25] *See* POL. CONST, ch. I, art. 2.

[26] *See id.* at art. 9.

[27] *See id.* at art. 14.

[28] *See id.* at art. 21. Expropriation will be allowed solely for public purposes and for just compensation. *See also* Pol. Const, ch. II, art. 64.

[29] POL. CONST, ch. I, art. 20.

freedom of economic activity may be imposed only by means of statute and only for important public reasons."[30] These constitutional promises are important to foreign entities considering doing business in Poland because they demonstrate a strong public commitment by the parliament and the people of Poland to create and maintain a democratic state that values freedom of economic activity and protects the ownership of private property.

Chapter II guarantees "The Freedoms, Rights and Obligations of Persons and Citizens." All persons shall be equal before the law and have the right to equal treatment by public authorities.[31] "No one shall be discriminated against in political, social and economic life for any reason whatsoever."[32] "Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value."[33] These sections are important because the parliament and the people of Poland have committed to create a society free of discrimination w here all people are equal before the law. This chapter creates both rights and the obligations for public authorities and private persons. Stating that

[30] *Id.* at art. 22.

[31] *See id.* at art. 32, § 1. Chapter II details the rights of "persons and citizens." U.S. business entities in Poland may wonder: to what extent does this include citizens and non-citizens? Will non-citizens always be treated equally under the law and by public authorities?

[32] *Id.* at § 2. This section raises many questions. Is the intent to ban all discrimination? Would this mean that all must be paid the same? May education, experience, or ability to do the job no longer be used as a discriminating factor? The Polish Charter of Rights and Liberties was more enlightening. "No one shall be discriminated against because of his sex, creed or its lack, views, ethnic or social origin, membership in an ethnic minority, birth, race, language, property, illness or handicap, or for any other reason." Polish Charter of Rights and Liberties, art. 4, § 2, *supra* note 23.

33. POL. CONST, ch. II, art. 33. The Polish Constitution promises gender equality, but the social reality is that Poland, like many other countries (including the U.S.), has not yet achieved social and economic equality. Women are employed in a wide variety of professions and occupations, including high positions in government and in the private sector. However, the U.S. State Department reports that Polish women frequently are paid less for equivalent work, mainly hold lower level positions, are discharged more quickly, and are less likely to be promoted than men. Ministry of labor statistics report that the unemployment rate is higher for women than men, and despite a generally higher level of education, women average 30 percent less earnings than men. Public discussion of sexual harassment is relatively new, but women are increasingly speaking out against it. While laws specifically addressing sexual harassment do not exist, the new Criminal Code states that whoever takes advantage of a position of power in a relationship to gain sexual gratification may be sentenced to prison for up to three years. A Supreme Court advisory opinion stated that such a relationship can occur between employers and employees, between a supervisor and an employee in a subordinate position, but not between persons of equal rank. The U.S. Department of State concluded that in 1999, Violence and societal discrimination against women and ethnic minorities persist." Bureau of Democracy, Human Rights and Labor, U.S. Department of State, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: POLAND, § 5, *Discrimination Based on Race, Sex, Religion, Disability, Language and Social Status* (last modified Feb. 25, 2000)<http://www.state.gov/www/global/human rights/1999 hrpreport/poland.html>. *See also* U.S. DEPARTMENT OF STATE, POLAND COUNTRY REPORT ON HUMAN RIGHTS PRACTICES OF 1998, *reprinted in* Human Rights, the Helsinki Accords, and the United States, Series 1, Book 23A, at 1415 (Igor I. Kavass, ed., 1999).

men and women have an equal right to employment, promotion and compensation creates a right for women that does not exist in many other countries, but also creates an obligation for employers to respect that right.

The Polish Constitution guarantees rights to workers in the areas of employment and labor law. "Everyone shall have the freedom to choose and to pursue his occupation and to choose his place of work."[34] "Everyone shall have the right to safe and hygienic conditions of work."[35] Employees have "the freedom of association in trade unions," and "trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute."[36] These sections are important from a historical context because in communist Poland workers were not free to pursue their chosen occupation and often had to endure poor work conditions. Polish workers engaged in a long and difficult struggle with the Communist Party to win the right to unionize, and it was

[34] Pol. CONST, ch. II, art. 65, § 1.

[35] *See id.* at art. 66, § 1. This article states, "the methods of implementing this right and the obligations of employers shall be specified by statute." Standards do exist for exposure to chemicals, dust and noise, but the U.S. State Department reports that they are exceeded routinely. In the first six montlis of 1999, there were 41,286 work-related accidents reported: 226 were killed, and 589 were seriously injured. Many accidents in the private sector go unreported. The labor union Solidarity contends that the problem is not with the law, which does establish safety standards. The problem is with enforcement. A small number of inspectors make enforcement difficult, and employer sanctions for illegal behaviors are minimal. *See* Bureau of Democracy, Human Rights and Labor, *supra* note 34, at § 6(e), *Worker Rights /Acceptable Conditions of Work.* Given Poland's interest in EU membership, it is likely that Polish labor law and practice will evolve in the direction of Western European standards on worker codetermination of the workplace environment. In every German company with more than six employees, workers have the right to elect a works council that is legally independent of both union and management. Works councils must agree to changes affecting the work environment. If agreement can not be reached, the matter goes to arbitration. *See* Lowell Turner, *Prospects for Worker Participation in Management in the Single Market*, in LABOR AND AN INTEGRATED EUROPE 45, 63-67 (Lloyd Ulman et al. eds., 1993). *See also*, Wolfgang Streeck, *The Rise and Decline of Neocorporatism,* in Labor AND AN INTEGRATED EUROPE 80, 104-106 (Lloyd Ulman et al. eds., 1993). Legally mandated work councils or worker safety committees in the Netherlands, Luxembourg, France, Belgium and Denmark give workers more control over occupational safety than U.S. workers. In Sweden, union run safety committees may order production stopped if they believe a hazard exists. *See also* DENNIS R. Briscoe, International Human Resource Management 165 (1995). Polish companies have begun using worker boards, similar to the German model, but their influence has not yet reached the level of their Western European counterparts. , Richard SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS Environment, 648 (4rth ed. 1999).

[36] POL. CONST, ch. II, art. 59. Despite Poland's long history of labor union activism and the importance of the Solidarity Trade Union in the overthrow of Communism, only about 13% of Polish workers belong to a union. Newly established small and medium sized firms are generally non-union, while union activity generally has been carried over from the formerly state-owned firms into the newly privatized firms. Unions have the right to strike, but it is highly regulated, and there is a lengthy process that must be followed prior to the strike in order for the strike to be legal. The process may require the parties to take their dispute to the labor courts prior to the strikes. Regulatory penalties are minimal, and in the opinion of the U.S. State

Department, are not effective deterrents to illegal labor practices by either employers or unions. *See* Bureau of Democracy, *supra* note 34, at § 6(a) *Worker Rights /The Right ofAssociation, §* 6(b) *Worker Rights/The Right to Organize and Bargain Collectively.*

the union strikes of the 1980's that precipitated the demise of Poland's communist government. These sections affirm hard won employment and labor rights and create an obligation on the part of government and employers to respect them.

The substantive protections in the Constitution are only words on paper unless procedural rules exist for enforcing them. Many of the Soviet style constitutions failed to provide procedural protection. However, the drafters of the Polish constitution provided three administrative procedures for enforcing constitutional rights.

The first administrative avenue for enforcing individual rights is through a court of law. "Everyone shall have the right to compensation for any harm done to him by any action of an organ of public authority contrary to law. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms and rights."[37]

The second approach involves petitioning the Constitutional Tribunal. The Tribunal, established in 1982, adjudicates the constitutionality of laws and regulations much like an appellate court. Tribunal members are appointed by the Sejm[38] for four-year terms and have legal expertise and superior qualifications. Once appointed, members of the Tribunal are independent and are to be bound only by the constitution. Findings of unconstitutionality are now final and binding.[39] "[E]veryone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or other normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution."[40]

The third approach to procedural protection involves intervention by the Office of the Commissioner of Citizen's Rights. The Sejm created the Citizen's Rights office in 1987 to act as a people's ombudsman, safeguarding individual civil rights and liberties. The office investigates infractions of Polish law on behalf of private citizens and organizations and reviews adverse actions by public officials, institutions or organizations. The Commissioner may confront the accused official, express displeasure, and negotiate change in official action or behavior. The Commissioner also may request the initiation of civil, criminal or administrative

37. POL. CONST, ch. II, art. 77.

38. *See supra* note 21.

39. *See* Bureau of Democracy, *supra* note 33, at § 1(e), *Respect for the Integrity of the Person, Including Freedom From: Denial of Fair Public Trial.* Prior to October, 1999, findings of unconstitutionality could be overturned by a two-thirds majority vote of the Sejm. *See also* FEDERAL RESEARCH DIVISION OF THE LIBRARY OF CONGRESS, A COUNTRY STUDY 196 (1994); Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe*, 41 AM. J. COMP. L. 153 (1993).

40. POL. CONST, ch. II, art. 79. Individuals may not petition the Tribunal directly. Only authorized organs and officials may do so. *See* MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND 148-151(1998).

proceedings against government officials. The Office may appeal a government action to the Constitutional Tribunal, or appeal a judicial ruling to the Supreme Court if it violates the Constitution.[41] "In accordance with the principles specified by statute, everyone shall have the right to apply to the Commissioner for Citizens' Rights for assistance in protection of his freedoms or rights infringed by organs of public authority."[42]

Despite its democratic protections, the Constitution leaves some unanswered questions for foreign businesses. To what extent do these constitutional rights extend to non-citizens? While the constitution clearly limits the actions of public authorities, it is unclear on the limits of private activities. Would a business owner that discriminated based on sex, or interfered with an employee's freedom of religion, or did not provide safe working conditions, or interfered with an employee strike, create a private cause of action for violation of individual rights and be subject to make reparation for injuries? Although the rights and responsibilities of employers and employees will be more clearly defined in the evolving Polish statutory law, the Constitution does not clearly answer these questions. Despite these unanswered questions, the constitution sets a strong foundation for a free market democracy and sets the stage for a favorable business climate.

B. *The Judicial System*

For Poland to attract new business, it also needs a dependable and fair judicial system. The Charter of Rights and Liberties and the Constitution will have little impact without enforcement through an independent judicial system. Prior to reform, the Polish judiciary was not independent of the government. The judiciary operated as a mechanism to control the people and the economy and to accomplish the objectives of the Communist Party (PZPR). Courts were not allowed to adjudicate the constitutionality of statutes, and constitutional review was the sole responsibility of the Communist controlled legislative branch.[43]

[41] *See* FEDERAL RESEARCH DIVISION, *supra* note 39, at 197. The office has been very popular among Polish citizens. It received 55,000 complaints in 1988 alone. It also brought 14 appeals to the Supreme Court and lodged two motions with the Constitutional Tribunal. In a 1990 opinion poll, the ombudsman enjoyed the highest popularity of any Polish politician. *Id. See also* BRZEZINSKI, *supra* note 40, at 79, 80 & 227.

[42] POL. CONST, ch. II, art. 80.

[43] *See* Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AM. J. COMP. L. 153 (1993). "Marxist-Leninist jurisprudence rejected the doctrine of separation of powers and assumed that the three traditional branches of government work together under the leadership of the Party." *Id.* at 158. "The communist regime in Poland rejected the concept of judicial review as a 'reactionary institution."' *Id.* at 165-166. "The ruling elite in Poland argued that the socialist theory of 'unity of state power' granted Parliament the highest position in the state apparatus and asserted that no other governmental branch or agency may curtail its supremacy. Courts could not review parliamentary statutes because this would constitute a limitation of the sovereign rights of Parliament, thus in effect rendering the

The 1989 Round Table Agreement announced the return of an independent judiciary, a familiar concept to the Polish people that was rooted in the constitution of 1791. In 1989, the Sejm created the National Judicial Council, a twenty-four member council of judges from national, district and local courts, to oversee the entire judiciary and establish judicial standards. Judgeship candidates are now nominated by the council and appointed by the president. By 1992, most communist political appointees left the Supreme Court. Many new judges have been recruited from qualified academic and legal positions to fill the courts at all levels.[44]

The Supreme Court, the highest judicial body in Poland, has supervisory authority over the district, provincial and appellate courts. Employing over one hundred judges, it is divided into four chambers: criminal, civil, labor and social insurance, and military. The Supreme Court hears appeals from lower courts and interprets and clarifies the law. As a result of judicial reform, Supreme Court Justices are now appointed for life from a list prepared by the National Judicial Council. A lifetime appointment makes it easier forjudges to exercise independent judgement free from political bias. The Supreme Court has final appellate jurisdiction over civil and criminal matters, but not over constitutional matters, which remain the responsibility of the Constitutional Tribunal.[45]

Poland's Supreme Administrative Court reviews administrative acts and standardizes administrative regulations. It also hears citizen complaints about the legality of administrative decisions. It is based in Warsaw and has branches in several major cities.[1]" In 1999, regional administration and governance in Poland was divided among 16 provinces (*voivodships*), over 300 districts *(powiaty)* and over 2000 communes *(gminy).* District Courts were established for one or several communes within one *voievode.* Provincial Courts (*voivodship* courts) have been established, with most serving a single province. District Courts are the courts of first instance for most legal disputes, including criminal, civil, labor, family, and real estate matters. The Provincial (*voivodship)* Courts hear some appeals from the

judiciary superior to Parliament." *Id.* at 166. "Judges in the communist system constituted part of the state's coercive apparatus, and the judicial branch, like other organs of state power, existed primarily to promote the political interests of the Party." *Id.* at 167. "All Polish judges received legal indoctrination and ideological training, and the process of judicial appointments and dismissals was carefully designed to assure political reliability of judges." *Id.* at 167-168. " Judges who could no longer guarantee political loyalty could be recalled by the Council of Slate upon the motion of the Minister of Justice." *Id* at 168.

[44] FEDERAL RESEARCH DIVISION, *supra* note 39, at 194. However, many effective judges and prosecutors have left public service for the more lucrative private sector. Bureau of Democracy, *supra* note 33, at § 1(e), *Respect for the Integrity of the Person. Including Freedom From: Denial of Fair Public Trial.*

[45] FEDERAL RESEARCH DIVISION, *supra* note 39, at 195. *See also* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, *Poland Law Digest*, POL 1-2,12-13 (2000).

[46] *See* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, *supra* note 45, at POL 13; FEDERAL RESEARCH DIVISION, *supra* note 39, at 196; Commercial Law Center Foundation, *Structural and Administrative Reform in the Polish Judiciary-Report and Recommendations* (visited July 24, 2000) <http://www.prawo.org.pl/ prawo/clcf/commentary/reforms.html>.

district courts. They are also the courts of first instance for more serious or complicated cases as defined by statute. Within the Provincial Courts, and some District Courts, specialized divisions, known as Commercial Courts, have been created. Their jurisdiction covers commercial activity conducted by business enterprises and other economic entities. The Antimonopoly court is an autonomous unit within the *voivodship* court in the City of Warsaw, and hears appeals from decisions of the Office of Protection of Consumers and Competition.[47] The Courts of Appeals hear appeals from the Provincial Courts and supervise the District and Provincial Courts.[48]

The revised judicial system has set the foundation for enforcement of the constitution and the rule of law. Although foreign new business investors may have legitimate concerns about system efficiencies, the availability of arbitration and alternative dispute resolution centers throughout Europe should limit the risk associated with judicial inefficiencies. The judicial system is fundamentally sound, and the inefficiencies can be accommodated as part of a complete business strategy.

C. *Demonopolization*

Prior to its return to a free market economy, Poland was not a good place for foreign new business investment. Most business was controlled by state owned monopolies and competition was seen as contrary to socialist ideals. For foreign investors to return to Poland, businesses need to feel confident that there will be a free and competitive market for their goods and services.

Since 1990, Poland has embarked upon an extensive program to change its economic structure from a state-controlled monopoly to a competitive free market economy. The overall responsibility for the privatization process was given to the Ministry of Ownership Transformation.[49] The Ministry had oversight of two types

[47] *See infra* notes 59 & 60 and accompanying text.

[48] *See generally*, MARTCNDALE-HUBBELL INTERNATIONAL LAW DIGEST; *Poland Law Digest*, POL 1-2,12-13 (2000); Commercial Law Center Foundation, *Overview of the Polish Judiciary* (last modified Feb. 23, 1999) <http://www.prawo.org.pl/prawo/clci71egal/judiciary.html>. Polish judicial facilities vary considerably, but most are outdated and overcrowded. In the Warsaw-Praga Regional Court, the Commercial Law Center Foundation of Warsaw reports one small office shared by seven judges, and ten judges sharing two courtrooms. Because even continuous use of the two courtrooms could not accommodate all ten judges, trials often are conducted in makeshift office courtrooms measuring three meters by three meters. A few courts, such as the *voivodship* court in Suwalki, have been reconstructed and are modem and spacious. Although the constitution promises an independent judiciary, the financial commitment of the government has been minimal. From 1989-1995, total budgetary outlays for the judicial system and the prosecutorial system combined were only 1.5% of total government spending. Commercial Law Center Foundation, *supra* note 46.

[49] *See* Law on Creation of the Office of The Minister of Ownership Transformation, of July 13, 1990, DZIENNHC USTAW (Journal of Laws), No. 51 (1990), item 299. *See also* Law on Privatization of July

of privatization, transformation[50] and liquidation.[51] In transformation, the state company remained an entity throughout the privatization process. In liquidation, the company was dissolved and the assets were leased or sold to other companies or individuals.

State enterprises chosen for transformation were first organized as joint stock companies. Boards of directors were appointed, and corporate shares, initially owned by the Polish Treasury, were created. These shares were then sold in one of three ways: 1) initial public offerings; 2) trade sales, sale of the enterprise to single investors through competitive bidding; or 3) mass privatization, the use of banks and investment funds to distribute the shares to large numbers of adult citizens throughout Poland.[52]

The Law on Privatization[53] was passed in 1990 with ambitious objectives. The goals of transferring half of the industrial state-owned assets to private investors within three years, and an ownership structure comparable to that of the average European Community country within five years were not reached. The Ministry was fairly successful using liquidation to accomplish its objectives in the privatization of small and medium sized enterprises. However, the privatization process for larger enterprises did not move forward fast enough to meet the program's original objectives.[54]

The process was revised in 1996 when The Law on Commercialization and Privatization of State Owned Enterprises[55] replaced the Law on Privatization.[56] The Minister of the State Treasury and the Privatization Agency now controls the process. Commercialization is now the first step, where viable state enterprises are transformed into joint stock or limited liability companies. Shares of the companies remain the property of the State Treasury until they are distributed through direct or indirect privatization. Direct privatization is most likely for small to medium sized enterprises and involves the sale of the enterprise and its assets to third parties. Indirect privatization, more likely with large enterprises, involves the sale of ownership shares through public offering, public written tender offers, or

13, 1990, DZENNBC USTAW, NO. 51 (1990), item 298, *translated in* 4 CEEL *supra* note 24 at release 2, 12/90.

[50] *See* Law on Privatization, at an. II, *supra* note 49.

[51] *See id.* at art. IV.

52. *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INDUSTRY IN POLAND, STRUCTURAL ADJUSTMENT ISSUES AND POLICY OPTIONS 33-34 (1992)

[53] *See supra* note 49.

54. *See* organization for Economic Co-operation and Development, *supra note* 52, at 38.

55. *See* DZIENNK USTAW, No. 18 (1996), item 561.

[56] *See supra* note 49.

negotiations with investors. For enterprises where liabilities exceed revenues, the Ministry may choose liquidation as an option over privatization.[5]

The Ministry of State Treasury reported 8453 registered state owned enterprises in 1990. By the end of 1999, over 60% had participated in the privatization process. Others have been liquidated. By 2000, 80% of all registered companies operate in the private sector, generating approximately 61% of the Gross Domestic Product and employing 65% of the working population. Only 2599 state- owned enterprises were still registered by the end of 1999, but many of these are large inefficient enterprises, employing large numbers of people, which will be more difficult to privatize.[58]

Another reason for delay in total privatization is that Poland does not want to trade its state-controlled monopolies for privately controlled monopolies. It must progress cautiously to avoid creating private companies that dominate key markets and eliminate competition. The Antimonopoly Office was created in 1990 to promote competition. By 1991, it employed 106 lawyers, economists and essential staff. In the first nine months of 1990, it considered 200 cases of monopolistic practices (i.e., tie-in contracts and price gouging), 261 cases of merger and restructuring activity harmful to competition, and 13 appeals.[59] To provide legislative support for the Antimonopoly Office, the Antimonopoly Law of the Republic of Poland[60] was passed in 1991, "to ensure the development of competition, to protect economic entities from monopolistic practices, and to protect the interests of consumers." This statute ordered the Minister of Justice to establish a separate organizational unit in the *voivodship* court in Warsaw to deal with all anti-monopoly cases. This court often is referred to as the Antimonopoly Court.

The Antimonopoly Law outlaws anti-competitive activities and illegal "monopolistic practices," including:

- imposing onerous contract terms
- acquiring shares of stock when such acquisition could lead to significant weakening of competition
- agreements setting prices among competitors

[57] *See* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, *Poland Law Digest,* POL 25 (2000); Polish Agency for Foreign Investment *[PA!Z\, The Polish Privatisation Process* (visited May 24, 2000) <http://www.paiz.gov.pl/privatisation.htm>.

[58] *See PAIZ, supra,* note 57.

[59] *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *supra note* 52, at 46.

[60] *See* Law on Counteracting Monopolistic Practices, of Feb. 24, 1990, as amended on June 28, 1991, DZIENNK Ustaw NO. 14 (1990), item 88, DZIENNK USTAW No. 65 (1991), item 279 (amendments); and DZIENNK USTAW NO 89 (1991), item 403 (consolidated text, *translated at* 4 CEEL, *supra* note 24, at release 18, 5/93) [hereinafter Antimonopoly Act].

- agreements dividing a market according to criteria of territories, product group or entities
- agreements restricting the market access of economic entities
- abusing a dominant position on a market by a) dividing the market according to territories, product groups, or entities, or b) setting resale prices and selling below cost of production in order to eliminate competitors.[61]

The Antimonopoly Law also regulates pricing. Economic entities in monopolistic positions are prohibited from limiting production, sale or purchase of commodities that lead to an increase in sales prices, or a reduction in purchase prices. Also, economic entities in monopolistic positions may not refrain from the sale of commodities to increase prices, and they may not charge "excessive, exorbitant prices."[62] Contracts that constitute illegal monopolistic practices or illegal pricing practices are void in whole or in relevant part.[63] The statute gives the Antimonopoly Office broad powers such as ordering monopolistic practices to cease and issuing orders to reduce prices.[64] Business entities planning a merger must notify the Antimonopoly Office, which may prohibit the merger if the result would be to gain or maintain a dominant position in the market.[65] It may order the division of an enterprise that permanently restrains competition.[66] The Office may conduct inspections[6] and fine violators up to 15% of the revenue earned in the preceding year.'[8] Decisions of the Antimonopoly Office may be appealed to the *voivodship* court (Antimonopoly Court) in Warsaw,[69] whose decisions are final.[70]

Poland's antimonopoly law has many parallels to antitrust law in the United States. Section 2 of the Sherman Act makes it a crime to "monopolize" or "attempt to monopolize." [1] Articles 4 and 5 of Poland's Antimonopoly Act make "monopolistic practices" illegal. Horizontal price fixing is a *per se* violation of section 1 of the Sherman Act.[73] Setting prices among competitors violates Article 4

61. *Id.* at art. 4 & 5. A dominant position is presumed if market share exceeds 40%. *See id.* at art. 2, §7.

62. *See id.* at art. 7.

63. *See id.* at art. 8, § 2.

64. *See id.* at art. 8.

65. *See id.* at art. 11.

66. *See id.* at art. 12.

67. *See id.* at art. 20.

68. *See id.* at art. 14.

69. *See id.* at art. 10.

70. *See id.* at art. 25.

71. Sherman Act § 2, 15 U.S.C.A § 2 (1998); *see e.g.*, Bonjomo v. Kaiser Aluminum and Chem. Corp., 752 F.2d 802 (3[d] Cir. 1984).

72. *See* Antimonopoly Act, *supra* note 60, at art. 4 & 5.

73. 15 U.S.C.A § 1 (1998); *see e.g.*, United States v. Socony-Vacuum Oil Co 310 U.S. 150 (1940).

of the Antimonopoly Act. [4] Horizontal market division is a *per se* offense under section 1 of the Sherman Act.[75] "Dividing a market according to criteria of territories, product group or entities" violates the Antimonopoly Act. [76] Section 8 of the Clayton Act outlaws interlocking corporate directorates.[77] Article 4 of the Antimonopoly Act prohibits "having the same person combine the functions of director, or member of the board, supervising council, or audit commission in competing economic entities when they have a combined market share of more than 10% of the market."[78] Section 3 of the Clayton Act[79] and Section 1 of the Sherman Act regulate tying contracts.[80] Article 4 of the Antimonopoloy Act outlaws "making the conclusion of a contract contingent on having the other party accept or perform another service not connected with the object of the contract which would not otherwise be accepted or performed if there were a choice."[81] The Robinson- Patman Act limits price discrimination by sellers among competitors.[82] Article 5 of the Antimonopoly Act outlaws "selling commodities in a manner that leads to offering privileged status to certain economic entities or other entities."[83] Numerous other comparisons could be made, but for U.S. companies doing business in Poland, it is reasonable to assume that competitive practices that violate principles of U.S. antitrust law, are also likely to violate Polish antimonopoly law.

Similarities in remedies also exist. The Polish Antimonopoly Office can conduct inspections,[84] fine violators,[85] expect notification of mergers,[85] prohibit mergers and "order the division of an enterprise that permanently restrains competition."[87] The Federal Trade Commission, operating in cooperation with the U.S. Department of Justice and the federal courts, also has the power to inspect, fine, regulate mergers and break up monopolies.[88] Differences exist in the remedies for violation of the law, for example Polish law does not allow for the private

[74] *See* Antimonopoly Act, *supra* note 60, at art. 4, § 2(1).

75 *See* 15 U.S.C.A § 1 (1998); *see e.g.,* United States v. Topco Assoc. 405 U.S. 596 (1972).

76. See Antimonopoly Act, *supra* note 60, at art. 4, § 2(2).

[77] *See* Clayton Act § 8, 15 U.S.C.A 19 (1998).

[78] *See* Antimonopoly Act, *supra* note 60, at art. 4, § 1(4).

[79] 15 U.S.C.A § 14 (1998).

[80] 15 U.S.C.A § 1 (1998), *see e.g.,* Northern Pacific Railway Co. vs. U.S., 356 U.S. 1 (1958).

[81] Antimonopoly Act, *supra* note 60, at art. 4, § 1(2).

[82] *See* Robinson-Patman Act § 2, 15 U.S.C.A §§ 13(a)-13(f) (1998).

[83] Antimonopoly Act, *supra* note 60, at art. 5, § (3).

[84] Antimonopoly Act, *supra* note 60, at art. 20.

[85] *See id.* at art. 14.

[86] *See id.* at art. 11, §(1).

[87] *See id.* at art. 11, §(2).

[88] *See generally,* Sherman Act, 15 U.S.C.A §§ 1-7; Clayton Act, 15 U.S.C.A §§ 12, 13, 14-19, 21, 22-27; 29 U.S.C.A §§ 52, 53; Robinson-Patman Act, 15 U.S.C.A §§ 13, 13a, 13b, 21a; and Federal Trade Commission Act § 5, 15 U.S.C.A. § 45.

recovery of treble damages,[89] while the U.S. law does not allow the Federal Trade Commission to order the reduction of prices.[90]

In a little over a decade, Poland has changed from a communist state to a democratic state, from a controlled economy to a free market economy. It ratified a new constitution and passed extensive new legislation aimed at ensuring that these changes stay in place. An administrative system has been created to continue the privatization process, control the spread of monopolistic practices and maintain the expansion of a free and competitive marketplace. With an improving political, legal and economic environment Poland is an attractive area for market expansion for many U.S. businesses. An understanding of the legal aspects of doing business in Poland is important for any business expanding into Poland.

III. DOING BUSINESS IN POLAND - EXPORTING FROM THE UNITED STATES

A. *Export regulation in the United States*

Although various strategies exist for doing business in Poland, the one with the least risk to U.S. businesses is exporting goods from home facilities to agents or end users in Poland.[91] To export legally requires compliance with U.S. export laws and Polish import laws and customs procedures. An export license may be required to export goods from the United States. U.S. Department of Commerce regulations create the presumption that no export licenses are required unless specifically stated in the regulations.[92] Important questions to ask, however, are: 1) what kind of product is it? 2) where is the product going? 3) who will use it? and 4) what will it be used for? Goods moving from the United States to Poland generally require the exporter must prepare a Shipper's Export Declaration (SED). Since most goods shipped to Poland do not require a license, U.S exporters can usually report no license required (NLR) on the SED form.[93]

[89] *See* Clayton Act § 4, 15 U.S.C.A § 15 (1998).

[90] *See* Antimonopoly Act, *supra* note 60, at art. 8, § (3).

91. *See e.g.*, J. Kim DcDee & John A Pearce II, *Eastern Euro-Markets: Strategies for United States Finns*, 12 INT L J. Mgmt. 315 (1995); Laura P. Pincus & James A Belohlav, *Legal Issues in Multinational Business Strategy: To Play the Game You Have to Know the Rules* 10 ACAD MOMT EXECUTIVE, No. 3, at 52 (1996).

[92] 15 C.F.R. 730.

93. *See generally* RICHARD SCHAFFER ET AL., INTERNATIONAL BUSINESS LAW AND ITS ENVIRONMENT, 493-521 (4 ed. 1999); RALPH H. FOLSOM ET AL., INTERNATIONAL TRADE AND INVESTMENTS 143-166 (1996); CAROLYN HOTCHKISS, INTERNATIONAL LAW FOR BUSINESS 240-250 (1994).

Exports are controlled through the licensing process primarily for political and economic reasons.[94] Goods classified under any of the following areas are more likely to fall under government control and require a license: AT (antiterrorism), CB (chemical and biological weapons), CC (crime control), MT (missile technology), NS (national security), NP (nuclear non-proliferation), RS (regional stability), SS (short supply), and XP (computers).[95]

Although most goods can be shipped from the U.S. to Poland without a validated license,[96] exporters should take great care when exporting goods that require a license such as items with potential military applications or goods that could somehow have an impact on national security. Penalties can be severe[97] if the exporter knew or should have known that a validated license was needed,[98] or if the

[94] U.S. policy on export controls is set forth in the Export Administration Act. *See* Export Administration Act, 50 U.S.C.A. app. § 2402 (1999).

> It is the policy of the United States to use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary -
>
> (A) to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States;
>
> (B) to restrict the export of goods and technology where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations; and
>
> (C) to restrict the export of goods where necessary to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand

[95] *See* SCHAFFER Et AL., *supra* note 93, at 498.

[96] Until a few years ago Poland was one of the countries where exporters were likely to need a validated license. The United States and sixteen other developed countries were members of the Coordinating Committee for Multilateral Export Controls (COCOM). This group coordinated restrictions on the export of goods with military applications to Soviet bloc countries including Poland. COCOM restrictions made it difficult to export high technology equipment to these countries because of their potential for military application. In 1990 the United States and Poland entered into a trade agreement concerning the control and use of technology which included giving vendors inspection rights. With the collapse of the U.S.S.R. and the end of communist controlled governments in Eastern Europe, COCOM was dissolved in March of 1994. U.S. export controls on many items of telecommunications and computer equipment for Eastern Europe were removed in April of 1994. Today, most high technology products, particularly communications equipment, can be shipped to Poland. *European Update - Doing Business in Poland, available in* 1991 WL 11687 (D.R.T.) at § 6.2.4 *Restrictions on Exporting High-Tech Products to Poland* (May 5, 1995 update). *See also* SCHAFFER Et AL., *supra* note 93, at 494; HOTCHKISS, *supra* note 93, at 241.

[97] The penalties for violation of the Export Administration Act (EAA) can be severe. A business that "willfully" violates the statute can be fined SI million, or five times the value of the exports, whichever is greater. An individual can be fined up to $250,000 and sentenced to up to 10 years in prison. The Secretary of Commerce can suspend, revoke or deny the authority to export goods. Property can be forfeited. *See* 50 U.S.C.A app. § 2410 (1991); 15 C.F.R. 764.3. These penalties may not be available to the government at present because Congress allowed the EAA to lapse in 1994. President Clinton extended the provisions of the EAA through Executive Order 12924 by declaring a state of emergency. *See* International Emergency Economic Powers Act (IEEPA), 50 U.S.C.A §§ 1701-1706 (1999). The penalties provided for under the IEEPA are less than those of the EAA *See* § 1705.

[98] *See e.g.,* Dart v. United States, 548 F.2d 217 (D C. Cir. 1988). William Dart planned to ship to Czechoslovakia two wafer polishers used in the manufacture of high-grade integrated circuits for computers.

exporter knew or should have known that the buyer of goods was likely to deliver the goods to an unauthorized destination." If the exporter determines that a validated license is required, an application for the license must be completed and submitted to the Commerce Department's Bureau of Export Administration (BXA) Office of Export Licensing (OEL), along with any required documentation. The OEL reviews the application, and if necessary will refer it to other federal agencies with review authority, such as the Department of Defense, Department of Energy, Department of State, Intelligence Community, Department of Treasury and the Office of Foreign Assets Control (OFAC).[100] If the license is granted, the exporter must complete a Shipper's Export Declaration and a Destination Control Statement. After the goods are shipped the exporter must complete a Record of Shipments.[101]

B. *Import regulation in Poland*

Part of Poland's radical economic restructuring program involved the liberalization of import restrictions. The two part strategy involved first removing most import licensing requirements and giving everyone the right to import goods. The second part of the strategy was to lower tariffs and to remove import quotas that made importing from non-communist countries so difficult in the past. Poland's association agreement with the European Union and other free trade agreements[102] require Poland to eliminate most trade barriers between European nations.[103] Poland hopes to maintain a free trading system that is comparable to most Western countries.[104]

By 1999, Poland continued to require licenses or concessions for the import of certain strategic goods such as police and military products, radioactive elements, weapons, transportation equipment and chemicals. A license also is required to

The machines were seized by customs in Los Angeles and Dart was charged with attempting to ship goods without the proper validated license. The Secretary of Commerce fined Dart $150,000 and prohibited him from exporting for fifteen years. Although the court of appeals reversed the penalty set by the secretary, the case still demonstrates the importance of obtaining the proper license for these types of goods. Penalties can be imposed if the exporter knew or should have known that a validated license was needed. *See id.*

[99] *See e.g.*. United States v. Elkins, 885 F.2d 775 (11th Cir. 1989) *cert. den.* 110 S.Ct. 1300 (1990). Elkins was sentenced to ten years in jail and a fine of $6,000,000 for his part in the export of thirty jets to a German corporation, which then were diverted to Libya. An export license to Libya would not have been granted. Since a Libyan national controlled the German company, the court ruled Elkins knew or should have known that the planes were likely to be diverted to Libya. Since there are still many in Poland with communist backgrounds, exporters should exercise caution when there is any possibility that export controlled goods may be diverted to an unauthorized destination. *See id.*

[100] *See* SCHAFFER Et AL., *supra* note 93, at 505.

[101] *See id.* at 511.

[102] *See supra* notes 4 & 5 and accompanying text.

103. See PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN POLAND 65 (2000).

104. *See European Update, supra* note 96, at § 6.2.1 *Import Licensing Requirements.*

import alcoholic beverages, gas, and certain agricultural products (including dairy, poultry and tobacco products). A phytosanitary import permit issued by the Plant Quarantine Inspection Service is required for the import of all live plants, fresh fruits, and vegetables into Poland. Veterinary permits are required to import meat and meat products, livestock, semen and embryos. Some goods are still subject to import quotas, including gasoline, diesel fuel, heating oils, wine and other alcohol, cigars and cigarettes.[105]

The Ministry of Economy issues import permits and concessions and regulates quotas. The list of products facing import restrictions is always subject to change. Although licensing requirements have been abolished for most products, and access to the Polish marketplace is far freer than under communism, the list of U.S. products facing import regulation grew in the late 1990's.[106] U.S. exporters must periodically check for changes in regulation to determine which licenses, quotas or other restrictions apply prior to shipping goods to Poland.

Imported goods, along with the proper documentation, must be presented to customs for clearance. In 1992 Poland adopted a single administrative document (SAD) that must accompany goods imported into Poland. The Polish SAD is essentially the same as the European Union SAD. The form has numerous questions asking for information about the goods, the importer, and the country of origin.[107] Other documents must accompany a SAD when transporting goods into and across Poland. These include:

- customs value declaration
- original invoice or other documents which prove the customs value
- bill of lading
- account number at the importer’s bank and its statistical number
- certificate of origin
- specification of goods if not contained in the invoice
- import permit (if required)[108]

[105] *See FY 2000 Country Commercial Guide, supra* note 4, at ch. VI, § E, *Import License Requirements.*

[106] *See id.* By contrast, goods from Europe face fewer restrictions because of agreements made by Poland to get into the European Union. *See supra* notes 4 & 5 and accompanying text.

[107] *See FY 2000 Country Commercial Guide*, *supra* note 4, at ch. VI, § G, *Special Import/ Export Requirements and Certificates;* PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN Poland 67 (2000).

[108] *See* BUSINESS LAW GUIDE TO POLAND 13-17, (Claudia Seibel ed., CCH Europe 1996). *See also European Update, supra* note 96, at § 6.2.3 *Customs Procedures',* PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN POLAND 67 (2000).

Goods exported to Poland may be subjected to customs fees (tariffs). As a member of the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization (WTO), Poland made numerous revisions of its customs coding system in 1993 to bring it into line with international customs nomenclature.[109] Tariffs and the customs classifications are based on the Harmonised System of Coding and on the Harmonised Description of Commodities developed by the International Customs Cooperation Council and applied in most countries.[1,0] The Polish Nomenclature System is applied and consistently adjusted to comply with modifications adopted by the European Union and the World Customs Organization."[1]

The Minister of Finance determines the rates for customs tariffs and duties.[112] These rates are subject to change at the beginning of each year.[113] The Antimonopoly Office has been active within the government in arguing against tariffs and other trade barriers.[114] In 1993, duties on high technology goods not produced in Poland, but used in Polish industries, were reduced or eliminated to encourage the improvement of Polish industrial competitiveness.[115] In addition, Poland has established a few duty free zones throughout the country.[116] Tariffs can range from zero to 400%, but after a revision of customs rates in 1999, the average rate of duty on new customs was 2.1% for industrial goods and 15.8% for agricultural and food products.[117] In 1992, Poland signed an Association Agreement with the European Union. Poland agreed to lower or eliminate tariffs on many products imported from the EU to Poland. Although the U.S. has negotiated for more favorable rates for some U.S. products, many U.S. companies are at a competitive disadvantage to European exporters who, under the EU agreement, will be able to ship goods into Poland without tariffs or duties.[118]

109 *See, e.g., European Update, supra* note 96, at § 6.2.3, *Customs Procedures.*

110 *See id.* at § 6.2.2, *Import Quotas and Tariffs*:; *FY 2000 Country Commercial Guide, supra* note 4, at ch. VI, § A, *Trade Barriers, Including Tariffs, Non-Tariff Barriers and Import Taxes.*

111 *See* PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN POLAND 65 (2000).

112 *See* MARTINDALE-HUBBELL INTERNATIONAL LAW DIGEST, *Poland Law Digest,* POL 20 (2000).

113 *See FY 2000 Country Commercial Guide, supra* note 107.

114 *See* ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INDUSTRY IN POLAND, STRUCTURAL ADJUSTMENT ISSUES AND POLICY OPTIONS 47 (1992).

115. See *European Update, supra* note 96, at § 6.2.2, *Import Quotas and Tariffs.*

116. Since 1994, 17 Special Economic Zones have been created. The number of duty free zones has declined in the late 1990 s because of government action to limit the number of zones in response to EU pressure. By 1999, only seven free trade zones remained; Gliwice (southern border), Malaszewicze/Terespol (eastern border), Przemysl-Medyka (eastern boarder), Warszawa-Okecie International Airport, Szczecin (Baltic port), Swinoujscie (Baltic port) and Gdansk (Baltic Port). *See FY 2000 Country Commercial Guide, supra* note 4, at ch. VII, § 0, *Foreign Trade Zones/Free Ports; European Update, supra* note 96, at § 6.2.2, *Import Quotas and Tariffs.*

117. *See FY 2000 Country Commercial Guide, supra* note 4, at ch. VI, § C, *Tariff Rates.*

118 *See id.* at ch. VI, § A, *Trade Barriers.*

All goods exported to Poland must be properly packaged and labeled. Polish labeling and packaging requirements vary depending on the product. Packaging must clearly contain the country of manufacture. Consumer goods require a product description on the inside of the packaging. Packaged or canned food products require Polish language labels stating the product's composition and weight, its nutritional value, a "best-before" date, and the name and address of the producer.[119]

Under Poland's testing and certification law, many products must pass a certification process and have packaging that includes the "B mark" (for "*bezpieczenstwo*," safety in Polish) on the packaging before they can be passed through customs. The list of products requiring the B mark is diverse and is modified every year. Hazardous products and those that protect life, health and the environment must be certified and carry the B mark. In 1999 about 1400 different products required the B mark[120] including fuels, machines, household chemicals, electrical goods, building materials and transportation vehicles.[121] Testing for B mark certification is done by the Polish Center for Research and Certification (PCBC) at one of fifteen authorized institutes supervised by the PCBC.

Testing for the B mark can be lengthy. Regulations require that the process take less than three months. However, regulations increasing the number of products requiring the B mark have greatly increased the work load of the institutes and make it difficult for them to meet deadlines. Poland is working with the European Union to make the B mark certification process consistent with the European CE mark certification. Companies and products that have earned foreign certifications such as the European CE mark and ISO 9000 can accelerate the Polish certification process.[122] Because the list of products requiring B mark certification is subject to change, exporters should consult with Polish authorities on the need for certification prior to shipping goods to Poland.[123] Companies selling goods that do not display the B mark or which are manufactured in conflict with B mark requirements can be fined up to 100% of the value of the products sold.[124]

C. *Establishing an Office in Poland*

Businesses that import goods for resale in Poland require a foreign trader's license. Foreign suppliers may create sales agencies or distributorships in Poland.

[119] *See id.* at ch. VI, § *H, Labeling Requirements.*

[120] *See id.* at ch. VI, § L(l), *"B " Safety Certificates.*

[121] *See Business Opportunities in Poland*, *supra* note 5, at § 13, *Export and Import Restrictions.*

[122] *See FY 2000 Country Commercial Guide*, *supra* note 120.

[123] *See id.* U.S. exporters may also contact the Commercial Serv ices Office Warsaw, operated by the U.S. Department of State, to determine if their products are subject to certification requirements. *See id.*

[124] *See Business Opportunities in Poland*, *supra* note 121.

They may be established and operated either by the foreign supplier or a Polish national. Either way, permits must be obtained to set up such companies, but once they are established, their trading activities no longer need to be specifically licensed. All Polish companies may freely import goods and services that they need to carry out their manufacturing or service activities.[125]

A U.S. company may wish to open an office in Poland to carry on economic activity that facilitates the export process, without forming a joint stock company or a limited liability company.[126] Polish regulatory law creates three options for creating a "foreign representation." "A foreign enterprise may establish a representation in the form of: 1) a branch or an agency, 2) a technical information office, or 3) a supervisory office."[127] These offices are treated as part of a foreign company and do not have the status of a separate legal entity.[128] They are considered exporters of foreign products. The offices may not engage in retailing or manufacturing activities and may hold inventory only for marketing and service purposes.[129] A representative office may employ either foreign citizens or Polish citizens.

A branch office or agency of a foreign enterprise may conduct "economic activity in the area of foreign trade, transport, tourist and cultural services."[130] A branch agent may offer, negotiate and sign contracts on behalf of the foreign entity it represents, and it can supervise contract performance. In addition, it may search for customers, promote, advertise and publish information for the company. A branch may install equipment for Polish customers, maintain an inventory of spare parts and provide technical and warranty service on the equipment. A branch office may not produce or store goods and requires a permit from the appropriate Ministry.[131]

[125] *See id.*

[126] *See infra* notes 139-143 and accompanying text.

[127] Foreign Representations Regulations, DZ1ENNK USTAW 1976, No. 11, Item 63,1 2, with later amendments Dz. U. 1984, No. 26, Item 133, *translated in* POLISH SOCIETY OF ECONOMIC, LEOAL AND COURT TRANSLATORS, POLISH BUSINESS LAW 897 (1992). *See also* PRICEWATERHOUSECOOPERS, *supra* note 111, at 86.

128. *See Business Opportunities in Poland, supra* note 5, at §. 6, *Forms of Business Entities for Foreign Investors.*

[129] *See FY 2000 Country Commercial Guide, supra* note 4, at ch. IV, § F, *Steps in Establishing an Office.*

[130] Foreign Representations Regulations, DZIENNK USTAW 1976, No. 11, Item 63, H 1, *translated in* POLISH SOCIETY OF ECONOMIC, LEGAL AND COURT TRANSLATORS, POLISH BUSINESS LAW 89 (1992). *See also* PRICEWATERHOUSECOOPERS, *supra* note 111, at 86. (The branch office is the type of representative office most frequently established by foreign companies.)

131. For most foreign trade, the Ministry of the Economy must give the permit. The State Sport and Tourism Administration would issue a permit for a tourism branch or technical office. The Ministry of Transportation would issue a permit for an international transportation branch or office. The Ministry of Culture would issue permits for cultural services branches or offices. *See Business Opportunities in Poland,*

A technical information office is limited to providing scientific and technical information about the products and services of the foreign enterprise. It may not engage in marketing or sales activities or any other type of commercial activity. A permit is required to establish a technical information office.[132]

A supervisory office may be established to supervise the performance of a business contract between a foreign company and a Polish company. It may oversee the installation of equipment by Polish personnel, but it may not engage in commercial or information activities. No permit is required. It can be established through the wording of a contract and should be set up only for the duration of the contract. Supervisory offices are common for ship building contracts and other limited life construction contracts, but would not be appropriate for longer term business relationships.[133]

The relaxation of import/export regulations over the past decade in both the U.S. and in Poland, along with pent-up demand for U.S. goods, makes Poland an attractive target for many U.S. exporters. Although U.S. exporters may sometimes be at a competitive disadvantage to exporters form other European countries, Poland offers an open and potentially profitable market for U.S. exporters willing to take on the European challenge.

IV. DOING BUSINESS IN POLAND - BEYOND EXPORT / IMPORT

Any business strategy for entering the Polish market beyond export / import may require additional investment of time and capital, and the assumption of additional risk. In writing about entry strategies for U.S. firms entering newly independent Eastern European countries, one commentator has identified six strategies: 1) export/import, 2) licensing, 3) joint venture, 4) franchising 5) consortia and 6) manufacturing/wholly owned subsidiary.[134] All six methods are possible ways of expanding into the Polish market under current Polish commercial law.

supra note 5, at § 6, *Forms ofBusiness Entities for Foreign Investors*; PRICEWATERHOUSECOOPERS, *supra* note 111, at 86.

[132] Foreign Representations Regulations, DZIENNK USTAW 1976, No. 11, Item 63,1 5, *translated in* POLISH SOCIETY OF ECONOMIC, LEGAL AND COURT TRANSLATORS, POLISH BUSINESS LAW 88 (1992). *See also* PRICEWATERHOUSECOOPERS, *supra* note 111, at 87; *Business Opportunities in Poland, supra* note 5, at § 6, *Forms of Business Entities for Foreign Investors.* (Only 10 percent of all foreign offices are technical offices.)

[133] *See Business Opportunities in Poland, supra* note 132; PRICEWATERHOUSECOOPERS, *supra* note 111, at 87.

[134] Avraham Shama, *Entry Strategies of U.S. Finns to the Newly Independent States, Baltic States, and Eastern European Countries,* 37 CAL. Mgmt. Rev. 90, 91 (1995). *See also* J. Kim DeDee & John A Pearce II, *Eastern Euro-Markets: Strategies for United States Firms,* 12 INT'L *J. OF* MGMT. 315 (1995) ; Laura P. Pincus & James A Belohlav, *Legal Issues in Multinational Business Strategy: To Play the Game You Have to Know the Rules*, 10 ACAD. MOMT. EXECUTIVE, No. 3, at 52 (1996).

Polish business law recognizes the concept of a joint venture, but uses the term in a broader context than customarily applied within the U.S. In Poland, the term is used to signify any company with foreign participation, even one that is wholly owned by foreign investors. In general, no permits are required to set up a joint venture.[135] Most types of business entities are open to foreign investment.[136] Foreign parties generally are not required to obtain a permit to incorporate a Polish company or to acquire shares of an existing company. However, permits are required when foreign parties establish a company that acquires an ownership interest in some state owned enterprises or in real estate. Before starting certain business activities a permit, license or concession is required. These restricted activities include:

- banking services
- insurance services
- telecommunication serv ices
- research and extraction of minerals
- manufacture of tobacco products
- production and trade in alcohol
- production and trade in pharmaceuticals
- international vehicle transport
- tourist services
- protection of persons and property services[137]

Any joint venture "allowing foreign parties to participate in income from the operation of enterprises within the territory of the Republic of Poland"[138] must be organized as either a limited liability company, or a joint stock company.[139] A limited liability company is the most common structure for small and medium sized businesses. It is also the most common form of business organization for foreign firms doing business in Poland. The founders must create articles of association in the form of a notarial deed and have them notarized by a Polish notary public. The

135. *See* Sergio Salani & Jerry Sloan, *An Overview of Legal and Financing Aspects for Doing Business in Hungary, Poland, and the Czech Republic,* 9 TEMP. INT'L & COMP. L. J. 27, 29 (1995).

136. *See* PRICEWATERHOUSECOOPERS, *supra* note 111, at 74.

137. *Id- See also* Robert L. Drake. *Legal Aspects of Financing in Czechoslovakia, Hungary, and Poland.* 26 INT'L LAW. 505, 525-526 (1992).

138. *See* Law on Companies with Foreign Participation, of June 14, 1991,at art. 1 , § 2 . DZIENNIK USTAW, No.60 (1991), Item 253, *translated at* POLISH SOCIETY OF ECONOMIC, LEGAL AND COURT TRANSLATORS, POUSH BUSINESS LAW 59-73 (1992).

139. *See id. See* generally, Jozef Frackowiak, *Poland,* in 3 INTERNATIONAL ENCYCLOPEDIA OF LAWS, CORPORATIONS AND PARTNERSHIPS, POLAND -1 (K. Geens ed. 1996). (Presenting a thorough review of Polish law on business organizations.) *See also Business Opportunities in Poland, supra* note 5, at § 6, *Forms of Business Entities for Foreign Investors',* PRICEWATERHOUSECOOPERS, *supra* note 111, at 70-87.

articles are then submitted to the Commercial Registration Court for review. When approved by the court, they are then recorded in the Commercial Company Register.[140] They must also receive a statistical number ("REGON") from the appropriate Provincial Statistical Office.[141] The limited liability company has a legal status that is separate from its founders and shareholders. It can be wholly owned by one or more persons. Its governing body is the management board. The board's members are appointed by the shareholders unless the notarial deed requires otherwise.[142]

To incorporate a business entity as a joint stock company a minimum of three founders (or promoters) must create the company charter in the form of a notarial deed. It must be registered under a process similar to that of the limited liability company. If shares of stock are sold by subscription of the general public, approval must first be obtained from the Polish Securities Council. A management board of one or more directors is elected by the shareholders at a general meeting. The board members are the legal directors of the company, and are responsible for managing all commercial activity of the business. Larger joint stock companies may have both a supervisory board and an audit commission, each composed of a minimum of five members. The members oversee the activities of the management board and the performance of the company, and they present written reports to the shareholders at the general meetings that must be held within four months of the end of each financial year.[143]

Partnerships are also recognized under Polish business law. They are not separate legal entities, but are recognized as economic entities capable of entering into commercial relationships in the partnership name. The partners are jointly and severally liable for partnership debts and are taxed individually for their respective share of the income of the business. Polish commercial law recognizes three types of partnerships: 1) civil partnership, 2) registered partnership, and 3) limited partnership. The civil partnership is a simple or general partnership and is the most common type of partnership. It has no capital requirements or restrictions and need only be registered in the local administration office. Those who engage in more complex business activities must organize as a registered partnership and are required to register with the Commercial Company Register. The limited

[140] There are four steps for establishing a limited liability company: 1) execution of the company agreement, 2) effective contribution of the entire initial capital, 3) appointment of members to the company's bodies, and 4) entry into the commercial registry. *See* Commercial Code, DZIENNK USTAW 1934, No. 57, item 502, Dz. U. 1991, No. 94, item 418, art. 160, *translated in* 4 CEEL, *supra* note 24, at release 29, 3/95. *See generally,* BUSINESS Law GUIDE TO POLAND 96-99, (Claudia Seibel ed., CCH Europe 1996).

[141] *See Business Opportunities in Poland, supra* note 5, at § 6, *Forms of Business Entities for Foreign Investors.*

[142] *See id.'.* Satani & Sloan, *supra* note 135, at 39; Drake, *supra* note 137, at 522.

[143] *See generally,* BUSINESS LAW GUIDE TO POLAND, *supra* note 140, at 99-104; PRICEWATERHOUSECOOPERS, DOING BUSINESS AND INVESTING IN POLAND 75-80 (2000).

partnership is a special type of registered partnership that was recognized in 1991. One or more general partners is responsible for the management of the company and has unlimited liability. The limited partners have liability no greater than the extent of their capital contribution. Both the registered partnership and the limited partnership are rarely used in Poland. All partners in a registered partnership, and general partners in a limited partnership, must assume the high risk of joint and several liability. For more complex business activities, Polish business owners generally prefer the reduced risk and greater flexibility of separate legal entity status available as a limited liability company or a joint stock company.[144]

A foreign person or corporation may not be a partner in a Polish partnership. In addition, foreigners may not establish sole proprietorships. However, foreign investors may form limited liability companies and joint stock companies. Both may be fully owned by foreign investors, and are still considered Polish legal entities. As such, a joint stock company or a limited liability company may enter into a partnership agreement, even if fully owned by foreign investors.[145]

If doing business in Poland requires ownership of land, then the formation of a joint stock company or limited liability company is recommended. Foreign parties may have difficulty acquiring ownership of land,[146] but Polish companies with foreign shareholders may do so with the permission of the Ministry of the Interior.[14]

Polish business law has changed in the past decade. Most of the change has been positive for foreign new business investors. The evolution, however, is not complete. Portions of the pre-communist commercial code are still part of Polish business law. As Poland moves toward full EU membership, it must complete the process of harmonizing Polish business law with EU business law. U.S. firms that

144 *See generally.* BUSINESS LAW GUIDE TO POLAND, *supra* note 140, at 83-86; PRICEWATERHOUSECOOPERS, *supra* note 143, at 85-86.

145 *See* PRICEWATERHOUSECOOPERS, *supra* note 143, at 73 & 87.

146. See Law on the Acquisition of Real Estate by Foreign Persons of March 24, 1920, as amended, DZIENNK USTAW (1933) no. 24, item 202, DZIENNK USTAW (1988) No. 41, item 325, DZIENNK USTAW (1990), no. 79, item 466, *translated at* 4 CEEL *supra* note 24, at release 28 1/95. Article I prohibits a foreigner from acquiring real estate w ithout a permit from the Minister of the Interior in cooperation with the Minister of the Defense, and after consultation with other appropriate ministers. A 1996 amendment to the law allowed foreign individuals to own small amounts of real estate without a permit. *See also Y2000 Country Commercial Guide, supra* note 4, at chap. VII, sect. A, *Openness to Foreign Investors.* A recent Act enacted in Poland s parliament bans foreigners from buying Polish farmland for 18 years and industrial land for six years. It still allows for the purchase of small plots of land, up to one half hectare (one acre.) The legislation is popular among many Poles, particularly Polish farmers, but could delay entry of Poland into the European Union. *See The Poles Bargain With Europe,* ECONOMIST NEWSPAPER, U.S. ED., July 31, 1999, at 1.

147. See Sergio Salani & Jerry Sloan, *An Overview of Legal and Financing Aspects for Doing Business in Hungary, Poland, and the Czech Republic*, 9 TEMPLE INT'L & COMP L.J. 27, 44 (1995); Robert L Drake, *Legal Aspects of Financing in Czechoslovakia, Hungary, and Poland* 26 INT'L LAW. 505,527(1992).

invest the time and money to compete in EU states should find Poland a comparable business risk once Poland achieves a compatible regulatory system.

V. Contract Enforcement

Any business strategy will have increased risk if contractual agreements cannot be enforced. In 1993, a group of European lawyers investigated improvements in Poland's commercial arbitration law. The panel found that the country's handling of trade disputes met high standards. Their conclusion was that foreign business people can expect fair treatment. However, U.S. businesses can expect a lack of expertise in international trade among some of their Polish partners and Polish legal council.[148]

A potential question that should be considered in every international business contract is: what body of law' will be used to resolve any dispute? Polish law allows the parties to a contract to choose any law to regulate their contract, as long as the law is related to the obligation of the parties.[149] The parties could choose U.S. law, or Polish Law, or an applicable body of international law, such as the U.N. Convention on International Sale of Goods (CISG). Arbitration is used frequently to resolve international business disputes and also could be chosen by the parties.[150] No business strategy is complete without a contract that includes not only a choice of laws clause, but also a choice of forum clause. For example, if the parties agree in advance on the choice of arbitration to resolve disputes, what type of arbitration will be used? How will the arbitrators be selected, and where will the arbitration take place? Answers to all these questions should seriously be considered in advance, and included in the contract.[151]

An arbitration clause is included in most international business contracts as a means of avoiding foreign courts when dispute resolution is needed. U.S. companies should seriously consider including an arbitration clause in contracts with Polish entities. The U.S. Department of State has described the Polish court system as "cumbersome, poorly administered and under funded." Court decisions are frequently not implemented, and a simple civil case can take as long as two to

148 Salani & Sloan, *supra* note 147, at 41.

149 *See* Martindale-Hubbell International Law Digest, *Poland Law Digest*, POL 16 (2000); Salani & Sloan, *supra* note 147, at 44.

150. *See* Martindale-Hubbell, *supra* note 149, at POL 16. "Polish law provides for dispute resolution only through judicial proceedings and arbitration. There are generally no statutes or rules for out- of-court proceedings such as mediation, fact finding or minitrials." *Id.*

151 One option within Poland is the National Economic Chamber's Arbitration Court in Warsaw. Its principles of arbitration are based on rules of the former college of arbitrators within the Polish Chamber of Foreign Trade, established in 1947. *See id.*

three years before resolution.[152] As of 1999, no major investment dispute with a foreigner had been resolved in Polish Courts.[153] Poland is a party to the U.N. Convention on the Recognition and Enforcement of International Arbitration Awards (New York, 1958) and the European Convention on International Commercial Arbitration (Geneva, 1961). Since the United States is also a party to the New York Convention, decisions of international arbitration bodies should be enforced and awards executed by the courts of either the United States or Poland.[154]

What if the parties have not agreed on a choice of law to resolve disputes? Since both Poland and the United States have ratified the CISG,[155] if the contract is for the sale of goods,[156] and one party's place of business is in Poland and the other party's place of business is in the United States, then the body of law that will apply is the CISG. If the parties wish, they can "opt out" of the CISG. However, this will not happen unless they specifically wave the applicability of the CISG in the contract.[1'] If a contract, with no choice of laws clause, were made between a Polish party and a business incorporated in Poland as either a joint stock company or a limited liability company, the appropriate law would be Polish Law. The CISG would not apply, even if all shareholders were U.S. citizens, because Polish law considers the joint stock company, or limited liability company, a Polish legal entity. If the contract is not for the sale of goods, and the parties are domiciled in

[152] Bureau of Democracy, *supra* note 33. at § 1(e) *Denial of Fair Public Trial.* Many effective judges and prosecutors have left public service for the more lucrative private sector. Bailiffs normally ensure the execution of civil verdicts such as damages. However they are underpaid, and have a mixed record of implementing court decisions. *See also* Commercial Law Center Foundation, *Structural and Administrative Reform in the Polish Judiciary-Report and Recommendations* (visited July 24, 2000) <http://www. pravvo.org.pl/prawo/clcf/commentary/reforms.html>. The Foundation reports that because judicial salaries do not compete with the private sector, trial court judges are often young, inexperienced and lack proper training. Because their knowledge and understanding of the law is limited, they often err in their decisions. This leads to a high number of appeals, which compounds the serious problem of overcrowding in the judicial system. *See id.*

153. See Y2000 Country Commercial Guide, supra note 4, at ch VII, § D, *Dispute Settlement.*

154. Although arbitral awards have the same legal effect as a judgement by a regular Polish court, and should be executed by the lower courts of general jurisdiction, *see* MARTINDALE-HUBBELL, *supra* note 128, at POL 16, given the current state of the Polish judicial system, there is no guarantee of the enforcement of arbitration awards. In 1996, the German firm Saarpaper Vertrieb GmbH won a decision in the Arbitration Court of Zurich against the Polish government. So far Poland has refused to pay the sum ordered by the arbitrator. *Y2000 Country Commercial Guide*, *supra* note 4, at ch VII, § D, *Dispute Settlement.*

155. See Louis F. Del Duca & Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part II)*, 29 U.C.C. L. J. 99, 103 (1996) (listing in note 3, all of the states that have ratified the CISG as of May 8, 1996).

156. *See generally* Louis F. Del Duca & Patrick Del Duca, *Practice Under the Convention on International Sale of Goods (CISG): A Primer for Attorneys and International Traders (Part I)*, 27 U.C.C. L. J. 331 (1995). Note that the CISG does not define "contract for sale of goods," but there is a consensus in the international community that "sale of goods" involves a contract to transfer ownership from a seller to a buyer for a price and that "goods" generally refer to items that are movable. *See id* at 347-48

157. *See id.* at 346.

different jurisdictions, the law of the country where the contract was consummated applies.[158] However, international conflicts of law questions are often complex and confusing. Omitting a choice of laws clause because a general conflicts of law principle supports one's preference in law would be a risky strategy.

VL Repatriation of Profits and Currency Risk

Poland was the first in Eastern Europe to introduce the free internal convertibility of its currency.[159] The Polish zloty can be exchanged for U.S. dollars at commercial banks and foreign exchange houses at an exchange rate subject to fluctuating money market forces. Since 1991, foreign investors have been allowed to transfer 100% of their after tax profits out of the country if they so desire.[160] In the case of a dividend, this may be done only after the financial year-end, once an audit certificate has been issued and the necessary taxes have been paid. The initial investment in capital also may be freely repatriated.[161]

Repatriation of profits will subject U.S. companies to the risk of fluctuating exchange rates. The Polish currency suffered rapid devaluation in the early 1990's, which led the National Bank of Poland to re-dcnominate the zloty on January 1, 1995. The new zloty was given the same value as 10,000 old zloty and new currency and coins were issued.[162] The National Bank of Poland was able to stabilize the value of the zloty in the latter 1990's by tying its value to a basket of Western currencies made up of the U.S. dollar (45%), the German mark (35%), the British pound sterling (10%), the Swiss franc (5%), and the French franc (5%). Government policy allowed for the creeping devaluation of the zloty at a rate broadly matching domestic inflation (approximately 0.3 percent per month in 1999)i« jhe impact of this policy was to establish a moderately stable currency that declined slowly but consistently relative to the dollar.[164] By March 2000 the government felt the zloty was stable enough to abandon the crawling peg and made the currency free-floating. Despite the moderate increase in volatility since frec-

[158] *See* Salani & Sloan, *supra* note 147, at 44-45.

[159] *See id.* at 43.

160. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INDUSTRY IN POLAND, STRUCTURAL ADJUSTMENT ISSUES AND POLICY OPTIONS 40 (1992).

[161] *See Y2000 Country Commercial Guide, supra* note 4, at ch. VII, § B, *Conversion and Transfer Policies.* Poland's 1991 Law on Companies with Foreign Participation, *supra* note 117, and the Foreign Exchange Law, of Dec. 18, 1998, DZIENNIK USTAW (1998) No. 160, item 1063, *translated in* 4 CEEL, *supra* note 24, at release 62, allow for the full repatriation of after tax profits and dividends and the return of capital investments without a permit. *See also,* PRICEWATERHOUSECOOPERS, *supra* note 143, at 71.

[162] *See* Embassy of the Republic of Poland, *Facts about Poland. Currency* (visited Feb. 23, 2001) <http://www.polishworld.com/polemb/english/info/page7.htm>.

[163] *See id. See also* PRICEWATERHOUSCOOPERS, *supra,* note 143, at 16.

[164] *See* Appendix B.

floating the currency, Polish monetary authorities have promised to refrain from routine intervention to manage the zloty. Reserves and policy authority have been maintained to respond to any potential currency crisis. Poland's goal for the next few years is to join the European Union as soon as possible. Once a member they plan to enter the European Exchange Rate Mechanism and adopt the euro as the Polish currency.[165]

Most signs are positive for foreign new business expansion in Poland. In the short run the currency risk will be moderately higher than Western European EU members, but lower than the risk for the other formerly communist states of Central and Eastern Europe. Depending on the success of the euro, within the EU and on international currency markets, the longer term currency risk in Poland may be comparable to that of its Western European neighbors. Global businesses that can manage the risk of other European currencies should not avoid the Polish market out of fear of the zloty.

VII. **Conclusion**

The economic, political and legal changes in Poland over the past decade have been rapid and far-reaching. Poland has moved toward establishing a free and democratic society and a free market that is open to foreign goods and investment. The Polish people are anxious for greater access to foreign goods, and the Polish government is encouraging more foreign investment. A great opportunity exists for business in Poland, but foreign businesses moving into the Polish market should proceed with caution. The Polish constitution has been ratified and provides a stable framework for the rule of law. However, the rapid evolution of the law is not yet complete. New laws have been passed in the last decade but the courts have not had the opportunity to apply and interpret the new statutes and regulations. Few precedents have been set. and some surprises in legal interpretation are always possible in the future. In addition, new statutes will be created as new and unforeseen problems arise. Although Director Kulczycki[166] has argued that the democratic process is irreversible, foreign businesses need to be alert to counter trends. Privatization of larger enterprises has not progressed as rapidly as was first projected. Unemployment is still high in some areas and leads to discontent and

[165] *See* U.S. Department of State, *FY 2001 Country Commercial Guide: Poland,* ch. 7, § M, *OP1C and Other Investment Insurance Programs* (released July 2000Xvisited Feb. 23, 2001)<http://www. state.gov/www/about_state/business/com_guides/2001/europe/poland_CCG2001.pdP> **In a** pole of Polish citizens taken February 10-12, 2001, only 23% said they are ready to part with the zloty two years after joining the EU, the earliest possible time new members can adopt the euro after membership. Agence France Presse, *Majority of Poles Against Quick Adoption of Euro* in Poland Today; Central Europe Online, (released Feb. 26, 2001) <http://www.centraleur.. .om/polandtoday/ news.php3?id=297893>.

[166] *See* Kulczycki, *supra* note 2.

labor strife. In times of future economic stress, labor uprisings could be a problem for the government, even a democratically elected one. Democracy does not guarantee free market capitalism. Recent elections in Poland and other Eastern European countries have seen victories by former communists running under new party names. Although their supporters do not want to go back to the old days of communism, many are not yet willing to give up their old socialist ideals. The future impact of these developments is yet to be seen. Foreign businesses entering the Polish market should be alert to whatever these changes may bring. Despite these concerns, the evolution of the past decade makes Poland an attractive target for export and business expansion. The business, economic and regulatory risk is moderate, and the risk of new business in Poland is less than for most of its Central and Eastern European neighbors. Businesses willing to take on the risk and rewards of global markets, and who are interested in moving into Central and Eastern Europe, should consider doing business in Poland.

Appendix A

International Agreements

Poland has become a signatory to numerous international treaties, conventions and associations, which reduces some of the risk of doing business in Poland.

Polish international agreements include:

1) Accord Establishing the World Trade Organization [WTO] (1994)
2) Association Agreement between European Union and Poland (1991)
3) Central European Free Trade Agreement (1992)
4) European Free Trade Agreement (1992)
5) U.N. Convention for the International Sale of Goods [CISG](1980)
6) U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York 1958)
7) European Convention on International Commercial Arbitration (Geneva, 1961)
8) Bern Convention on Protection of Literary and Artistic Works (Bern 1886)
9) Universal Convention on Copyright (Geneva 1962)
10) Paris Convention on Protection of Industrial Property (Paris 1883)
11) Convention for the Avoidance of Double Taxation and the Prevention of Fiscal

Evasion with Respect to Taxes on Income (Washington, D.C. 1974)[167] Poland has membership

in numerous international organizations. These include:

1) European Bank for Reconstruction and Development [EBRD]
2) International Bureau of Weights and Measures
3) North Atlantic Treaty Organization [NATO]
4) Organization of Economic Co-operation and Development [OECD]
5) United Nations [UN]
6) International Bank for Reconstruction and Development [IBRD or World Bank]
7) International Monetary Fund [IMF]
8) United Nations Industrial Development Organization [UNIDO]

167. See MAKTINDALE-HUBBELL, *supra* note 149, at POL 27 (providing a more thorough list of Polish international agreements).

9) World Trade Organization [WTO][168]

Poland also has signed numerous treaties with the United States that could have an impact on commercial transactions. Bilateral agreements have been reached on agricultural commodities, settlement of claims, copyright protection, environmental cooperation, finance, foreign exchange, customs, shipping, trade and commerce, taxation and others.[169]

[168] See CIA WORLD FACTBOOK 1999, *supra* note 15 (providing a more thorough list of Polish international organizations). *See also* Walden Publishing Ltd., *Country Reports-Poland* (last modified June 17, 1999), *available in* LEXIS NEXIS Academic Universe, Country Profiles file.

[169] *See* U.S. DEP'T OF STATE, Treaties IN FORCE 238 (providing a thorough list of U.S. treaties with Poland and other international agreements of the U.S. in Force on Jan. 1, 1999).

Appendix B

Polish Zloty per U.S. Dollar Monthly Average and Annual Average Exchange Rates[170]

	2000	1999	1998	1997	1996	1995
January	4.1036	3.5417	3.5316	2.9273	2.5110	2.4342
February	4.1439	3.7948	3.5386	3.0279	2.5442	2.4438
March	4.0902	3.9430	3.4593	3.0793	2.5760	2.3934
April	4.2347	4.0016	3.4194	3.1212	2.6214	2.3942
May	4.4988	3.9368	3.4188	3.1713	2.6716	2.3926
June	4.3994	3.9431	3.4789	3.2385	2.7145	2.3446
July	4.3229	3.8827	3.4592	3.3965	2.7147	2.3652
August	4.3593	3.9510	3.5850	3.4817	2.7291	2.4399
September	4.4900	4.0799	3.6066	3.4566	2.7781	2.4616
October	4.6369	4.1092	3.4955	3.4223	2.8189	2.4429
November	4.5606	4.2527	3.4496	3.5033	2.8158	2.4718
December	4.3126	4.1696	3.4858	3.5256	2.8579	2.5098
Yearly Average Rate	4.3464	3.9675	3.4937	3.2808	2.6965	2.4244
Yearly Avg. % Change	9.6%[171]	13.6%	6.5%	21.7%	11.2%	

170. National Bank of Poland, *Statistics, Time Series, Exchange Rates* (visited February 26, 2001)<http://www.nbp.pl/eiVstatislies/czasowe/kursy.html>. In 1995 the National Bank of Poland redenominated the old zloty and issued new currency and coins. In March 2000 NBP discontinued its crawling peg management of exchange rates and the zloty became a free-floating currency.

171. In 2000, on average, it took 9.6% more zloty to buy a dollar than in 1999. For each of the past five years, the zloty has declined in value relative to the dollar.