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## BUCKING GLOBAL TRENDS

How Poland is resisting  
the crunch

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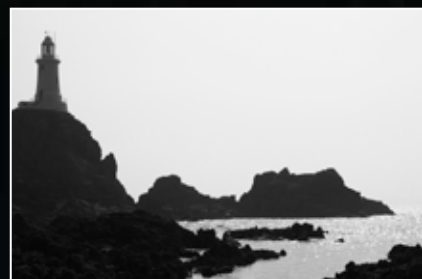
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# BUCKING GLOBAL TRENDS HOW POLAND IS RESISTING THE CRUNCH

The current economic crisis has affected the world's markets in a number of different ways. Some countries are struggling to cope with a rapid economic slowdown, while others are emerging virtually unscathed in comparison. An example of the latter is Poland, a country buoyed by export growth, industrial production and increasing levels of foreign direct investment (FDI). Ruth Saunders spoke to the partners of Kubas Kos Gaertner, one of Poland's leading law firms to find out more.



**I**n recent years the Polish economy has been characterised by a steady and significant increase not only in the number of mergers and acquisitions taking place, but also in the value of these transactions. In 2005 322 M&A transactions were completed with an aggregate value of \$7.9 billion. This figure rose to 398 transactions in 2006, with a value of \$10.6 billion and 438 in 2007 worth \$13.25 billion. However, the initial effects of the global credit crunch can be seen in the M&A figures for the first nine months of 2008, which show only 354 deals were completed totalling \$8 billion.

Poland's lack of exposure to the sub-prime market means that the current global financial crisis bears only a limited influence on the economic situation in Poland, as banks do not possess a portfolio of bad credits that could threaten their liquidity. That said, some slowdown in overall economic growth is noticeable, with predictions coming in at around 2-3% growth in 2008, as opposed to 5-6%.

Professor Andrzej Kubas said that while the effects of the global economic crisis are so far minimal in Poland there have been reports of a slowdown in certain areas of the business community. He added there had been quite a significant reduction in activity reported in the production sector, where many investments have been put on hold.

He said: "Those that export a major part of their production to Germany and other European countries are apprehensively monitoring the situation as it develops in those countries. Already, there have been some falls on export volume reported. Also, in a bid to secure themselves against the zloty getting stronger, many Polish exporters established complicated structures on the currencies markets. The fact



ADWOKACI - SPÓŁKA PARTNERSKA

that the zloty has now fallen from a rate of approximately 3 to €1 to over 4 for €1, means that many are facing a serious loss on those currency transactions."

#### A change in direction

Historically, the majority of private SMEs in Poland have developed organically, which Rafał Kos said is often due to the anxiety of Polish managers and a general lack of skills when it comes to initiating M&A transactions. "In the past it was generally believed among the owners and managers of Polish SMEs, that the strategy of growth through mergers and acquisitions is the domain of a narrow group of market leaders, who easily obtain synergies and have the resources to conduct such transactions."

He added: "Polish management teams have also been known to display an excessive attachment to their businesses, which inevitably causes a certain degree of resistance when it comes to disposing of the company, especially when the market is growing. Many have a problem accepting the fact that the transaction does not constitute a consolidation, but an actual takeover of their company."

Contrary to this, the past year has seen an increasing number of SMEs launching themselves into M&A transactions to further their growth prospects. Henryk Gaertner said: "In the last year a significant part of the Polish market has been occupied by entrepreneurs who, for the first time, have made M&A transactions the foundation of their development. In order for these transactions to be completed quickly and efficiently management teams have had to streamline their processes and establish a clear framework in order to achieve post merger success and ensure synergies between the two companies."

The present turbulence on the financial markets means that entrepreneurs and managers are having to adapt the ways in which they do business. In order to meet their ever changing needs it is important for law firms to adapt with them as well.

Kamil Zawicki said the main area of concern will be the increased risk of non-performance of obligations by their business partners. "We have recently seen some statutory amendments made to the regulation that governs the performance of obliga-

tions, such as the planned changes in mortgage regulation and registered pledges," he said. "As a result, we are concentrating this year on the effect this will have on our clients and the new measures this will enable them to take if and when the terms of a contract are contravened."

Another interesting field of activity is the proposed introduction in Poland of an institution similar to that of the American 'class action', which looks set to revolutionise the litigation market in Poland. Mr Zawicki added: "At present, there are no effective mechanisms in place to pursue group claims that occur as a result of monopolistic practices or misleading individual investors. The draft act will create the means for the execution of their claims, which is of specific interest to all lawyers dealing with litigation."

#### Foreign investment

Investing overseas has become the mainstay of developing businesses worldwide with global flows of FDI reaching a historical high of USD\$1.8 trillion in 2007, reflecting the fourth consecutive year of growth.

The size and strength of the Polish market, the low labour costs and the potential for economic growth are just some of the factors that make Poland attractive to foreign investors. According to data from the National Bank of Poland, the value of FDI in 2007 reached €16,582 million and €9,862 million in the first nine months of 2008. According to the Polish Information and Foreign Investments Agency, foreign investments in Poland are mainly directed towards the production and IT sector, with additional interest in the Business Process Outsourcing (BPO) industry. Historically, Poland's main source of FDI has been Germany, followed by France, the Netherlands, Austria, USA, Sweden, Great Britain, Spain and Malta.

While FDI levels in Poland have remained high, there has also been an increase in the number of Polish companies expanding into new overseas markets. The natural direction of Polish investments are neighbouring countries such as Ukraine, the Czech Republic and Germany, with some investments or joint ventures taking place in China and former Soviet republics such as Kazakhstan.

#### Getting it right

In times of economic crisis the level of disputes inevitably rises as companies battle it out in the court rooms in an attempt to recoup their losses. Unfortunately, a report issued by the European Commission ranks Poland among the countries with the longest time of pursuing claims, with the average duration of proceedings from the lodgement of a statement of claims to the enforcement of the claim totalling more than 800 days.

In order to avoid this situation it is necessary to secure all personal interests at the contract stage, so that if a dispute arises, full judicial proceedings are avoided as

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much as possible, or alternatively, faster and cheaper methods are employed.

Professor Kubas said: "In many cases, alternative dispute resolution methods such as arbitration and mediation allow us to provide simple solutions without the need for court action. Furthermore, the use of qualified documents is often a quicker and cheaper way of pursuing claims by writ of payment. This method allows a reduction of up to 75% on the court entry fee or the possibility to obtain a judgement without the need to hold a hearing, based solely on the documents attached to the statement of claims."

Alternative dispute resolution methods are already well developed in Poland and foreign arbitration judicature is beginning to play an ever more significant role in both arbitration and litigation. Furthermore, Poland is a signatory to the New York Convention, which guarantees international standards in the recognition and enforcement of such practices in Poland.

Following recent amendments to Poland's arbitration legislation, the scope of disputes which can be submitted to arbitration, including foreign arbitration, has been broadened. Mr Kos said: "At present, almost all disputes involving entrepreneurs from Poland may be submitted to settlement by arbitration courts abroad, and as a signatory to the New York Convention, Poland is obliged to recognise such awards quickly. Any verdict reached in courts abroad is equal in legal status to a judgement that may be issued by Polish state courts. As a result, foreign investors are able to negotiate an arbitration clause which renders it impossible for Polish adversaries to sue them before a Polish judicial forum."

However, as Mr Kos added, the devil is in the detail. "In such a situation, the key is to ensure that utmost care and diligence is applied in negotiating provisions pertaining not only to the law applicable for a clause, but also the law applicable for the subject of a litigation case and the obligations stemming from a contract," he said. "In addition to this, the correct definition of the scope of disputes which may arise from an agreement and which are to be submitted to arbitration are of particular relevance in cases of multi-subject contractual relationships, such as deeds of formation or shareholders' agreements. The court's ability to decide the outcome of such disputes should also be taken into account."

Mastering an M&A transaction on local soil can at times be tricky, therefore, structuring a transaction or investment across borders can be even trickier, as it often involves navigating unfamiliar legislation, languages and cultures. It also means that extra attention must be paid to ensuring contracts are suitably drafted in order to prevent the possibility of legal disputes.

Dominik Gałkowski said that foreign investors seeking to minimise risk with appropriately formulated contracts have two fundamental instruments at their disposal, namely a contractual allocation of risk onto a contractor and a contractual limitation of liability. He said: "The first of these elements involves reaching an agreement which covers unusual but predictable types of risk, especially those with substantial financial consequences. The second instrument, a contractual limitation of liability, is of particular significance when the damage potential (negative contractual interest) exceeds the sum of remuneration (positive contractual interest). As a result, the limitation of the entrepreneur's liability in the contract (up to the amount of their remuneration) diminishes the risk of liability on the grounds of

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failure to perform an agreed task."

It is also possible to limit not only contractual liability, stemming from the non-performance of an agreement, but also tortious liability that is the result of perpetration of a tort.

#### KKG in Poland

Kubas Kos Gaertner - Adwokaci (KKG) was established in 1995 and comprises 60 members of staff, including 48 qualified lawyers, who provide services to clients from two offices in Warsaw and in Krakow.

Mr Gaertner described the structure of the firm and the ways in which the staff work together to provide solutions tailored to individual clients needs. "Specific projects are carried out by teams created within our office who work under the direct supervision of one of the partners to provide the most effective and reliable legal advisory services to our clients. Our work is characterised by a high standard of organisation, frequent and transparent communication with our clients, as well as defined time frames and costs for each project."

The firm guarantees high formal and factual quality of the documents they prepare, which always fully reflect the current state of legal knowledge and practice, as well as the dominant direction of court judicature.

Mr Gaertner added: "The extensive and also international experience of all our partners ensures that our firm possesses a wealth of resources in the form of unique models of letters and agreements, which in turn limits the document preparation time for our clients. In effect, our clients benefit from the entirety of our professional achievements."

For more information about KKG and the work they do visit [www.kubas.pl](http://www.kubas.pl)