

Bartosz Kucharski

POLISH COMMERCIAL LAW IN A NUTSHELL



WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

**POLISH
COMMERCIAL LAW
IN A NUTSHELL**



WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

Bartosz Kucharski

POLISH

COMMERCIAL LAW

IN A NUTSHELL

 WYDAWNICTWO
UNIWERSYTETU
ŁÓDZKIEGO

ŁÓDŹ 2015

Bartosz Kucharski – Uniwersytet Łódzki, Wydział Prawa i Administracji
Katedra Prawa Gospodarczego i Handlowego, 90-232 Łódź, ul. Kopcińskiego 8/12

RECENZENT
Wojciech Pyziol

REDAKTOR WYDAWNICTWA UL
Elżbieta Marciszewska-Kowalczyk

SKŁAD I ŁAMANIE
AGENT PR

PROJEKT OKŁADKI
Stämpfli Polska Sp. z o.o.

Zdjęcie na okładce: © shutterstock.com

© Copyright by Uniwersytet Łódzki, Łódź 2015

Wydane przez Wydawnictwo Uniwersytetu Łódzkiego
Wydanie I. W.06689.14.0.S

ISBN 978-83-7969-424-2

ISBN 978-83-7969-553-9 electronic version

Wydawnictwo Uniwersytetu Łódzkiego
90-131 Łódź, ul. Lindleya 8
www.wydawnictwo.uni.lodz.pl
e-mail: ksiegarnia@uni.lodz.pl
tel. (42) 665 58 63, faks (42) 665 58 62

TABLE OF CONTENTS

PREFACE	15
PART ONE. ENTREPRENEURS	17
Chapter One. NOTION AND SOURCES OF COMMERCIAL LAW	19
1. Object and method of regulation	19
2. Subjective and objective approach	20
3. Independence within the system of Law	21
4. Sources of Commercial Law	22
Chapter Two. ECONOMIC ACTIVITY	25
1. The notion of economic activity	25
2. Basic principles of undertaking and carrying on economic activity	26
3. Formal limits to freedom of economic activity	28
3.1. Registration	28
3.2. Concessions	29
3.3. Permits, licenses, permissions	30
3.4. Regulated activity	31
4. Material limit to the freedom of economic activity	31
4.1. Requirement of professional qualifications	31
4.2. Police and administrative conditions	32
4.3. A duty to make payments via bank account	32
Chapter Three. ENTREPRENEUR AND CONSUMER. ENTERPRISE	33
1. Notion of entrepreneur	33
2. Various kinds of entrepreneurs	34
2.1. Based on legal personality	34
2.2. Based on the main purpose of the activity carried out	35
2.3. Based on size	36
3. Notion of consumer	37
4. Notion of enterprise	37
5. Transfer of an enterprise	38
6. Registration of Entrepreneurs	39

6.1. Register of Entrepreneurs	39
6.2. Central Economic Record and Information	40
7. Commercial power of attorney	41
7.1. Notion of commercial power of attorney	41
7.2. The scope of commercial power of attorney	41
7.3. Differences in comparison to the normal power of attorney	42
7.4. Grant, revocation and expiration of a commercial power of attorney	43
7.5. Special kinds of commercial power of attorney	43
8. Business name	44
8.1. Notion of a business name	44
8.2. General principles of a business name law	44
8.3. Elements of a business name	46
8.4. Kinds of a business name	46
8.5. Legal protection of a business name	47
 Chapter Four. PARTNERSHIPS	 49
1. Introduction	49
1.1. Notion of a partnership	49
1.2. Various Kinds of a partnerships and companies	49
1.3. Unity of civil law principle	52
2. Partnership (Civil Partnership)	52
2.1. Notion of a civil partnership	52
2.2. Formation of a civil partnership	53
2.3. Property and contributions	54
2.4. Internal relations	54
2.4.1. Management of a partnership affairs	54
2.4.2. Share in profits and losses	55
2.5. External relations	56
2.5.1. Representation	56
2.5.2. Liability for the partnership obligations	56
2.6. Withdrawal of a partner	56
2.7. Dissolution of a partnership	57
3. Common Problems for commercial partnerships	58
3.1. Quasi-legal personality	58
3.2. Amendment of articles	59
3.3. Transfer of share(s)	59
4. Registered partnership	59
4.1. Notion of registered partnership	59
4.2. Differences with respect to civil partnership	60
4.3. Formation	61
4.4. Property	61

4.5. Internal relations	61
4.5.1. Management of the partnership's affairs	61
4.5.2. Capital share	62
4.5.3. Participation in profits and losses	62
4.5.4. Non-competition ban	63
4.6. External relations	63
4.6.1. Representation.	63
4.6.2. Liability	63
4.7. Withdrawal of a partner	64
4.8. Dissolution and liquidation	65
4.8.1. Reasons for dissolution	65
4.8.2. Liquidation	65
4.8.3. Liquidators	66
4.8.4. Divisions of assets or shortfalls	66
4.8.5. Deletion from the register	67
5. Professional partnership	67
5.1. Notion of a professional partnership	67
5.2. Partners – self-employed professionals	68
5.3. Liability	69
5.4. Formation	69
5.5. Management of affairs and representation. Management board	70
6. Limited partnership	71
6.1. Notion of limited partnership	71
6.2. Formation	71
6.3. Liability of a limited partner	72
6.4. Property situation of a limited partner	72
6.5. Management of affairs, representation and supervision by a limited partner	73
7. Limited joint- stock partnership	74
7.1. Notion of limited joint- stock partnership	74
7.2. Formation of limited joint-stock partnership	75
7.3. Property relations in limited joint- stock partnership	76
7.4. Management of affairs and representation	77
7.5. Supervision. Supervisory board	78
7.6. General assembly	78
Chapter Five. CAPITAL COMPANIES. TRANSFORMATIONS	81
1. Common problems for a capital companies	81
1.1. Company in organisation	81
1.1.1. Notion of a company in organization	81
1.1.2. Legal status of a company in organisation	81

1.1.3.	Liability for the obligations of the company in organisation	82
1.2.	Shares and contributions	82
1.2.1.	Notions of share, contribution, and share capital	82
1.2.2.	Kinds of contributions	83
1.2.3.	Legal ability to constitute an in kind contribution	83
1.2.4.	Time of making contributions	84
1.3.	Share capital	85
1.3.1.	Notion of share capital and its relation to a company's property	85
1.3.2.	Minimum value of share capital	85
1.3.3.	Functions of share capital	86
1.3.4.	Criticism and alternatives to share capital. Prospective reforms	86
1.4.	Rights and duties of shareholders	87
1.4.1.	Property rights	88
1.4.2.	Corporate rights	90
1.4.3.	Duties	90
1.5.	Company governing bodies	91
1.5.1.	Management board	91
1.5.2.	Supervision	94
1.5.3.	General Meeting of Shareholders/General Assembly	96
1.6.	Amendment to the articles of association/statute	100
1.6.1.	General rules	100
1.6.2.	Increase of share capital	101
1.6.3.	Decrease of share capital	102
1.7.	Dissolution and liquidation	102
1.7.1.	Reasons for dissolution	102
1.7.2.	Opening of liquidation	103
1.7.3.	Liquidators and their duties	103
1.7.4.	Distribution of the company's assets	103
1.7.5.	Termination of liquidation	104
2.	Limited liability company	104
2.1.	Notion of a limited liability company	104
2.2.	Formation	105
2.2.1.	Conclusion of articles of association	105
2.2.2.	Contributions for the entire share capital	105
2.2.3.	Appointment of the company's bodies	106
2.2.4.	Registration	106
2.3.	Shares in limited liability company	106
2.3.1.	Main characteristics of shares	106
2.3.2.	Transferability of shares	108

2.3.3.	Redemption of shares	108
2.3.4.	Ban on acquiring own shares	109
2.4.	Expulsion of a shareholder	110
3.	Joint- stock company	110
3.1.	Notion of a joint-stock company	110
3.2.	Formation	111
3.2.1.	Signing of the statutes	111
3.2.2.	Subscription of the shares	112
3.2.3.	Making contributions	112
3.2.4.	Consent to the formation of a company and to the content of the company's articles	113
3.2.5.	Appointment of the company bodies	113
3.2.6.	Registration	114
3.3.	Shares in and other documents in joint-stock company	114
3.3.1.	Share – meanings and features	114
3.3.2.	Kinds of a shares	115
3.3.3.	Transferability of shares	117
3.3.4.	Redemption of shares	117
3.3.5.	Invalidation of a share	118
3.3.6.	Ban on acquiring own shares	118
3.4.	Increase of a share capital in joint- stock company	118
3.4.1.	General rules	118
3.4.2.	Subscription of shares	119
3.4.3.	Special ways to increase the share capital in a joint-stock company	119
3.5.	Squeeze out and reverse squeeze out	121
4.	Merger, division and transformations of companies	122
4.1.	Merger of companies	123
4.1.1.	Possible configurations	123
4.1.2.	Methods of merger	123
4.1.3.	Effects of merger	123
4.1.4.	Protection of creditors	124
4.1.5.	Cross-border merger	124
4.2.	Divisions of companies	124
4.2.1.	Possible configurations	124
4.2.2.	Methods of division	125
4.2.3.	Effects of division	125
4.2.4.	Protection of creditors	126
4.3.	Transformations of companies	126
4.3.1.	Possible configurations	126
4.3.2.	Effects of transformation	127

4.3.3. Protection of creditors	127
4.4. Procedures governing merger, division and transformation	128
4.4.1. Preparatory acts	128
4.4.2. Resolutions	129
4.4.3. Registration and announcements	131
Chapter Six. BANKRUPTCY AND REORGANISATION	131
1. Bankruptcy in general	131
1.1. Notion and functions of bankruptcy	131
1.2. Types (stages) of bankruptcy	131
1.3. Kinds of typical bankruptcy proceedings	132
2. Prerequisites for Declaring Bankruptcy	132
2.1. Bankruptcy capacity	132
2.2. Insolvency	133
2.3. At least two creditors	134
2.4. Assets sufficient to cover costs	134
3. Proceedings on Declaring Bankruptcy	134
3.1. Capacity to file the petition	134
3.2. Preliminary meeting of creditors	135
3.3. Decision on declaring the bankruptcy	136
4. Effects of Declaring Bankruptcy	136
4.1. With respect to the bankrupt's assets	136
4.2. With respect to the bankrupt	137
4.3. With respect to the bankrupt's obligations	137
4.4. With respect to a bankrupt's inheritance and his or her marital property	139
5. The course of the bankruptcy proceedings after declaration of bankruptcy	139
5.1. Filing and establishment of claims	139
5.2. Bankruptcy with the possibility to make an arrangement	140
5.3. Liquidation of the bankruptcy assets	142
5.4. Distribution of bankruptcy estate funds	
6. Closure and discontinuance of the bankruptcy proceedings	144
6.1. Closure	144
6.2. Discontinuance	144
7. Reorganisation proceedings in Cases of a Threat of insolvency	145
7.1. Aims and legal prerequisites of reorganisation proceedings	145
7.2. Opening of reorganisation proceedings	145
7.3. Effects of opening reorganisation proceedings	146
7.4. Manner of restructuring the enterprise	146
7.5. Arrangements in reorganisation proceedings	147

PART TWO. COMMERCIAL ACTS	149
Chapter One. LIABILITY OF ENTREPRENEURS	151
1. The concept of obligation and its sources	151
2. Torts as a source of obligation on the market	152
3. Contracts as a source of obligations on the market	156
4. Prerequisites of liability in contract and tort – a comparison	158
5. Liquidated damages	159
6. Special features of entrepreneurs' liability	160
Chapter Two. CONCLUSION OF A CONTRACT	165
1. Offer and acceptance	165
2. Negotiations	167
3. Auction and tender	168
4. Preliminary contract	170
5. Letter of Intent	171
6. Standard forms of contracts (standard form contracts, model contracts, templates) and consumer protection	172
7. Contracts concluded outside the premises of an enterprise and distance contracts	174
Chapter Three. VARIOUS TYPES OF COMMERCIAL CONTRACTS	177
1. Contract of Sale	177
1.1. The Concept of Sale	177
1.2. Obligations of the seller	179
1.3. Obligations of the buyer	180
1.4. Warranty against defects	181
1.4.1. Notion of a defect	182
1.4.2. Nature of liability	183
1.4.3. The seller's remedies on account of warranty against defects	184
1.4.4. Prerequisites of the warranty against defects and its limitations	185
1.4.5. Claims of the seller resulting from defects of the thing sold	186
1.5. Guarantee of quality	187
1.6. Special kinds of sale	189
1.6.1. Instalment sales	189
1.6.2. Reservation of ownership in the thing/item sold	189
1.6.3. Sale on approval	190
1.6.4. Sale with a right of repurchase	190
1.6.5. Sale with a right of pre-emption	190
1.6.6. Other specific kinds of sales	191

1.7. International sale	191
2. Contracts for a work	194
2.1. Contracts for a specific work	194
2.1.1. The concept of a contract for a specific work	194
2.1.2. Obligations of the acceptor of an order	194
2.1.3. Obligations of the orderer	196
2.1.4. Limitation of claims	197
2.2. Construction work contract	197
2.2.1. Notion of a construction work contract	197
2.2.2. The parties and other persons engaged in performance of the contract	198
2.2.3. Obligations of the investor	199
2.2.4. Obligations of the contractor	200
3. Leasing contract as an example of contract to use a thing	201
3.1. Origins and notion of a leasing contract	201
3.2. Obligations of the financing party (lessor)	202
3.3. Obligations of the leasing party (lessee)	202
3.4. Liability for defects of the leased thing (object)	203
3.5. Expiration of the contract	204
4. Intermediation contracts	206
4.1. Intermediation in general	206
4.2. Mandate contract	207
4.2.1. Notion of a mandate	207
4.2.2. Formation of a mandate	208
4.2.3. Duties of the party accepting the mandate (mandatee)	208
4.2.4. Duties of the principal	209
4.2.5. Expiration of the mandate	210
4.2.6. Limitation of claims	210
4.3. Agency contract	211
4.3.1. Notion of agency, basic kinds and conclusion of an agency contract	211
4.3.2. Obligations of the agent	212
4.3.3. Duties of the principal	213
4.3.4. Termination of the contract	215
4.3.5. Special kinds of agents	215
4.4. Contract of commission	216
4.4.1. Notion and kinds of contracts of commission (commission contracts)	216
4.4.2. Obligations of a commission agent	217
4.4.3. Obligations of the commissioning party	218
4.4.4. The commission agent's liability for defect	218

4.5.	Brokerage contracts	219
4.5.1.	Stock broker	219
4.5.2.	Maritime broker	219
4.5.3.	Insurance broker	220
5.	Contracts in transport	221
5.1.	Contract of carriage	221
5.1.1.	Notion of the contract of carriage and its regulation	221
5.1.2.	Documents of carriage	222
5.1.3.	Obligations of the parties	223
5.1.4.	Liability of the carrier	224
5.2.	Forwarding contract	225
5.2.1.	Notion of a contract of forwarding and its regulation	225
5.2.2.	Obligations of the forwarding agent	226
5.2.3.	Obligations of the principal	227
5.2.4.	Liability of the forwarding agent	227
6.	Contracts with banks	228
6.1.	Bank account contract	229
6.1.1.	Notion of a bank account contract	229
6.1.2.	Obligations of the bank	229
6.1.3.	Obligations of the bank account holder	230
6.1.4.	Termination of the contract and limitation of claims	230
6.2.	Loan contract	231
6.2.1.	Notion of a loan contract	231
6.2.2.	Obligations of the lender	232
6.2.3.	Obligations of the borrower	232
6.3.	Credit contract	233
6.3.1.	Notion and characteristics	233
6.3.2.	Formation of the credit contract	234
6.3.3.	Obligations of the bank	234
6.3.4.	Obligations of the borrower	235
6.3.5.	Termination of the credit contract	237
6.3.6.	Consumer credit	237
7.	Insurance contract	238
7.1.	The notion and characteristics of an insurance contract	238
7.2.	Parties to the contract	239
7.3.	Sources of insurance contract law	240
7.4.	Types of insurance	241
7.5.	Conclusion of an insurance contract and insurance documents	243
7.6.	Obligations of the insurer	244
7.7.	Obligations of the named insured	245
7.8.	Termination of an insurance contract	246

Chapter Four. SECURITIES (COMMERCIAL PAPERS)	247
1. The notion of security and moment of its creation	247
2. Kinds of securities	248
3. Abstractness of the obligation and the problem of defences	248
4. Entitlement documents	249
5. Redemption of securities	250
Chapter Five. FAIR TRADING AND INTELLECTUAL PROPERTY	251
1. Prevention of unfair trading practices (unfair competition)	251
1.1. The Polish regulation of fair trading	251
1.2. Notion of unfair trading practices	251
1.3. The most important acts of unfair trading practices	253
1.3.1. Misleading designation of an enterprise	253
1.3.2. Misleading labelling or naming of products or services	254
1.3.3. Imitating products	255
1.3.4. Breach of confidential information	256
1.3.5. Unfair trading practices involving geographical designations	256
1.3.6. Unfair advertising	257
1.3.7. Slandering, hindering other entrepreneurs' access to the market, interfering in contractual relations	258
1.3.8. Promotional sales, excessive sale of the owner's brands, pyramid sales scheme, or a Ponzi scheme	259
1.4. Remedies for victims of unfair trading practices	260
2. Trademarks	261
2.1. Notion and functions of trademark	261
2.2. Kinds of trademarks	262
2.3. Registrability of a trademark	262
2.3.1. Capability of a sign to affect the senses and of being repre- sented graphically	263
2.3.2. Capability of distinguishing (Distinctiveness)	263
2.3.3. Absolute and relative grounds for refusal of registration	264
2.4. The content and legal character of the right to a trademark	265
2.5. The protection from infringement of a trademark	267
2.5.1. Protection within the specialization rule	267
2.5.2. Protection outside the scope of the specialization rule	269
2.5.3. Remedies	270
2.6. Revocation and termination of trademark rights	270
BIBLIOGRAPHY	273

PREFACE

The present book developed mainly as a result of my lectures on Commercial Law at the Faculty of Management University of Łódź and formerly at the Koźminski University in Warsaw. I will be happy if it serves all those students who learn Polish law in English as well as students who set off to study abroad in English and seek books that could acquaint them with English legal terminology. Hopefully the work can also be of help to foreigners, especially foreign entrepreneurs who want to engage in business activity in Poland and need basic knowledge of Polish Commercial Law, as well as legal practitioners who have to explain the institutions of Polish Law to their foreign clients.

It is difficult to find on the market a comprehensive textbook in English that would correspond the structure of an academic lecture on Polish Commercial Law. “Polish Commercial Law: An Introduction” by Robert Lewandowski is much wider in the scope than this book and refers also to EU law, but it is rather rudimentary when taking into account Polish Partnerships and Companies. Nor does it cover commercial contracts, apart from some rules concerning their conclusion and the contract of sale, nor unfair competition and intellectual property law.

I wanted to simplify lecture on Commercial Law and adapt it to the needs of students who do not have general knowledge of law, especially those from Business and Management faculties. Usually lectures on Commercial law in Poland are divided into two basic parts: the first regards entrepreneurs, and the second regards commercial acts, mainly contracts. The present book follows this sequence. The first part deals mainly with partnerships and companies as the most important forms of organization of business

activity in the modern economy. The second part, apart from contracts, includes remarks on commercial papers (securities) as well as on the prevention of unfair competition and trademark law. The scope of the book made it impossible to cover other intellectual property rights and copyright.

Preparing this book I made extensive use of translations of Polish legal acts accessible on the market, especially the books: *Kodeks cywilny. Civil Code. Polsko – angielski. Przepisy dwujęzyczne* by T. Bil, A. Broniek, A. Cincio, M. Kielbasa; and *Kodeks spółek handlowych. Code of Commercial Companies. Polsko – angielski. Przepisy dwujęzyczne* by G. Domański, J. Palinka, K.A. Zakrzewski, both published by Wolters Kluwer Business in 2011. I have also used the translations of Polish legal Acts accessible via Internet. I am indebted to those who professionally translated Polish Law into English. Such translation is difficult for obvious reasons: English speaking countries have a common law legal system, which is quite different from the civil law system of continental Europe. Hence Polish concepts often do not have counterparts in common law countries, and vice versa. Proposing a completely new translation seemed not only difficult, but rather pointless as it would only lead to more chaos.

I would like to thank to Professor Wojciech Jan Katner for help in publishing this book and Dr. James Hartzell for checking the English text.

PART ONE
ENTREPRENEURS

Chapter One

NOTION AND SOURCES OF COMMERCIAL LAW

1. OBJECT AND METHOD OF REGULATION

Commercial Law regulates commercial turnover/transactions¹ in general. **Commercial turnover/transactions** may be defined from both the economic and legal point of view. From the economic point of view commercial turnover is understood as the exchange of the goods and services using the transfer of money or in-kind goods (goods which can be calculated in monetary terms). From the legal point of view commercial turnover encompass the activity of an **entrepreneur** rendering performance (selling goods or services) to another person within the scope of his enterprise's activity. In other words it may be said that commercial law regulates legal relations between participants of the market.

Commercial turnover include business to business relations (**B2B**), where both parties to a transaction are entrepreneurs acting within the scope of their professional activity. and business to consumer relations (**B2C**), where one party is an entrepreneur acting

¹ It should be noted that the terms 'turnover' and 'transactions' are basically interchangeable. A transaction, by definition, produces a turnover, and a turnover is based on a transaction. In Polish law the term 'turnover' is used, while in Anglo-Saxon legal systems the term 'transaction' is usually used. In this book the terms are used either simultaneously or separately, but unless otherwise noted they have the same meaning.

within the scope of his enterprise and another is a consumer accepting performance of the entrepreneur for his or her private use.

The method of regulation of commercial law is civil in nature, which means both **parties to a transaction are equal** from the legal point of view. This principle however is often incapable of being put into practice, due to the natural economical imbalances between the parties to a transaction. For this reason consumers are usually offered legal protections with respect to their relations with entrepreneurs. The basic source of the legal relations in commercial law is a contract, i.e. an agreement between the parties based on consensual manifestations of intent. In some instances, legal relations between entrepreneurs and/or between entrepreneurs and consumers may also arise from the legal spheres of torts and unjust enrichment.

2. SUBJECTIVE AND OBJECTIVE APPROACH

There are two general approaches to commercial law in the continental countries of Western Europe. The first is the subjective approach adopted in the German Commercial Code from 1897 (Handelgesetzbuch). The basic notion underlying this approach is the notion of a ‘merchant’ (in modern legal language – entrepreneur), i.e. a person conducting acts aimed at making profits on his/her own behalf.

The second approach is that of the Romanesque countries, above all that adopted by the French Commercial Code of Napoleon from 1807. The basic notion underlying this approach is the notion of a commercial act (usually a contract) entered into by a professional merchant. The focus is on the act, however, not the person of the merchant.

The Polish approach is probably more close to the German one, but may be also viewed as mixed. The first modern Polish legal act regulating commercial law was **Commercial Code of 1934** (the Decree of the President of 27 June 1934), which was divided into