

September 1987

The Polish Law of 1986 on Joint Ventures

Andrzej Burzynski

Follow this and additional works at: <https://scholarship.law.ufl.edu/fjil>

Recommended Citation

Burzynski, Andrzej (1987) "The Polish Law of 1986 on Joint Ventures," *Florida Journal of International Law*. Vol. 3: Iss. 1, Article 4.

Available at: <https://scholarship.law.ufl.edu/fjil/vol3/iss1/4>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Journal of International Law by an authorized editor of UF Law Scholarship Repository. For more information, please contact kaleita@law.ufl.edu.

THE POLISH LAW OF 1986 ON JOINT VENTURES

*Andrzej Burzynski**

I. INTRODUCTION	51
II. BASIC PRINCIPLES OF THE LAW ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION	52
III. THE SCOPE OF ACTIVITY OF THE COMPANIES WITH FOREIGN CAPITAL PARTICIPATION	53
IV. WHO CAN BE A PARTNER IN COMPANIES WITH FOREIGN CAPITAL PARTICIPATION	53
V. LEGAL FORMS OF COMPANIES WITH FOREIGN CAPITAL PARTICIPATION	54
VI. PERMISSION TO ESTABLISH A COMPANY WITH FOREIGN CAPITAL PARTICIPATION — PROCEDURAL RULES	55
VII. THE COMPANY'S ECONOMIC ACTIVITY	56
VIII. FINANCE OF THE COMPANY WITH FOREIGN CAPITAL PARTICIPATION	56
IX. TAXES AND CHARGES	57
X. DISSOLUTION OF THE COMPANY	58
XI. GUARANTEES	58

I. INTRODUCTION

On April 23, 1986, the Polish Parliament passed the Law on Companies with Foreign Capital Participation. This law paved the way for foreign investors direct involvement in the economic activity in Poland.

Until then, foreign companies and individual entrepreneurs wishing to participate in Poland's economic life could do so by setting up agencies and technical offices. Beginning in 1976 they could also estab-

*Director, Legal Information and Service Center of the Polish Chamber of Foreign Trade. Master of Arts, 1961, Foreign Service College, Warsaw, Poland; Master of Law, 1963, Warsaw University of Law School; Diplome Des Etudes Superieure En Droit Compare Avec Mention Bien et Felicitation de Jury, 1968-1970, International Faculty for Teaching of Comparative Law; Doctor of Law in International Private Law, 1971, Institute of State and Law of the Polish Academy of Sciences, Warsaw, Poland.

lish light industry firms on their own or with Polish corporate bodies and natural persons. In 1982, the Banking Law expanded the scope of foreign investor activity in Poland, the establishment of banks in Poland as stock companies with foreign capital participation.

However, as foreign companies and their Polish partners have long been claiming, the Polish legal system lacked detailed regulations that would clearly and unequivocally define the rules which Polish and foreign entrepreneurs could follow to carry out a joint economic activity on a large scale.

The 1986 Law was the long-awaited act that bridged the gap.

II. BASIC PRINCIPLES OF THE LAW ON COMPANIES WITH FOREIGN CAPITAL PARTICIPATION

The Law allows foreign investors to take part in virtually any sphere of Poland's economic life, if the investment activity takes the legal form of the company and if a Polish economic organization participates. The Law does not require a minimum contribution by the foreign investor to the company's initial capital. It does, however, limit the investor's contribution to no more than 49 percent of the capital. The Law may allow an exception based on convincing economic evidence to the contribution limitation, as it does to each of its few restrictions.

To set up such a company, the parties involved must apply for a permit, and the Foreign Trade Minister in consultation with the Finance Minister must approve it.

The Law's delegation of permitting authority to the Minister of Foreign Trade, as well as its provision for substantial income tax reductions for export production, reveals its underlying intent. Its framers clearly hope that capital cooperation with foreign partners — including transfer of technology, new methods of organization, and additional financial aid from abroad — will boost the export potential of the Polish economy.

The Polish economy can reap the benefits of such a program only if foreign investors are persuaded that their investment would be safe and profitable. For this reason, after long and thorough discussion, the Parliament embodied the principles of foreign capital participation in law. Also for this reason, the Law offers the foreign investor favorable taxation terms, as well as the right to transfer abroad not only his profits but also upon dissolving the company, his contribution to the company's capital. To this end, the Law authorizes the Polish National Bank to provide guarantees to those foreign investors who fear they may incur losses because of Polish administrative decisions affecting the company's assets.

Now that we have the basic assumptions and aims of the Law, let us get down to details.

III. THE SCOPE OF ACTIVITY OF THE COMPANIES WITH FOREIGN CAPITAL PARTICIPATION

Companies with foreign capital participation can be established to perform any economic activity aimed at the production of goods and rendering of services beyond the sphere of small industry and banking, where foreign investors' activities have been stipulated by separate regulations (Law of 6 July 1982 on Foreign Corporate Bodies and Natural Persons' Economic Activity in Poland, *Dziennik Ustaw*, 1985, No. 13, item 58, and the Banking Law of 26 February 1982, *Dziennik Ustaw*, 1982, No. 7, item 56).

The permission necessary before entering any such business enterprise is subject under the Law to restrictions in certain spheres of economic activity. These certain spheres are the defense industry, railway and air transport, communications, telecommunication, insurance, the publishing industry (except for printing), and agency in foreign trade. The restraints thus concentrate mainly on areas of service activity.

However, given sufficient economic reasons, the Minister of Foreign Trade may grant permission to conduct a business enterprise in one of the sectors under restriction. It is worthwhile to emphasize here that the list of restricted activities does not include such economic sectors as the raw-materials industry or agriculture. These exclusions confirm the intention of the Law to encourage foreigners to do business in Poland.

IV. WHO CAN BE A PARTNER IN COMPANIES WITH FOREIGN CAPITAL PARTICIPATION

Just as the Law is liberal as to the scope of economic activity allowed companies with foreign capital participation, it is liberal as to the partners a company may select.

Foreign partners may be natural persons, corporate bodies, or unincorporated companies. Partners from both socialist and capitalist countries are encouraged. The Law provides to both equal access to economic activity in Poland.

Since the Law formulates a legal framework for large-scale economic activity, clearly the Polish partners are the only organizations with the adequate means to carry out such an activity since they include state enterprises, cooperatives, and vitally important universities and research institutes. These latter very often have the know-how and the patents, skillful implementation in production of which may result in significant economic achievements.

V. LEGAL FORMS OF COMPANIES WITH FOREIGN CAPITAL PARTICIPATION

In adopting legal forms of capital cooperation between Polish and foreign partners, the Law resorts to the long-tested international economic operations of companies structured according to the Polish Commercial Code of 1934. Thus, companies with foreign capital participation will operate as either limited liability companies or joint stock companies. Both forms of company, under Polish law, enjoy corporate status, with the partners liable for the company's obligations only to the extent of the partners' assets. The partners define company relations, membership of its authorities (board of directors, supervisory board), and decisionmaking procedures in the articles of incorporation.

In giving the partners decisionmaking freedom on these matters, the Law makes only one reservation: a Polish citizen and resident must be chairman of the board. This requirement facilitates contacts with local and state administration, as well as with other national organizations. According to the Law, one person elected by the company's employees always sits on the supervisory board which controls the board of directors on behalf of the Assembly of the Partners. This stipulation reconciles the prevailing right of employees to participate in the running of the enterprise with the specific legal situation of the company with foreign capital participation.

As for a partner's contribution to the company's initial capital, the Law, like the Commercial Code, stipulates that the contribution be made in cash or in kind. In the case of the foreign partner, the money contribution shall be either in foreign currency or in zlotys from a documented exchange of foreign currency. The in-kind contribution may consist of equipment, raw materials, or patents and other rights. Machinery may be either imported or purchased in Poland for zlotys. The volume and kind of the in-kind contribution should be included in the company's articles of incorporation and are subject to verification by independent experts at the request of the body which granted the permission.

The character of a company with foreign capital participation will depend in part upon its partners. Thus, a partner who enters into capital cooperation on the basis of confidence in the other partners will be interested in maintaining the membership of the partners' body.

On the other hand, no partner can be forced to remain in the company against his will. Instead, he may designate a transferee to take his place in the company. Attempting to reconcile the interests of both partners wishing to stay with the company and of those wishing to leave, the Law requires full partnership agreement on the transferee. A partner who disapproves a proposed transferee becomes re-

sponsible himself for finding an acceptable substitute. Should the transfer not materialize, the company would be dissolved.

VI. PERMISSION TO ESTABLISH A COMPANY WITH FOREIGN CAPITAL PARTICIPATION — PROCEDURAL RULES

Setting up a company requires permission from the Minister of Foreign Trade in consultation with the Minister of Finance and, if separate regulations require, with other state administrative bodies. To expedite the permit process, the Law places responsibility for permit application on the Polish partner. His knowledge is necessary to provide an adequate application. To get a permit, it is crucial to establish the probable success of the proposed company, through thorough cost-benefit analysis and precise assessment of supply and marketing possibilities.

By placing this responsibility on the Polish partner, the Law intends only to simplify the procedures the foreign investor must go through. Certainly, the Law does not mean to exclude the foreign partner from active participation in the wording of the application. Such active participation will encourage stable and long-lived capital cooperation between foreign and Polish partners. Of course, this kind of fruitful economic enterprise benefits the state, on whose behalf the permission-granting body acts, as well as the partnership.

If the company wishes to engage in foreign trade, the application must include a request for a foreign trade license. Polish foreign trade monopoly principles require that all business dealings with foreign countries, by either economic organizations or natural persons, be licensed by the Minister of Foreign Trade. Unlicensed persons may not buy or sell their goods and services abroad except through licensed foreign trade enterprises.

The permit application must include drafts of the articles of incorporation, in compliance with the Commercial Code. For a limited liability company, this would mean the company's draft contract, while for a stock company, it would mean its draft partnership agreement.

The application must also include documents presenting the prospective partners' legal and financial status. In the case of the foreign partner, such a document will include (1) an extract (duplicate) from the register where he is entered in his own country and (2) reports on his financial status issued by a competent organization in his country.

The permitting body is obliged by the Law to consider the application within three months of its submission. The decision is final and not subject to appeal.

The permission may be revoked only when the company operates against the Law or against the provisions of the permission, in violation of a prior order by the Minister of Foreign Trade to halt an activity within a given time limit. The company may be dissolved only following court decision.

Even after a company has been established, it is necessary to obtain permission from the Minister of Foreign Trade to transfer assets or shares between partners, to accept a new partner into the company, or to alter the agreement or the articles of incorporation.

VII. THE COMPANY'S ECONOMIC ACTIVITY

As to economic activity, the company with foreign capital participation is an entirely independent organization. The partners have authority through either the articles of incorporation or a resolution passed by the Assembly of the Partners, and company management is exclusively the responsibility of these managers.

Here again, as with license revocation, the respective bodies of state administration may interfere in the company's activity only when the activity violates the Law or the provisions of the permission.

The company enjoys equal rights with all larger economic organizations in Poland, that is, with state enterprises and cooperatives. Moreover, the Law of 1986 expands these rights in some areas. It allows the permission to include rules and procedures for obtaining the raw materials, machinery, and so forth that are indispensable to production, as well as rules of product marketing not envisaged for state enterprises. The following are examples of rights not accorded state enterprises:

(1) The company may obtain a license to purchase items for convertible currency if sufficient reason exists.

(2) The company may obtain the use of state land for the duration of the company's life.

(3) Any disputes between the company and national economic organizations will be settled by the court and not by state arbitration committees.

VIII. FINANCE OF THE COMPANY WITH FOREIGN CAPITAL PARTICIPATION

As with economic activity, although the company's finance is subject essentially to the same rules as the finance of state enterprises, there are some differences.

In contrast to other economic organizations operating in Poland, which are obliged to sell to the State at least 50 percent of their foreign currency proceeds, the company with foreign capital participa-

tion must sell the State only 15 to 25 percent of such proceeds. Furthermore, in some economically-justified cases, the Minister of Foreign Trade in consultation with Minister of Finance may reduce this requirement to less than 15 percent. The amount of foreign currency that must be sold to the State is established in the company's operating permit. Thus the regulating authorities and the partnership cooperate to formulate a viable company financial policy.

The company may use the remaining foreign currency as it thinks fit. It must deposit its foreign and Polish currency in a Polish bank account. However, it may also open accounts at foreign banks, after obtaining bank permission and the appropriate foreign currency permit. The company may get credits from Polish banks, or from foreign banks if it has the required foreign currency permit and permission from the Polish bank that keeps its accounts. Finally, it may get a Polish bank guarantee for its liabilities incurred in Poland or abroad.

The company may dispose of after-tax profit at its discretion. It is obliged only to form a reserve fund to cover losses shown in the balance sheet resulting from profit payments. These payments must amount to 10 percent of the annual profit. However, the company may avoid even this obligation if the fund reaches 4 percent of its operating costs in the business year.

The company is authorized to pay its Polish and foreign partners the accrued dividends in foreign currency. Also, it may pay its foreign employees 50 percent of their wages or salaries in foreign currency (with the remainder to be paid in Polish zlotys).

Both the foreign partners and foreign employees may, without any additional foreign currency permission, transfer their earnings from the company to any foreign countries. The foreign partners may also reinvest any profits due them in the company.

IX. TAXES AND CHARGES

Companies with foreign capital participation are subject to the same taxation rules and enjoy the same tax privileges and reductions as state enterprises. Thus, the company pays the turnover tax, wage tax, tax on excessive wages and remunerations, tax on property, and income tax.

Companies and foreign capital participation, however, enjoy special tax reduction and privileges not available to state enterprises. For example, a state enterprise pays a 65 percent tax on income, while companies with foreign capital participation pay only 50 percent of their gross profit. At the same time, they enjoy a 0.4 percent tax reduction for each 1 percent of the export value of production or services sold. Thus, a company that sells all its production for export must pay an income tax of 10 percent of its gross profit.

Furthermore, the company will enjoy tax exemption for the first two years of its production or service activity. This period does not cover the time spent on organization and investment prior to the company's production activity proper. The company will also be exempted from paying income tax on that profit portion earmarked for investment. Finally, a company with foreign capital participation is exempt from import duties on all things that constitute the in-kind contribution of the foreign partner, as well as on any machines, equipment, or transportation used by the company.

X. DISSOLUTION OF THE COMPANY

When the company with foreign capital participation is dissolved, its assets are sold in compliance with the Commercial Code. What remains after satisfying any creditors of the company is divided among the partners in proportion to their contribution to the company's initial capital.

By virtue of the Law, Polish partners enjoy priority to buy the rights and things that are the company's property, unless the partners have stated otherwise in the agreement. For example, the agreement may give such a right to a foreign partner concerning his non-cash contribution to the company's assets. The company's foreign partners are authorized to transfer abroad that part of the company's assets which was allotted to them after the company was dissolved.

XI. GUARANTEES

Finally, it is worthwhile to note that the Law provides for a Polish National Bank guarantee that the foreign partner can recoup the value of his contribution to the company's start-up capital, if the company incurs before-registration loss because of Polish administrative decisions affecting company assets.